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# **THE ENGLISH REPORTS**

**HOUSE OF LORDS**

**CONSULTATIVE COMMITTEE**

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ENGLISH REPORTS

VOLUME II

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## PREFATORY NOTE

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IN one or two instances in the present volume of the English Reports, a note or reference in brackets has been added in the text where an incidental point seemed to require elucidation. An example will be found in the references appended to the note to *Nicol v. Verelst* (1775, 4 Bro. P. C. 431).



THE LORD CHANCELLORS, LORD KEEPERS, AND  
LORDS COMMISSIONERS OF ENGLAND

1700 to 1801

- 1700-1705. Sir JOHN HOLT, Knt.,  
Sir GEORGE TREBY, Knt., } Lords Commissioners.  
Sir EDWARD WARD, Knt., }  
Sir NATHAN WRIGHT, Lord Keeper (1700).
- 1705-1707. WILLIAM COWPER, Esq., afterwards LORD COWPER, Lord Keeper.
- 1707-1710. WILLIAM LORD COWPER, Lord Chancellor.
- 1710-1713. Sir THOMAS TREVOR, Knt., after-  
wards BARON TREVOR, } Lords Commissioners.  
ROBERT TRACY, Esq., }  
JOHN SCROPE, Esq., }
- 1713-1714. Sir SIMON HARCOURT, Lord Keeper (1710).
- 1714-1718. SIMON LORD HARCOURT, Lord Chancellor (1713).
- 1718-1725. WILLIAM LORD COWPER, Lord Chancellor.
- 1718-1725. ROBERT TRACY, Esq.,  
Sir JOHN PRATT, Knt., } Lords Commissioners.  
Sir JAMES MONTAGU, Knt., }
- THOMAS PARKER, EARL OF MACCLESFIELD, Lord Chancellor (1718).
- 1725-1733. Sir JOSEPH JEKYLL, Knt.,  
Sir ROBERT RAYMOND, Knt., after- } Lords Commissioners.  
wards LORD RAYMOND, }
- JEFFREY GILBERT, Esq.,
- PETER LORD KING, Lord Chancellor (1725).
- 1733-1736. CHARLES LORD TALBOT, Lord Chancellor.
- 1736-1756. PHILIP YORKE, LORD HARDWICKE, Lord Chancellor.
- 1756-1757. Sir JOHN WILLES, Knt.,  
Sir S. S. SMYTHE, Knt., } Lords Commissioners.  
Sir J. E. WILMOT, Knt., }
- 1757-1766. Sir ROBERT HENLEY, Knt., afterwards EARL OF NORTHINGTON, Lord  
Keeper; Lord Chancellor (1761-1766).
- 1766-1770. CHARLES LORD CAMDEN, Lord Chancellor.
- 1770-1771. CHARLES YORKE, Esq., Lord Chancellor.
- Sir RICHARD ASTON, Knt.,  
Sir S. S. SMYTHE, Knt., } Lords Commissioners.  
Sir HENRY BATHURST, }
- 1771-1778. HENRY BATHURST, LORD APSLEY, afterwards EARL BATHURST,  
Lord Chancellor.
- 1778-1783. EDWARD LORD THURLOW, Lord Chancellor.
- 1783-1792. ALEXANDER LORD LOUGHBOROUGH,  
Sir W. H. ASHURST, Knt., } Lords Commissioners.  
Sir BEAUMONT HOTHAM, Knt., after- }
- wards LORD HOTHAM,
- EDWARD LORD THURLOW, Lord Chancellor (1783).
- 1792-1801. Sir JAMES EYRE, Knt.,  
Sir W. H. ASHURST, Knt., } Lords Commissioners.  
Sir JOHN WILSON, Knt., }
- ALEXANDER LORD LOUGHBOROUGH, afterwards EARL ROSSLYN,  
Lord Chancellor (1793).



# REPORTS of CASES upon Appeals and Writs of Error determined in the High Court of Parliament. By Josiah Brown, Barrister- at-Law. Second Edition by Tomlins. Vol. IV.

## EXECUTORS.

CASE 1.—ALICE WARBURTON and another, — *Appellants*; PETER WARBURTON, —  
*Respondent* [15th February 1702].

[Mew's Dig. x. 1278, 1362; xiv. 452, 507; xv. 1838.]

[A. makes two of his daughters his executrixes, and directs them to distribute a sum of £400 and also the residue of his personal estate, among themselves, and their brothers and sisters, according to their needs and necessities, *as they in their discretion should think fit*. The court restrained the exercise of this power, by decreeing a *double share* to the eldest son and heir, looking upon him as a necessitous person.]

\*\* The other point determined in the case as stated in 2 Vern. 420. and 14 Vin. 279. c. 17. was, that where a term is limited to raise portions for younger children by *rents* and *profits*, the heir may have the portions raised by a *sale*, though the younger children oppose it; as they may insist on a sale if they think fit. The statement of the case in 2 Eq. Ca. Ab. 654. c. 5. and 16 Vin. 448. ca. 8. is not justified by this report: it should be thus—A younger child, whose portion, in case he died before 21, was directed to survive, attained 21, and received part of it, but died intestate in his father's life-time before the residue was paid. Held, that this residue *did not lapse or sink into the real estate*, but subsisted for the benefit of the other children; and ought to be added to the father's personal estate, and disposed of according to his will.—The case under this name in 2 Eq. Ca. Ab. 237. c. 3. and 6 Vin. 332. c. 30. is on a point totally distinct and unconnected.

The Lord Keeper's DECREE WAS AFFIRMED.\*\*

2 Vern. 420. 1 Eq. Ca. Ab. 345. ca. 13. Viner, vol. 3. p. 437. ca. 7. vol. 6. p. 332. ca. 30. vol. 11. p. 198. ca. 13. vol. 14. p. 279. ca. 17. vol. 16. p. 448. ca. 8.  
\*\* 2 Eq. Ca. Ab. 654. c. 5.\*\*

By indentures of lease and release, dated the 14th and 15th of November 1690, Robert Warburton, the father, conveyed all his estate to trustees, for a term of 99 years, subject to a power of revocation; remainder to his eldest son Peter, for life, with power, when seised of the freehold in possession; to make a jointure upon any wife, not exceeding £200 per ann. remainder to his first and other sons in tail male; remainder to Thomas, the second son, for life; with remainder to his first and other sons in tail male; remainder to John, the third son, for life, and to his first and other sons in tail male; remainder to his daughters Alice and Hester, and the heirs of their bodies; remainder to his own right heirs. The trusts of the 99 years term were declared to be, that the trustees should, *out of the rents and profits*, raise £1100 for the portion of Alice; £100 for the portion of Hester; £300 for the portion of Thomas; and £700 for the portion of John; with interest, at £6 per cent. until the portions were paid: and in case any of the younger children should die under 21, their portions were to be paid to the surviving younger children. And the eldest son, Peter, was to have £40 per ann. for his maintenance, until all these trusts were discharged.

[2] On the 19th of May 1691, the father made his will; and thereby, after giving some legacies, and confirming his settlement, he gave the residue of his personal estate to his daughters, the appellants, whom he appointed his executors; to be disposed of by them to the use of themselves, *their brothers and sister, or to such of them, and in such proportion, as they should judge most fit and convenient, according to their needs and necessities.* And, after again mentioning his settlement, the testator proceeds in the following words: "I do hereby further appoint, that my trustees shall raise, out of the profits of my lands, £400, and pay the same to my executors, to be disposed of by them, to the use of themselves, *their brothers and sister, or to such of them, and in such proportions, as they shall judge most fit and convenient, according to their needs and necessities.*"

The testator's son Thomas, having attained 21, received £61 8s. 6d. in part of his portion of £300, which was thereby reduced to £238 11s. 6d. but before he had received any part of this residue, he died, in his father's life-time; and soon afterwards the father died.

In Michaelmas term 1696, the respondent filed his bill in Chancery, against the appellants, and other proper parties; praying, that the portions might be raised by sale of a competent part of the premises, comprised in the 99 years term, and that thereupon he might be let into possession of the residue; that he might also have a reasonable share of the surplus of the personal estate, and of the £400 to be raised out of the real estate; and that the residue of Thomas's portion might be considered as sunk in the real estate, and not be raised.

The cause came on first before the lord chancellor Somers, on the 9th of July 1697; who made no other decree than merely referring it to a master, to state the particulars and value of the personal estate, and the different claims of all parties; and reserved all further consideration of the matters in question until after the report.

The master having made his report, the cause came on to be heard before the lord keeper Wright, on the 17th of October and 18th of November 1700; when his lordship declared, that, considering the plaintiff was heir of the family, and bred up to the law, and looking upon him as a *necessitous* person, he ought to have a double share of the personal estate, and of the £400 which was to be raised out of the trust estate, and decreed the same accordingly: and also decreed, that the trustees should sell the trust term of 99 years, of and in so much of the trust estate as would satisfy the portions unpaid, and the £400: and declared, that the residue of Thomas's portion did not lapse or sink in the real estate, by reason of his death in his father's life-time; but that it subsisted for the benefit of the other children, and ought to be added to the father's personal estate, and disposed of according to his will.

[3] From this decree the defendants, the executors, appealed; and on their behalf it was contended (W. Cowper), that the respondent ought not to have any, and much less a *double* share of the personal estate, or of the £400, because he was not *under any necessity*; for the decree, by ordering a sale of part of the estate, had entitled the respondent to the possession of the residue, which was near £500 per ann. so that he was not at all necessitous, or at least not equally so with the rest of the family; and it was evident that the testator, in the designed distribution of his personal estate, considered only the necessity of his family, and intended that most should be given where most was wanted. That he had spent about £2000 in educating the respondent to the law, and in paying his debts; and, in several letters to him, complained, *that he had done more for him than he was able; and that it was high time for him to make provision for his younger children; and that the provision he intended for them out of his real estate should be £3500.* But the provision made for the younger children, by the settlement, amounted only to £3100, and therefore, by the will, the real estate was charged with £400 more, in order to make up that sum. And as to this £400, it could never be supposed to have been the testator's meaning to charge his eldest son's estate with it, to the intent that any part of it should be distributed back to such eldest son, as that would be to *charge his estate with a sum of money payable to himself*: but the personal estate, and the £400 being devised *in totidem verbis*, the testator's intent was the same as to both. That the power given to the executors by the will over the personal estate, was entirely *discretionary*; and though subject to be regulated by the court of

Chancery, if abused, yet, until it was abused, it ought not to have been taken from them. And, as to the residue of Thomas's portion, it was insisted, that if he had died *before* 21, his portion was expressly directed by the settlement, to survive to the other younger children; and much more ought it to be raised, as by his having attained 21, it became *vested* in him by the settlement: besides, the testator by his will, expressly directed his real estate to be enjoyed, *under the charges appointed by the settlement*; and as this portion was one of those charges, the unsatisfied residue of it, could not be taken from the surviving younger children, without setting aside both the settlement and the will.

On the other side it was insisted (W. Dobyns), that the decree in giving the respondent a double share of the personal estate, and of the £400, was founded in reason and justice; because he had the most need and necessity, and laboured under greater difficulties than all the other children. That the discretionary power given to the executors, was unnatural and unjust; and that their ill use of it, respecting the respondent, gave the court of Chancery just reason to interpose, and correct the ill conscience of an executor; as had been frequently done in similar cases. And as to the £238, the remainder of Thomas's portion, it was conceived, it ought [4] to sink into the estate; because it was created by the father, in a voluntary family settlement, with a power of revocation; and, as the son died a bachelor, and intestate, before his father, the court of Chancery would never raise a child's portion out of a trust upon land, when there was no occasion for it; and more especially when, if it still subsisted, the father, as next of kin, was entitled to it by right of administration; but he never took administration, or did any thing, whereby it might appear that he claimed this portion.

There was also a cross appeal between these parties, which was chiefly confined to the question, whether the residue of Thomas's portion should be raised, or not.

After hearing counsel upon the *original* appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decrees therein complained of, affirmed; and that the appellants should pay to the respondent £10 for his costs in defending the said appeal. (Jour. vol. 17. p. 279.)

And, after hearing counsel on the *cross* appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed.

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CASE 2.—DUTCHESS DOWAGER OF HAMILTON,—*Appellant*; ROBERT INCLEDON,—*Respondent* [1st February 1719].

[Mew's Dig. vi. 1519, 1708.]

[An attorney having delivered up deeds to an executor, which he was not obliged to do till his bill was paid, and these deeds being of great use to the executor in several suits which were then carrying on; this is a sufficient consideration to make the executor liable to the attorney's whole demand, whether there be assets or not.]

\*\* The case in the Exchequer is stated very fully in 4 Vin. 103. c. 20. where it is classed under the head of *Baron and Feme*; and seems to have turned on the question, what debts of the husband the widow is liable to pay on survivorship. In 11 Vin. 279. c. 53. the circumstances of the executor's having changed her attorney is relied on.—Both reports in Viner are from MSS.—the latter is copied into 2 Eq. Ca. Ab. 456. c. 8. and the former something abridged in p. 524. c. 6. of the same work.

ORDER of the Exchequer, refusing an injunction to stay the attorney's proceeding on a judgment at law, AFFIRMED.

Viner. vol. 4. p. 103. ca. 20. vol. 11. p. 279. c. 53. Eq. Ca. Ab. 456. ca. 8. 524. ca. 6.

The appellant and the Duke of Hamilton, her late husband, having brought an ejectment upon their own demise, for the recovery, in right of the appellant, of a

considerable estate in Staffordshire; did in Michaelmas term 1710, employ the respondent, as their attorney, to carry on the said action.

But in November 1712, and before the action was determined, the duke died; whereupon the appellant requested the respondent to proceed in the cause, and also to defend an ejectment brought against her and her tenants, for other lands in Staffordshire; and judgment being given in both these actions, [5] against the appellant's title, several writs of error were brought by the respondent, by her direction, to reverse those judgments.

In December 1715, some differences arose between the appellant and respondent, so that from that time he ceased to be concerned as her attorney; and therefore he soon afterwards delivered to Mr. Salkeld, her grace's new attorney, his bill of costs, which amounted to £624 1s. 2d. towards which, he had received, in the duke's life-time, £184 12s. and after his death, £135 7s. 6d. which being deducted, left a balance due to the respondent, of £304 1s. 8d.

The appellant neglecting to pay the respondent this balance, he, in Michaelmas term 1718, brought an action against her, in the court of Common Pleas, for the same; whereupon, in Hilary term following, the appellant exhibited her bill against the respondent, in the court of Exchequer, for an injunction to stay his proceedings at law; suggesting, that so much of the business charged in the respondent's bill, as amounted to £334 5s. 7d. was done in the duke's life-time; and that she, though his administratrix, was not liable to pay the same, because she had no assets; but that the duke's mother had provided a fund for the payment of his debts: and therefore she insisted, that she was liable only to satisfy so much of the respondent's bill, as was for business done after the duke's death, being £289 15s. 7d. and having paid £135 7s. 6d. towards the same, she was willing to pay the residue.

The respondent having answered this bill, brought his action to trial before the Lord Chief Justice King, on the 6th of February 1718; when the appellant's counsel insisted, to have the money paid by her applied to discharge that part of the business which was done after the duke's death; but it appearing that such money had been received and applied indefinitely towards the respondent's whole demand, the jury gave a verdict, to the satisfaction of the judge, for £289 15s. 7d. which was the total for the business done after the duke's death, but was £14 6s. 1d. short of the respondent's demand.

After this verdict, the appellant moved for a new trial; which being refused, she brought a writ of error, and the judgment having been affirmed thereon, and the damages and costs settled at the sum of £344, the appellant, on the 28th of October, 1719, moved the court of Exchequer for an injunction to stay the respondent's proceeding at law upon his judgment, and obtained an order, *ex parte*, that the respondent, on the 4th of November following, should shew cause why an injunction should not be granted; but after hearing counsel on that day for both parties, the court discharged the order, and refused to grant an injunction.

From this order of the 4th of November, the dutchess appealed; and on her behalf it was insisted (C. Phipps, W. Hamilton), that no widow is liable, in her own right, to make satisfaction for the debts of [6] her husband, his assets being the proper fund for that purpose; and yet the demand in question was undoubtedly a debt of the late duke's, and the appellant had none of his assets. That it might be of very dangerous consequence to oblige a widow to be answerable for the costs of such suits, as the husband, in his life-time, should bring in the name of the wife, even though in her right; since the wife is entirely under the controul of the husband, for thereby a liberty might be taken very much to the prejudice of widows. That as this was a debt of the late duke's, and to which the appellant was not liable in her own right; so she never undertook to pay it, or made any promise to that purpose: this the respondent had by his answer admitted to be true, nor did he so much as pretend, that he ever asked the appellant to make satisfaction for the arrears in the duke's time, or ever made any such demand, till two years after the appellant had discharged him from any farther concern in her business. That as great part of the money claimed by the respondent was the debt of the late duke, and he had obtained a verdict for his whole demand, as well what was due from the duke as the appellant; it seemed unreasonable, and inconsistent with the rules of equity, that the respondent should be at liberty to take out execution against



the appellant for more than was due to him from her in her own right; and therefore an injunction ought to have been granted, to prevent any proceedings till the cause should be heard. That though the respondent, by his answer, insisted upon the appellant's being liable for his whole demand, yet he thereby submitted that to the judgment of the court; and therefore it was conceived, he ought not to proceed any farther at law till the determination of the court could be had upon the hearing of the cause.

On the other side it was contended (S. Cowper, T. Bootle), that the appellant having had the benefit of a discovery from the respondent's answer, before the trial, and the damages being afterwards ascertained by a verdict, there was no room for a court of equity to controul or proportion such damages; and the whole matter of the appellant's bill in equity, beyond the discovery, was proper only for her defence at law. That the appellant, by her appeal, endeavoured to impeach the verdict; but it was conceived, that could not regularly be done, without bringing the same in judgment before their lordships by writ of error; and especially, as the same was not mentioned in the pleadings of the cause. That the appellant having, after the duke's death, continued the respondent in the management of those suits, of which she would have had the whole benefit, in case she had prevailed, together with all the costs; and having had the use and benefit of all the deeds and writings then in the respondent's custody, (which, by the practice of the courts below, the appellant could not have had, without first paying all that was due to the respondent,) and by that means the benefit of all the former proceedings in the duke's life-time, she ought to answer the charges of those proceedings; and there[7]fore the respondent humbly hoped, that the appeal would be dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the order therein complained of, affirmed: and it was further ORDERED, that the appellant should pay to the respondent, the sum of £20 for his costs, in respect of the said appeal. (Jour. vol. 21. p. 217.)

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CASE 3.—SAMUEL MASON,—*Appellant*; MOSES HAWKINS and others,—*Respondents* [4th March 1729].

[Mew's Dig. vi. 1386; xv. 1741.]

[Where a legacy is left to one of two executors, neither of them is thereby excluded from the surplus of the personal estate undisposed of. And though there have been a variety of opinions, and some different determinations, touching the residue of personal estates not expressly bequeathed by will; yet it has never been carried so far as to exclude two executors, by reason of a legacy given only to one of them.]

\*\*The same rule holds, (on the reason, in both instances, that the testator might intend a preference to the executor *pro tanto*;) where several executors have *unequal* pecuniary legacies. *Bowker v. Hunter*, 1 Bro. C.R. 328; which see, and Cor's Peere Williams, l. 550. in the notes; for all the cases on this subject: and *post*, *Lawson v. Lawson*, case 5.

DECREE of the Master of the Rolls AFFIRMED.\*\*

A. by will gives £100 South Sea stock to B. and another £100 South Sea stock to C. payable in six months after his death. Before time expired an addition was made by the company to every £100 stock. Held, that the legatees were entitled to the additional as well as the original stock.

Mosely's Rep. 20.

John Hawkins of London, citizen and distiller, had an only child named Sarah, who married the appellant, and with whom her father, on that occasion, gave a considerable fortune.

On the 2d of June 1720, Mr. Hawkins made his will, whereby, after taking

notice, that having fully advanced his said daughter, by giving her a plentiful fortune, his personal estate was wholly at his own disposal; he gave to Moses Hawkins, his brother, £100 of his capital stock in the South Sea company, to be transferred to him within six months after the testator's death; and to his sister the respondent Mary Dawes, a like legacy, and transferrable at the same time; and after her death his will was, that the said stock so given to her should be divided to her children then living. He then gave to trustees, for his said daughter Sarah, £1000 South Sea stock, to be at her disposal, and desired the appellant to comply with the disposition which she should make thereof; and he gave the appellant £500 and £10 for mourning. He also devised to the appellant and his heirs for ever, two houses in Wapping; and after giving several other legacies, he gave and bequeathed the rest and residue of his estate, real and personal, to his said daughter Sarah during her natural life; and after her decease, he gave and bequeathed the same to her child and children born of her [8] body for ever, in case such child or children should attain the age of 18, or be married; but in case they died before such age or marriage, then he gave and bequeathed the said rest and residue of his estate as follows, viz. to the said Moses Hawkins his brother, and to his heirs for ever, all his messuages or tenements in Houndsditch and Woolpack-alley in the parish of St. Botolph without Aldgate, London; and to his kinsman Moses Hawkins and his heirs, the lease of his houses in the Minories; and appointed his daughter the said Sarah Mason executrix of his will, during her natural life, and from and after her decease, he made and appointed his brother the said Moses Hawkins, and his brother-in-law George Dawes, late husband of the respondent Mary Dawes, executors; and made his stock in the South Sea company liable to the payment of his debts, and of such of his legacies as should be due within six months after his decease.

On the 24th of March 1720, the testator died; after whose death, the said Sarah Mason, his daughter, proved his will, and she and her husband, the appellant, possessed themselves of the whole of his personal estate.

On the 26th of April 1722, the appellant's wife died without issue; and thereupon Moses Hawkins, the testator's brother, and the said George Dawes, proved the will, and the appellant obtained letters of administration of the personal estate of his wife.

After the testator's death, and before the two several legacies of £100 South Sea stock were transferred to the said Moses Hawkins and Mary Dawes, £33 6s. 8d. and £6 5s. 0d. South Sea stock were added to each £100 capital stock.

After the expiration of the six months next ensuing the testator's death, the said Moses Hawkins, in his own right, and the said George Dawes for the respondent Mary his wife, applied to the appellant and his late wife for the said legacies; but the appellant put off transferring or making them any satisfaction for the same till after his wife's death; and on the 30th of May 1722, fourteen months after the testator's decease, and not before, he transferred to the said Moses Hawkins, deceased, and the respondent Mary Dawes, respectively, £100 capital South Sea stock only, and paid each of them one half year's dividend only in respect thereof; and thereupon Hawkins and Dawes severally executed to him a release and discharge of all the legacies given the said Moses Hawkins and the respondent Mary Dawes by the testator's will, and of all dividends payable for the same; they not being then apprised that the said additional stock of £33 6s. 8d. and £6 5s. 0d. had been made to every £100 capital South Sea stock, or of the dividends that were then due in respect of such capital and additional stocks; but as soon as they discovered the same, they applied to the appellant to transfer to them the said additional stocks, and to pay them respectively the dividends due in respect thereof; but which he refused to do, insisting, that they were not entitled thereto; or if they were, yet, that the releases so executed as aforesaid, were a sufficient bar against such claims.

[9] Whereupon the said Moses Hawkins, and the respondents Mary Dawes, Elizabeth Deck, then Elizabeth Dawes, and William Dawes, together with the said George Dawes, sen. and George Dawes, jun. his son, since deceased, and the respondent Cuthbert Smith and Sarah his wife, since also deceased, did, in Trinity term 1723, exhibit their bill in the high court of Chancery against the appellant;

setting forth that the respondents Elizabeth Deek and William Dawes, and the said George Dawes, jun. and Sarah Smith, were the children of the said George Dawes, sen. and the respondent Mary his wife, and were, after the decease of the said Mary, entitled to the £100 South Sea stock given to her as aforesaid, and to the additional stocks added thereto; and therefore the bill prayed a transfer thereof accordingly, and to have an account of the testator's personal estate, and that the residue thereof, not disposed of by his will, might be paid to the said Moses Hawkins and George Dawes, sen. as executors of the testator's will, after the death of the appellant's wife.

To this bill the appellant put in a plea and answer, and by his plea insisted on the releases which had been given him by the said Moses Hawkins and George Dawes, sen. on transferring the said two several legacies of £100 South Sea capital stock. But this plea, upon argument on the 11th of March 1723, was over-ruled.

After this, George Dawes, sen. died, having made his will, and thereof appointed the respondent Mary Dawes sole executrix; and George Dawes, jun. being also dead, the respondent Mary, his mother, took out letters of administration to him, and the suit being thereby, and by the intermarriage of the respondents Darius Deek and Elizabeth his wife, abated, the same was afterwards duly revived.

On the 12th of June 1727, the cause was heard before the master of the rolls in the absence of the lord chancellor; when his honour declared, as to the £100 South Sea stock devised to the said Moses Hawkins deceased, and the £100 South Sea stock devised to the respondent Mary Dawes, that they were respectively entitled thereto, and to the additional stock thereon, and the proceeds thereof, from the end of six months after the death of the testator John Hawkins; and therefore ordered, that the additional stock on the said £100 and £100 South Sea stock, should be transferred to the said Moses Hawkins deceased and the respondent Mary Dawes; and that the master should take an account of the dividends received on the said £100 and £100 South Sea stock, and the additional stock thereon; and that the appellant should answer and pay the same to the said Moses Hawkins deceased, and the respondent Mary Dawes respectively; and the respondent Mary Dawes was to enjoy the £100 South Sea stock, and the additional stock thereon, during her life; but she was to declare the trusts thereof in the manner mentioned in the decree: and his honour [10] further declared, that by giving a legacy to one of the executors, neither of the executors were excluded; and therefore decreed, that the appellant should account before the master, for the personal estate of the testator John Hawkins, which had come to the hands, custody, or power of the appellant, or the said Sarah his late wife, or any other person in trust for them or either of them; and the usual directions were given for taking of the said account; and the surplus of the testator's estate, after payment of his debts and legacies, and the appellant's and respondents costs of the suit to that time, which were to be taxed by the master, was to be divided into moieties; and that the said Moses Hawkins deceased was to have one moiety thereof, and the respondent Mary Dawes, the executrix of the said George Dawes senior, the other executor of the said testator John Hawkins, was to have the other moiety; and the consideration of costs, from the time of the decree, was reserved till after the accounts thereby directed were taken, and the master should have made his report.

The appellant conceiving himself aggrieved by the *latter* part of this decree, appealed from it; insisting (P. Yorke, C. Talbot), that if the whole and entire right to the residue of the testator's personal estate, was not well bequeathed to and vested in his late wife; yet, that the testator having expressly given away no more of the residue after her decease, than some leasehold houses to his kinsman Moses Hawkins, the surplus was still undisposed of by the will, and ought, according to the statute for the distribution of intestate's estates, to go to the appellant's wife as the testator's only next of kin, and consequently must now belong to the appellant as her administrator. That it did not appear to have been the testator's intention to give the surplus to Hawkins and Dawes, barely by making them executors after his daughter Sarah's death; especially, as they had each of them legacies in the will; viz. £500 South-Sea stock, and £10 for mourning to Hawkins, and Dawes's share of the £40 given to his wife to buy mourning for him and herself and two children. And therefore it is hoped, that so much of the decree as directed the

appellant to account for the surplus of the testator's personal estate, would be reversed.

In support of the decree it was contended (T. Lutwyche, J. Willes), that Sarah Mason dying without issue, the appellant, as her administrator, could not be entitled to this residue, because the same was only given to Sarah for her life. And that there being no devise of the residue after the death of Sarah, the same became vested in Hawkins and Dawes, they being made executors after her death, and thereby entitled to the residue of the personal estate not disposed of by the will. The only objection which had been, or could be made was, that there being a legacy given to Hawkins, he and Dawes ought not to take such residue as executors; and it was compared to the case, where a legacy is given to an executor, and nothing said about the residue [11] of the testator's estate. It was also insisted to have been several times decreed, that the executor shall be only deemed a trustee for the testator's next of kin; but it was admitted, that where no legacy is given to an executor, and there is no devise of the residue, there the executor shall be entitled to such residue in his own proper right as executor, without being deemed a trustee for the next of kin. In the present case there were two executors, and there was no legacy given to one of them; so that it could not, from the words of the will, be inferred to have been the testator's intention to make his executors trustees only of the residue of his personal estate. And though there have been a variety of opinions, and some different determinations touching the point of the residue of personal estates not expressly bequeathed by will, yet it has never been carried so far, as to exclude two executors by reason of a legacy given only to one of them: and therefore it was hoped that the decree would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 22. p. 496.)

CASE 4.—RICHARD MATTHEW,—*Appellant*; CHRISTOPHER FITZ-SIMON and others,—*Respondents* [10th February [1757].

[Mew's Dig. vi. 1404.]

[A. being possessed of a bond for £1400 deposits it in the hands of B. who signs a proper acknowledgment for the same. A. afterwards assigns this bond to B. and takes his promissory note for the value; but the note was never paid. A. by his will gives several legacies, and appoints B. and another executors; but makes no disposition of the residue of his estate. Held, that the money due on this bond is part of the residue, and shall go to the executors equally; and that B.'s note is not such a debt as can be extinguished by his being made an executor.]

\*\* This case is not reported in any other book.—DECREES of the Lord Chancellor of Ireland AFFIRMED; except as to costs.\*\*

Christopher Leonard was in his life-time indebted to the testator James Walsh in £1400 by bond, dated in the year 1716, in the penalty of £2800 conditioned for the payment of £1400 and interest, with a warrant of attorney to confess judgment thereon, which was entered up in Trinity term 1721, in the court of Common Pleas in Ireland.

James Walsh, on the 8th of September 1727, deposited this bond with the appellant, who thereupon signed an acknowledgment thereof in the following words, viz.

"Memorandum. Mr. James Walsh deposited in my hands, for his own use, a bond payable from Mr. Christopher Leonard, deceased, to him the said Mr. Walsh, for principal money, fourteen hundred pounds; and also one other [12] bond, payable from Thomas Power, and Simon Kirwan, with Michael Bodkin, to the said Mr. Walsh, for principal money, three hundred pounds. Given under my hand in Dublin, September 8, 1727."—The words for *his own use* being interlined.

Christopher Leonard, the obligor, died seised of a freehold lease of lands called Coolebegg and Ballinacloough, in the county of Wicklow, leaving an only daughter, his heiress at law, who intermarried with Patrick Byrne; and he not being ready to pay the said debt, which had been many years owing, and the recovery thereof being likely to be attended with difficulty and trouble, the said James Walsh, who was an intimate friend and acquaintance of the appellant, agreed to assign him this judgment for £1451 2s. 10d. which then remained due thereon, and also to procure and be at the expence of Patrick Byrne's acknowledging a statute staple to the appellant, as a farther security for the debt.

In pursuance of this agreement, James Walsh did, by deed dated the 2d of April 1729, in consideration of £1451 2s. 10d. therein mentioned to be paid by the appellant to him, absolutely assign and transfer to the appellant the said judgment against Christopher Leonard, and all principal and interest due thereon; and at the same time signed a receipt on the assignment, whereby he acknowledged to have received the said £1451 2s. 10d. of the appellant, who gave Walsh his promissory note (which Walsh knowing him to be a person of substance and fortune readily accepted), dated the said 2d of April 1729, whereby the appellant promised to pay to Walsh, on demand, £1451 2s. 10d. sterling, value received in Dublin, and so became Walsh's debtor for this judgment.

The appellant afterwards obtained a statute staple from Patrick Byrne, but as the same was agreed to be paid for by Walsh, the appellant accordingly, on the 19th of February 1729, made him debtor, in an account between them, for £4 8s. the charge of the statute staple.

The said Patrick Byrne, in order to raise money towards the discharge of Christopher Leonard's debts, in the year 1731, conveyed his right and title in the said lands of Coolebegg and Ballinacloough, subject to the appellant's demand, to Daniel Reddy, Esq. who then stood indebted to the appellant in £4000 and upwards, on various accounts; and on the 24th of November 1736, the appellant delivered Walsh a bond from Reddy to the appellant for £300 which Walsh accepted, in discharge of the interest accrued on the appellant's said note of £1451 2s. 10d. to Michaelmas 1736; but instead of assigning over this bond to Walsh, the appellant made the following indorsement on his note: "Memorandum. I gave Mr. Reddy, and his brother's bond, taken in my name, but in trust for Mr. James Walsh, to the amount of three hundred pounds, which clears all interest to Michaelmas last, dated November 24th, 1736."

[13] The appellant, besides this note of £1451 2s. 10d. was farther indebted to Walsh in £250 for money lent on the 6th of May 1735, for which the appellant then gave his note payable to Walsh, on the 7th of July then next, with interest, and having afterwards paid half a year's interest due thereon, the 6th of November 1735, he indorsed that payment on the note.

The appellant was willing and offered to pay Walsh both his said notes, but Walsh refused to take the money, and died on the 1st of December 1736, having by his will, dated the 7th of April 1731, appointed Raymond Fitz-Simon (the respondent Christopher Fitz-Simon's father) and the appellant his executors, provided they paid and discharged all his legacies, and the debts he should owe at his death; and gave legacies to the said Raymond Fitz-Simon's wife and children, to the amount of £1950, but no legacy whatsoever to the appellant; and made no disposition, or took any notice of the residue of his estate, after payment of his debts and legacies: and Raymond Fitz-Simon and the appellant both proved his will in the prerogative court of Dublin, and paid all his debts and legacies.

The testator James Walsh lodging several years, and dying in Raymond Fitz-Simon's house in Dublin, he, as one of his executors, possessed himself of his securities, money, effects, books, writings, papers and accounts; and the next day, being the 2d of December 1736, the appellant hearing of the testator's death, and going to the said Raymond Fitz-Simon's house, he produced to the appellant Walsh's will, and such of his bonds, notes, and cash, as he thought fit; whereupon an inventory and account was taken, and a gross computation made of the same, in order to see what fund there was for payment of the debts and legacies; one part of which inventory, or account, consisted of, and was intitled, "Account of notes found in the escutore of Mr. James Walsh, deceased, 2d December 1736;" and the

other part consisted of, and was intitled, "An account of bonds found in the escutore of Mr. James Walsh, deceased, 2d December 1736." In which inventory, or account, was included £121 18s. 6d. cash in the house; and as soon as this was done, Raymond Fitz-Simon possessed himself of the £121 18s. 6d. cash, and all the notes, amounting to £4695 7s. 4d. among which were the appellant's said two notes for £1451 2s. 10d. and £250, so that he took to himself in cash and securities of the testator's, to the amount in the whole of £4817 5s. 10d. and it being thought improper that the other securities should remain in his hands only, he delivered to the appellant the testator's bonds, amounting to £4560 10s. 9d. part of which, to the amount of £3260 10s. 9d. the appellant afterwards delivered back to him to receive the money upon them, and which he received accordingly; but no division then was, or could be made between the executors, of their parts or shares of the testator's estate; his debts, legacies, and funeral expences remaining to [14] be paid, and no perfect account of his whole estate being yet taken.

On the 3d of March 1736, about three months after Walsh's death, the appellant and Raymond Fitz-Simon met at a tavern, to see what of the testator's debts and legacies had been paid, what money was received by the executors, and what bonds or notes remained unreceived; at which meeting one Ambrose Farrel was present, who took down an account or computation in writing, whereby it appeared, that the appellant had received from the testator's estate no more than £534, but that the other executor Raymond Fitz-Simon had received to the amount of £3292 18s. 1d. and had discharged several legacies therein mentioned, which, with what he had paid for debts and funeral expences, amounted to £2355 19s. 10d. so that, according to such computation, he had received £936 18s. 2½d. more than he had paid, and much more than had been received by the appellant; and among the legacies charged to have been paid by him, were those left to his own wife and family, and particularly two legacies of £50 each, given by the testator to the respondent Christopher, and his sister Jane Fitz-Simon; and by the said account or computation it also appeared, that there remained in the executors hands the several bonds therein specified, and in the hands of Raymond Fitz-Simon, several notes payable to the testator, and among others, the appellant's note for £1451 2s. 10d. (therein mentioned to be for £1450) and his other note for £250, but no demand was made at this meeting on the appellant for the said notes, or either of them, nor was the said account or computation, a settled or complete account of the testator's estate, or intended as such. The vouchers for it were not produced, sums of money were fraudulently charged therein as paid by Raymond Fitz-Simon, which were afterwards demanded of and recovered from the appellant; and no calculation or charge was made of the testator's plate, household goods, or other moveables in Raymond Fitz-Simon's possession. It appeared however by the account, that a considerable sum of money had been received by Raymond Fitz-Simon for part of the bonds, which, by the inventory of the 2d of December 1736, were mentioned to be in the appellant's hands, and he also received other sums to a considerable amount for other part of the said bonds which had been redelivered to him by the appellant, but which he never accounted for, and only delivered to the appellant a note of £147 18s. of one Thomas Wolf, that the appellant might get payment of, which was one of the notes mentioned in the inventory to be in Raymond Fitz-Simon's hands; no other account of the executorship, or of the testator's estate, was ever settled or taken between Raymond Fitz-Simon and the appellant; nor was the *quantum* of the surplus or residue, after payment of debts and legacies, ever fixed, or any division thereof made between them.

[15] In April 1737, soon after the above meeting, John Walsh, the testator's only brother and next of kin, to whom the testator had left a legacy of £3000 to be divided between him and his children, instituted a suit in the court of Exchequer in Ireland, against the appellant and the said Raymond Fitz-Simon, for a distribution of the residue of the testator's personal estate, undisposed of by his will; but on the 23d of February 1738, his bill, as to that, was dismissed.

In the latter end of the year 1737, the said Daniel Reddy, who had purchased of Patrick Byrne the said Christopher Leonard's lands and premises, called Coolebegg, and Ballinacclough, subject to the appellant's demand, failing in his credit, his estate, real and personal, was soon afterwards vested, by act of parliament, in trustees, to be sold for the payment of his debts; and the said Daniel Reddy's interest in the

lands of Coolebegg, and Ballinacloagh, being by them sold at a public cant to William Cooper, Esq. in trust for Isham Baggs, Esq. the appellant, on the 29th of August 1739, in the said Raymond Fitz-Simon's life-time, received from the said Isham Baggs the principal sum of £1400 with interest and costs, due on his judgment and statute staple; and delivered up to Baggs the assignment made to him by the testator Walsh.

Raymond Fitz-Simon died on the 26th of February 1743, having made his will, and his son Thomas Fitz-Simon his sole executor; and although he had retained out of Walsh's effects £50 for the legacy given to his daughter Jane Fitz-Simon, as appeared by the account and computation of the 3d of March 1736; yet the said Jane, on the 18th of November 1745, exhibited her bill in the court of Exchequer in Ireland, against the appellant as Walsh's surviving executor, for her said legacy of £50 and interest, alledging it was still due and unpaid to her; and on the 9th of May 1748, obtained a decree for the same; in obedience whereunto, the appellant, on the 28th of June following, paid her £84 14s. 7d. for principal and interest, with £42 2s. 3d. for costs, making £126 16s. 10d.

The said Thomas, the son of Raymond, died in June 1748, having made his brother, the respondent Christopher Fitz-Simon, his sole executor and residuary legatee; who thereby became the representative also of Raymond Fitz-Simon, their father.

No sooner had the appellant satisfied the said Jane's demand, but the respondent Christopher Fitz-Simon himself made a like demand upon him; and though the respondent was then the said Raymond Fitz-Simon's representative, and well knew his father had also retained out of Walsh's effects £50 for the legacy given the respondent, yet he insisted on having received no more than £25; and on the 21st of October 1748, exhibited his bill in the court of Exchequer in Ireland, to compel the appellant to pay him the said legacy of £50 with interest from Walsh's death, deducting thereout the £25 paid him; and the appellant, in order to avoid charge, on the 10th of December 1748, paid [16] him £50 demanded by him as the balance, taking a receipt for the same, in full of the remainder of the principal of his said legacy, with interest and costs.

The said respondent did not, when he filed his bill for and received what he pretended was unpaid of his legacy, set up any other demand whatever against the appellant, on account of the testator Walsh's estate; but upwards of two years after, viz. on the 28th of February 1750, he thought fit to file a bill in the court of Chancery in Ireland against the appellant, for an account of James Walsh's personal estate, and to compel the appellant to pay him one moiety of the sum recovered from Daniel Reddy's trustees, and of the said note of £250 and of all Walsh's other effects; charging the appellant to have been but a trustee for Walsh in the judgment and statute staple, and that he had never paid any thing, or given any value upon the assignment of the judgment to him, consequently the same was to be considered as part of Walsh's estate; he also charged, that the appellant's said notes of £250 and £1451 2s. 10d. were subsisting in equity for his the respondent's benefit; and that it was evident from the transactions both before and after the assignment, that neither the appellant considered himself, nor did Walsh consider him, as a debtor on the foot of the assignment or statute staple, but merely as a trustee.

The appellant, by his answer to this bill, positively denied his taking the assignment from Walsh of the judgment against Christopher Leonard, in trust for Walsh, or that he had ever owned, looked upon, or imagined himself in any sort as a trustee therein for Walsh; and said, that Walsh had agreed to be at the charge of the statute staple, and that the note given by the appellant, in consideration of the assignment, was a full and adequate consideration for the same; and that he took the assignment for his own benefit, and that the statute staple was executed to him for his own use; that during Walsh's life, he was his debtor for the £1451 2s. 10d. the contents of his note given for the assignment; but that as he and Raymond Fitz-Simon took under Walsh's will, not as residuary legatees, but as executors, he admitted he refused accounting for any part of the money owing upon his two notes; and insisted, that being, by Raymond Fitz-Simon's death, Walsh's only surviving executor, he was as such become entitled to all his personal estate, not possessed by Raymond in his life-

time; and therefore insisted upon the same, in bar of any relief which the respondent Christopher Fitz-Simon could have against him, as to Walsh's personal estate, or the moiety of the money received by the appellant Isham Baggs, or of that owing by the appellant on his said notes.

The respondent Fitz-Simon afterwards amended his bill, and made the other respondents parties thereto; and answers being put in by all the defendants, issue was joined, and witnesses being examined, and publication passed, the cause came on to be heard before the lord chancellor, on the 4th, 5th, and 10th of [17] December 1753, on the last of which days his lordship ordered it to stand over, and that the respondent Christopher Fitz-Simon should be at liberty to examine the appellant on personal interrogatories, which were accordingly exhibited on the 4th of January 1754; and on the 15th of May following, the appellant put in his answer to them.

On the 2d, 3d, 7th, 14th, 15th, and 16th of May 1755, the cause came on again; and on the 2d of August following, his lordship was pleased to decree, that the respondent Christopher was entitled to a moiety of the money received by the appellant from the said Isham Baggs, on the foot of the said judgment and statute staple, with interest from the time the same was paid to the appellant by the said Isham Baggs, and that the respondent Christopher was also entitled to a moiety of the money received by the appellant on account of the principal and interest due on the bond executed by Daniel Reddy, bearing date the 20th day of November 1736, to the appellant, in trust for the said James Walsh deceased; and it was referred to the master to take an account of the money received by the appellant from the said Isham Baggs, with interest for the same from the time of the payment thereof; as also to take an account of the several sums received by the appellant on account of the said bond so executed to him by the said Daniel Reddy, in trust for the said James Walsh, with and without interest from the respective times of payment, upon which account all just allowances were to be made; and the usual directions were given for examining witnesses, and likewise the respondent Christopher and the appellant, on interrogatories, and for their producing on oath all deeds, papers, evidences, and books of account, in their or either of their power relating to the said account; and in case any matter should appear difficult to the master in stating the said accounts, he was to report the same specially; and on return of the report, such further order was to be made as should be fit; and his lordship was pleased to reserve the consideration of such further or other directions, in relation to the said accounts, as should from time to time be thought necessary; and it was thereby further ordered, that the respondent Christopher Fitz-Simon's bill, as to the note of £250 and also as to the respondents, the next of kin of the said James Walsh, should be dismissed; and that they should have their costs against the respondent Christopher; and that he should have the same over against the appellant.

The master, in pursuance of this decree, proceeded to take the accounts thereby directed; and on the 13th of December 1755, made his report, whereby he certified, that he found, by the appellant's answer to the respondent Christopher Fitz-Simon's charge, that the appellant did, on the 29th of August 1739, receive from the said Isham Baggs, on the foot of the said judgment and statute staple, £1609 with a moiety of which, being £804 10s. the master did thereby charge the appellant, together with £782 16s. 3d. for interest, making £1587 6s. 3d. [18] And the master also found, that the appellant did, on the 10th of September 1739, receive from the trustees, for the creditors of Daniel Reddy, on account of the said Daniel Reddy's bond, £100 upon a moiety of which, being £50, the master had computed interest, amounting to £48 7s. 4d. which, added to the £50, made together £98 7s. 4d.; but it did not appear to the master, that the appellant received any other sum on account of the said bond, so that £200 and interest still remained due on the foot thereof; which said £98 7s. 4d. being added to the £1587 6s. 3d. the amount of the principal and interest of the moiety of the money received by the appellant from Isham Baggs, made together £1685 13s. 7d.; and the master also found, that without charging interest for the said sum of £50 the sum due to the respondent Christopher, amounted to £1637 6s. 3d.

Upon this report (which was absolutely confirmed) the cause came to a final hearing on the 26th of February 1756, when it was ordered and decreed, that the appellant should pay the respondent Christopher Fitz-Simon the sum of £1637 6s. 3d.



being the balance reported due to him (the said respondent's counsel waiving the sum of £48 7s. 4d. being the interest of the £50), together with interest from the time to which the master computed the same, to be computed by the register; and the register having so done, the same amounted to £12 9s. 5½d. which being added to the said sum of £1637 6s. 3d. made in the whole the sum of £1649 15s. 8½d. And it was further ordered and decreed, that the respondent Christopher was entitled to, and should have and recover a moiety of the sum of £200 and interest remaining due upon the bond executed by the said Daniel Reddy to the appellant, in trust for the testator James Walsh, when the appellant should receive the same; and it was further ordered, that the respondent Christopher should have and recover his costs against the appellant.

From the two decrees of the 2d of August 1755, and the 26th of February 1756, the present appeal was brought; and on behalf of the appellant it was argued (C. Yorke, A. Forrester), that the assignment of the judgment against Leonard made by the testator Walsh, and the statute staple afterwards entered into by Patrick Byrne to the appellant, were absolutely for his own use and benefit, and so intended by Walsh, who received a valuable consideration from the appellant on that account. That the appellant became his debtor from that moment, and liable at all events to pay him the £1451 2s. 10d. for which he had given his note: he never considered himself as a trustee for Walsh, nor did Walsh consider him as such, but as a debtor. If however the appellant was merely a trustee, it was very strange that his co-executor Raymond Fitz-Simon, who at Walsh's death took into his custody the appellant's notes, and other memorandums relative to this transaction, who lived seven years after the testator's death, and upwards of four years after the appellant's receipt of the money upon this judgment, should never in all that time proceed to [19] recover any part of it, when he appears to have been as well acquainted with the state of the testator's affairs as the appellant. But admitting the appellant to have been only a trustee for Walsh, and the money received upon this judgment to be part of Walsh's estate, still the respondent Fitz-Simon had no right to any part of it: for here was no specific bequest of the surplus to the executors, they took it plainly as executors: and as on the one hand the law is clear, that the creditor making his debtor executor, is an extinguishment of the debt, and so admitted by the decree of the 2d of August 1755, as to the £250 note; so on the other hand it is no less clear, that where two are made joint executors, and one dies, the office and interest survives to the other, who thereby becomes the sole representative of the testator; and this the respondent had himself admitted, by bringing his bill against the appellant after Raymond Fitz-Simon's death, not for a moiety, but for the whole of what he insisted was unpaid of his legacy. No complete account therefore of the undisposed surplus of Walsh's estate having ever been taken by his executors, no division thereof made between them, nor any thing done to sever the joint-tenancy, each executor had a right to retain such part of that surplus as he possessed; and all that remained unreceived, whether legal or equitable interests, did, upon the death of Raymond Fitz-Simon, survive to the appellant, who had therefore a right to keep the whole money by him received from Baggs upon the judgment, as much also as was received from Reddy's trustees upon his bond, and what still remained due upon that bond. That the decrees complained of charged the appellant with a moiety of the money due upon the judgment, and upon Reddy's bond, and yet made him no allowance for the £126 16s. 10½d. and £50 which he paid the respondent Fitz-Simon and his sister after their father Raymond's death, for the principal, interest, and costs of their two legacies; whereas these sums ought to have been specially allowed him out of the testator's assets, even admitting the decrees to be well founded, especially as Raymond Fitz-Simon had retained the money payable for the same; and consequently, the appellant was in danger of being compelled to pay these legacies twice over. That the several defendants, who were made parties to the respondent Fitz-Simon's bill, as next of kin to the testator Walsh, were improperly and unnecessarily made so; they had no sort of right to the undisposed surplus, and so it had been determined by the court of Exchequer, upon the bill brought by John Walsh, the testator's brother, and only next of kin: their costs therefore should have been paid them, not by the appellant, as directed by the decree of August 1755, but by the respondent Fitz-Simon.

On the other side it was contended (R. Henley, C. Pratt), that the dismissal of John Walsh's bill, had determined the right of the two executors to their testator's residuary estate, and that the appellant having by his answer and cross bill in those causes insisted, that the testa-[20]-tor, by constituting them executors without any particular legacy, did intend that they should have the *residuum* of his estate to their own proper use, and that the same did in law amount to a disposition of such residue to them, could no longer contend, that they were not entitled to such residue, as a bequest of the beneficial interest; consequently there was no pretence to exempt any particular part of the assets from distribution, by considering the note in question in the light of a debt to be extinguished by the executorship. But admitting that the rule of law could take place, and that the debts of each co-executor should be extinguished by the executorship, yet in this case the appellant was a mere trustee for his testator; for neither the deposit of the bond, or the assignment of the judgment, passed any property to the appellant in these securities either in law or equity: the only consideration which could possibly convey any equitable interest to the appellant in either, was the promissory note; but when that was coupled with the express declaration of trust when the bond was delivered, and explained afterwards by the account, and the delivery of Reddy's bond to the testator, with the indorsement upon the promissory note, the whole appeared to have been a trust from the beginning; how otherwise could he account for the interest home to the death of Walsh, when the note carried no interest? or charge Walsh with the expences of the statute staple, and the renewal of the lease, after all these securities had been absolutely exchanged for the note? What business had Walsh with Reddy's bond, or the receipt of rents, if he had already parted with the judgment, which was the only lien upon the estate? All this shews the appellant to have been a mere trustee; nor is it credible that any man should sell a real security carrying interest, for a mere personal promise in a note which carried none. As to the other point contended for by the appellant, namely, the benefit of survivorship, because no severance or division of the money in question had been made during the life of his co-executor: it was answered, that the transactions at the two meetings in December and March 1736, amounted to an actual severance of the whole residuum, the division not being partial only but of the whole, as appeared from the appellant's own bill and answer in Jane Fitz-Simon's cause; and the only reason why his two notes were not divided (for they were the only effects left undivided), proceeded from his own fraud and misrepresentation, of which he could never be suffered to avail himself. That no acquiescence could be imputed in this case; for it appeared that Raymond Fitz-Simon complained of the grievance whilst recent, and at the very time it arose, and frequently threatened to apply to equity for relief; and that both Raymond and his son made several applications afterwards to the appellant for redress, which he has often refused: and so lately as in the cause of Jane Fitz-Simon, the appellant insisted upon that settlement of accounts as a bar, which he would now represent as no settlement at all; which with [21] his subsequent submission to pay the respondent's legacy, merely upon a bill being filed, and before answer, betrayed in the strongest manner his own conviction of the justice of the respondent's claim. But his own misrepresentation and fraud, independent of every other circumstance, at once accounted for, and justified every appearance of acquiescence.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that that part of the decree of the 2d of August 1755, which directed, that the respondent Christopher Fitz-Simon should have such costs as he was thereby directed to pay to the defendants, the next of kin of James Walsh, over against the appellant, should be reversed, and that the said decree should in all other respects be affirmed; and it was further ORDERED and ADJUDGED, that the other decree of the 6th of February 1756, should be affirmed. (Jour. vol. 29. p. 40.)

CASE 5.—WINIFRED LAWSON, widow,—*Appellant*; JOHN LAWSON and others,—*Respondents* [28th April 1777].

[Mew's Dig. vi. 1386, 1389.]

[Where a man gives his wife a legacy of £300 which he declares to be her own money, and makes her executrix, but makes no disposition of the residue of his estate, this legacy shall not exclude her from being entitled to such residue.]

Both the DECREES of the LORD CHANCELLOR REVERSED.

\*\*See ante, p. [8] *Mason v. Hawkins*. The result of the many cases on this subject appears, according to a note of Mr. Cox's on 1 P. Wms. 550. to be this:—"By law, the appointment of an executor vests in him all the personal estate of the testator; and if any part remain undisposed of by the will, it rests with the executor *beneficially*. But wherever Courts of equity have seen, *on the face of the will*, sufficient to convince them that the testator did not intend the executor to take the surplus, they have turned the executors into trustees for the next of kin. Where, however, a legacy is *consistent* with the intent that the executor should take the whole, a court of equity will not disturb his legal right."—For cases similar in principle to the present, see Pre. Ch. 231, 263, 316: 1 P. Wms. 114: 2 Eq. Ab. 444. pl. 58: 2 Atk. 45.

The case under the same name in 1 P. Wms. 441. and 2 Eq. Ab. 575, was earlier in time, between different parties, and relative to a *donatio causa mortis*.\*\*

Hylton Lawson, Esq. the appellant's late husband, by his will, dated the 14th of April 1748, charged all his copyhold and freehold estates therein mentioned, as also all his personal estate (except £300 which he received as part of the fortune of the appellant, and which was then lent out upon bond to John Hylton, Esq. and then undischarged; and which £300 he gave to the appellant, declaring it to be his full intention, that it should go entire to her), with the payment of his debts, legacies, and funeral expences, and directed them to be discharged by mortgage, or sale of such of his said freehold and [22] copyhold lands, as should be sufficient to discharge the same, with all his personal estate (except the said £300); and he also gave the appellant, during her life, an annuity or yearly rent-charge of £100 to be issuing out of his copyhold estates; which annuity she was on his death entitled to receive out of such copyhold estates, under her marriage articles, dated the 12th of February 1737, though it was not so mentioned in his will; and he also left to the appellant, as long as he should choose to live in it, his messuage at Chirton, with the appurtenances; and after giving some other legacies, he bequeathed to the appellant, all her wearing apparel, with her watch and rings, and appointed her sole executrix; but he made no further disposition of the residue of his personal estate.

John Hylton, to whom the £300 was lent, as mentioned in the will, died in the testator's lifetime, much involved in debt; and a suit having been after his death instituted in Chancery, for applying his estate in payment of his debts, and the testator being made a defendant in that suit, he in his answer stated the said debt of £300 and afterwards, on making a dividend of the estate of John Hylton, of 17s. in the pound amongst his creditors, the testator received that dividend in respect of the said bond debt.

The testator died on the 14th of November 1767, within the province of York, where he was a settled inhabitant, without revoking his will, otherwise than by receiving 17s. in the pound on the said debt; leaving the appellant his widow, and the respondent John Lawson, and Mary Nicolson, his nephew and niece, and only next of kin.

The appellant soon afterwards proved the will, and possessed the personal estate of the testator, out of which she paid his debts, legacies, and funeral expences.

Mary Nicolson died in July 1769, intestate; and administration of her personal estate was granted to William Nicolson, one of her two children.

On the 31st of August 1770, the respondent John Lawson, and the said William Nicolson, filed their bill in the court of Chancery against the appellant, claiming title with the appellant, to the whole surplus of the testator's personal estate and effects, as undisposed of; and praying an account thereof, and that the clear residue might be distributed amongst the appellant and the plaintiffs in moieties, according to the statute of distribution of intestates estates.

To this bill the appellant put in her answer, and thereby stated, that the testator was an inhabitant of, and died within the province of York, and she claimed the whole legacy of £300 under his will; and insisted, that as the testator had not by his will disposed of the residue of his personal estate, such residue was distributable according to the custom of the said province of York, and the statute of distribution, and consequently that she, as his widow, was entitled to one half under the custom, and to a moiety of the other half under the statute; and that the next of [23] kin were entitled to the other moiety of the last half, being one fourth of the whole under the said statute.

The said William Nicolson having died intestate, the respondent Mary Stuart obtained administration to him, and the suit was on that occasion revived.

On the 7th of March 1772, the cause was heard before the Lord Chancellor Bathurst, who was pleased to declare, that the appellant was to be considered as trustee of the testator's residuary personal estate, beyond the £300 debts specifically bequeathed to her, and that such residue was to be divided according to the custom of the province of York, by which the appellant would be entitled to one moiety of such residue, and also to a moiety of the remaining moiety; and that the other moiety of such remaining moiety belonged to the respondents: and his lordship directed the proper accounts to be taken, and that the clear surplus of the said personal estate should be accordingly divided between the appellant and the respondents in such shares as aforesaid, and all parties were to be paid their costs to be taxed, out of the estate.

The respondents being dissatisfied with that part of the decree which declared that the appellant was entitled to a moiety of the residue of the testator's personal estate, according to the custom of the province of York, and which gave directions for the appellant's retaining one moiety of such residue in that right, procured an order, that the cause should be reheard as to that particular. And the appellant being advised that there was error in the decree, in declaring that she was to be considered as a trustee of the testator's residuary personal estate, and in all the directions given in consequence thereof, obtained an order that the cause should be reheard as to that matter.

Accordingly, on the 11th and 18th of May 1776, the cause was heard before the lord chancellor, when his lordship was pleased to order, that the appellant's petition of rehearing should be dismissed; and to declare that the appellant was to be considered a trustee of the testator's residuary personal estate beyond the £300 debt specifically bequeathed to her, and that such residue was to be divided according to the statute of distribution of intestates estates, by which the appellant was to be entitled only to one moiety of such residue, and that the other moiety belonged to the respondents in manner following; viz. one moiety of such moiety to the respondent John Lawson, as one of the testator's next of kin; and the other moiety of such moiety to the respondents Francis Stuart and his wife, as she was the administratrix of Mary Nicolson deceased, the other next of kin of the testator. And it was further ordered, that the clear residue of the testator's personal estate should be distributed between the parties in such proportions; and with such variations, it was ordered, that the former decree should be affirmed.

The appellant conceiving that both these decrees were erroneous, appealed from them; and on her behalf it was said (A. Wedderburn, J. Ord, W. Ainge) to be [24] evident from the testator's will, that he did not consider the gift to the appellant of the £300 lent on bond to John Hylton, as any bounty from himself, but merely as her own money, placed out on security for her own benefit, liable to his debts, though not liable to be taken from her by his next of kin; he therefore meant to pen his will so as to secure to her what he considered as her own, and made her executrix, that in case he should live to increase his personal estate, she might be beneficially interested by being executrix. It appeared also to have been the

testator's intention, that nobody but his wife should be interested in the residue of his personal estate, after payment of his debts, because every legacy given by the will was charged upon his real estate in the first instance; and this intention seemed to be founded in justice and reason, as the testator's next of kin were very remote relations; and it could not be supposed, that he meant merely to give his wife trouble by making her executrix, but which would be the case, if she was not entitled to the surplus. The legacy to the appellant of her wearing apparel, was no bounty from the testator, they being in their nature her paraphernalia; and though liable to his debts, yet had the creditors taken them, she would have been entitled to satisfaction out of his real estate, whether he had so directed by his will or not. But supposing the decrees to be right in declaring the appellant to be a trustee of the residue of the testator's personal estate, beyond the £300 given to her, yet as to such residue, the testator must be considered as dying intestate; and the custom of York being the law of the place where he resided and died, his effects must be distributed accordingly, so that one moiety would belong to the widow as he died without children, and the other moiety would be distributable between her and the next of kin. Though this rule clearly obtains upon a legal intestacy, and the appointment of an executor is in a court of law considered as a total disposition of the personal estate; yet when a court of equity declares a man an inhabitant of the province of York, to die intestate as to the whole or any part of his personal estate, it does necessarily declare at the same time that he has not exercised so far the power of devising. The statute 4 William III. c. 2. enabling an inhabitant of the province of York to dispose of the whole of his personal estate by will, cannot affect a case where no disposition is made; nor can there be a different rule of succession in a court of equity and a court of law, either as to personal or real estates. It was therefore hoped that both the decrees would be reversed, and the respondents bill dismissed.

On the other side it was argued (E. Thurlow, J. Madocks, F. Buller), that as to the first point made by the appellant, namely, that it ought to have been declared, that she was entitled to the whole surplus for her own benefit; nothing is more clearly established than that, although by the common law, the appointment of an executor in a will is a gift of the residue or surplus of the personal estate to such executor, yet in equity, if the executor has a particular legacy given him by the [25] will, he thereby becomes a trustee of the surplus for the benefit of those who may be entitled by the general law of the land. The appellant's counsel endeavoured to distinguish between a general and specific legacy; but if such distinction has in any case prevailed, which was denied, yet it was insisted, that in the present case, the appellant could not avail herself of it; because her legacy of £300 though made a charge upon a particular fund, was payable also out of the general assets of her husband, and was so claimed by her answer. Besides, this claim to the whole surplus was never so much as pretended by the appellant's answer; and therefore not being put in issue, or made part of her case, she was strictly not entitled to insist upon it; and especially, after having submitted to pay part of such surplus to the respondents, under an order made in the cause, on the 18th of December 1771.

And as to the other point insisted on by the appellant, viz. that she ought to have been permitted to retain one moiety of the clear surplus, as the widow of the testator, under the custom of York; it was said, that this question depended upon the construction of the statute of 4 Will. and Mary, c. 2. by which the inhabitants of the province of York are enabled to dispose of their whole personal estate by will, notwithstanding the custom. The words of this statute are, "That it shall be lawful for such inhabitants, by their last wills and testaments, to give, bequeath, and dispose of all their goods, chattels, debts, and personal estate, to their executor or executors, or to such other person or persons as such testator shall think fit, in as large and ample manner as by the law and statutes of this realm, any person may give and dispose of the same in the province of Canterbury, or elsewhere; and that the widows, children, and other the kindred of such testator or testators, shall be barred to claim or demand any part of the goods, chattels, or other personal estate of such testator, in any other manner than as by the said last will and testament is limited and appointed." Before this statute, such inhabitant could only dispose of a moiety in case he left a widow, and only of a third in case he left both

widow and children; and the statute recites, "that the widow and children were entitled to their shares by the custom;" so that the law considered them as having a charge upon the personal estate, which could not be affected by the husband or father. In the case of *Read v. Duck* (Preced. in Chan. 409), a loss happening by the insolvency of an executor of a freeman of London, before the statute which gave such freemen power over their whole personal estate, Lord Cowper determined, that the loss should be borne by the testamentary part only; the widow and children being in the nature of creditors on the other parts. But since the above statute, if an inhabitant of the province of York, or a freeman of London, makes a will, naming an executor, and such executor should embezzle the effects, or prove insolvent, if there be assets of the testator to be found, the creditors or legatees will not suffer, because the whole personal estate would be assets, and liable to answer the purposes of the will, he being testate as to the whole; whereas, before the statute, the dead man's share alone was so liable; which clearly points out the difference introduced by the statute: for where a man makes an executor, the whole personal estate vests in him; and as there is nothing left for the custom to operate upon, the whole becomes testamentary. Now in the present case, the testator having made an executrix, had died testate as to the whole, so that the whole thereby became the testamentary, or dead man's share, since by the statute he had a right to bequeath the whole; nothing therefore being left for the custom to operate upon, and there being, in equity, a resulting trust of the surplus, the court had properly decreed a distribution of it, according to the general law of the land, the custom being excluded; namely, to those to whom, antecedent to the statute, the dead man's share would have gone. Though the case of *Beard v. Beard* (3 Atk. 72.), was cited on the part of the appellant, with intent to shew that there is no difference between a total and a partial intestacy, yet in fact that case confirms the doctrine; for there the court held the will to be revoked as to all the personal estate, and decreed distribution, as if no will or deed had been made. The general law of the land must therefore take place upon the resulting trust, for if the widow was now to set up the custom, she would claim against the statute, *in other manner than the will has appointed*, which had devised away the whole, and taken it out of the custom; a court of equity will not therefore restore the operation of the custom against the statute.

But after hearing counsel on this appeal, it was DECLARED, that the appellant was entitled to the residue of the personal estate to her own use: and therefore it was ORDERED and ADJUDGED, that both the decrees should be reversed; and that the cause should be remitted back to the court of Chancery, to set aside the order of the 18th of December 1771, and to make such further order as should be just. (M.S. Jour. sub anno 1776-7. p. 676.)\*

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[27] CASE 6.—JOSEPH RANN and another,—*Plaintiffs*; ISABELLA HUGHES,—*Defendant* (in Error) [14th May 1778].

[Mew's Dig. iv. 97; vi. 1518. 6 Rul. Cas. 1. See 7. T. R. 350: 29 Car. II c. 3, s. 4.]

[Where an executor is sued upon a parol promise of paying the debt, it is sufficient to ground a judgment against the assets of the testator; but where by such promise it is attempted to charge the executor *personally*, and to ground judgment against his own effects, it must be proved to be in writing, otherwise it is void.]

\*\* By the statute of frauds, 29 C. 2. c. 3. § 4. it is explicitly provided, "That no action shall be brought whereby to charge any executor or adminis-

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\* Accordingly, on the 7th of July 1777, the court made an order, discharging the former order of the 18th of December 1771, and directing the monies which had been paid by the appellant in pursuance thereof, to be paid back again; after deducting thereout the costs of the suit. (Register, 1777. Lib. B. 1. 412.)

trator upon *any* special promise, to answer damages out of his own estate," unless on an agreement or memorandum in writing.

This case is not reported in any other book.

Judgment of the Court of Exchequer Chamber (reversing the judgment of K. B.) **AFFIRMED.\*\***

The plaintiffs, in Hilary term 1774, brought their action against the defendant, in which they declared as follows: viz. "Middlesex (to wit), John Rann clerk, and Arthur Taylor, executors of the last will and testament of Mary Hughes deceased, complain against Isabella Hughes, being in the custody of the marshal of the Marshalsea of our sovereign lord the king, before the king himself; for that whereas, on the 11th day of June, in the year of Lord 1764, at Westminster, in the said county of Middlesex, divers disputes, differences, and controversies had arisen, and were then and there depending, between the said Mary Hughes in her life-time, and one John Hughes; and thereupon, for the putting an end to the said disputes and differences, the said Mary Hughes in her life-time, and the said John Hughes on the same day and year aforesaid, at Westminster aforesaid, submitted themselves to stand to the award, order, arbitrement, final end and determination of Francis Wheler, of the Inner Temple, London, Esq. and Richard Geast, of Blythe Hall in the county of Warwick, Esq. arbitrators indifferently named, elected, and chosen, as well on the part and behalf of the said John Hughes, as the said Mary Hughes, to arbitrate, award, order, judge, and determine of and concerning the said disputes, differences, and controversies, so as the said award should be made in writing, ready to be delivered on or before the 29th day of September then next ensuing; and whereas afterwards, and within the time in that behalf limited for the said Francis Wheler and Richard Geast to make their award concerning the premises as aforesaid, (to wit,) on the said 29th day of September, in the said year of our Lord 1764, the said Francis Wheler and Richard Geast in due manner made their award, order, and determination in writing, of and concerning the premises, so referred to them as aforesaid, then ready to be delivered to the said John Hughes, and Mary Hughes, and bearing date the same day and year last aforesaid, and thereby they the said Francis Wheler and Richard Geast did then and there, among other things, award and order, [28] that the said John Hughes, his heirs, executors, or administrators, should on or before the 25th day of March next ensuing the date of the said award, well and truly pay or cause to be paid unto the said Mary Hughes, her executors, administrators, or assigns, the sum of £983 Os. 2½d. with interest for the same, after the rate of £4 by the hundred, by the year, from the day of the date of the said award; and the said Francis Wheler and Richard Geast did then and there, by their said award, further award and order, that the said John Hughes should within the space of one month then next ensuing, execute to the said Mary Hughes, a general release of all actions, suits, damages, accounts, reckonings, and demands whatsoever, from the beginning of the world to the day of the date of the therein recited bonds of arbitration; and that the said Mary Hughes should within the same time, in like manner execute to the said John Hughes, a like general release of all actions, suits, damages, accounts, reckonings, and demands whatsoever, from the beginning of the world to the day of the date of the said recited bonds of arbitration; of all which said premises, he the said John Hughes, afterwards, (to wit,) on the said 29th day of September, in the year aforesaid, at Westminster aforesaid, had notice: and the said Joseph and Arthur in fact say, that the said John Hughes afterwards, and after the making of the said award, (to wit,) on the first day of October, in the year of our Lord 1765, at Westminster aforesaid, died intestate, possessed of and entitled unto divers goods, chattels, and effects of great value, (to wit,) of the value of £3000: and the said Joseph and Arthur further say, that administration of all and singular the goods, chattels, and credits, which were the goods, chattels, and credits of the said John Hughes at the time of his death, after the death of the said John Hughes, (to wit,) on the 26th day of October, in the year of our Lord 1770, at Westminster aforesaid, by Frederick, by divine Providence archbishop of Canterbury, primate of all England and metropolitan, was in due manner committed to the said Isabella (to wit) at Westminster aforesaid,

and by virtue thereof, she the said Isabella afterwards, (to wit,) on the same day and year aforesaid, at Westminster aforesaid, became and was possessed of divers goods and chattels which were the goods and chattels of the said John Hughes at the time of his death: and the said Joseph and Arthur further say, that the said Mary Hughes afterwards, (to wit,) on the 23d day of February, in the year of our Lord 1766, at Westminster aforesaid, made her last will and testament in writing, and thereby constituted and appointed them the said Joseph and Arthur executors thereof, and afterwards (to wit,) on the same day and year aforesaid, at Westminster aforesaid, died: and the said Joseph and Arthur further say, that the said sum of £983 Os. 2½d. mentioned in the said award, at the time of the death of the said Mary Hughes, was wholly due, owing, and unpaid [29] to the said Mary Hughes, by reason of which premises, the said Isabella, as administratrix as aforesaid, became liable to pay to the said Joseph and Arthur, as executors as aforesaid, the said sum of £983 Os. 2½d. in the said award mentioned, together with interest for the same from the day of the date of the said award, after the rate of £4 by the hundred, by the year; and being so liable, she the said Isabella, in consideration thereof, afterwards, (to wit,) on the same day and year last aforesaid, at Westminster aforesaid, in the said county, undertook, and to the said Joseph and Arthur then and there faithfully promised to pay them the said sum of money in the said award mentioned, together with interest for the same as aforesaid, when she the said Isabella should be thereunto afterwards requested." There were other counts in the declaration, but those were by the verdict rendered immaterial.

To this declaration, the defendant pleaded several pleas; 1st, That she never made any such promises as the plaintiffs had alledged. 2d, That she had fully administered all the effects of John Hughes. 3d, That the said John Hughes, at his death, was indebted by bond to one Henry Jackson, in the sum of £1400 and that she the defendant Isabella had fully administered all the effects of the said John Hughes, except to the value of £5 which were not sufficient to satisfy the bond debt due to Jackson.

The plaintiffs replied and took issues on these pleas, and the cause was tried before Lord Mansfield, at the sittings in Westminster Hall, after Trinity term 1774; when the jury found a verdict for the plaintiffs on the first count of the declaration, that the defendant did make the promise therein alledged, and gave the plaintiffs £483 damages, and 40s. costs; the jury also found, that the defendant Isabella had fully administered the effects of John Hughes.

In Michaelmas term 1774, a motion was made by the defendant, in the court of King's Bench, to set aside the verdict, and for a new trial; but the court were unanimously of opinion, that the verdict was well founded, both on the facts and the law of the case; whereupon in Easter term 1775, judgment was entered up against the defendant generally, for £547 damages and costs.

Soon afterwards the defendant brought a writ of error in the Exchequer Chamber, where the case was twice argued; and in Michaelmas term 1776, the judgment of the court of King's Bench was reversed.

But to reverse this judgment of reversal, the plaintiffs brought a writ of error in parliament; and on their behalf it was said (T. Buller, J. Dunning), that the debt which they recovered by the first judgment, was justly due from John Hughes, at the time of his death, and this had never been denied; but it was insisted by the defendant, that notwithstanding the debt continued unpaid, and notwithstanding she did make the promise stated in the declaration, [30] and that every fact therein alledged by the plaintiffs was true, yet she was not personally liable to pay the damages given by the jury. I. Because the promise stated in the declaration, and found by the jury, was not a personal promise by her, but merely in the character of administratrix; and therefore she was not liable to pay the debt out of her own effects, but so far only as she had assets, and she had no assets. II. Supposing it to be a promise to pay the debt out of her own effects, and that the charge in the declaration was to be so understood, yet that promise was void in law.

In answer to the first objection it was said, that in all actions against executors or administrators, where they are sued in that character only, the declaration usually begins with describing and charging them as such; but in this case the



complaint was exhibited against the defendant as for a personal demand, which the plaintiffs as executors had against her; and when she was first named, she was called upon to answer personally, and not by the name or description, or with the addition, or in the character of administratrix: and it was conceived, that no pleader reading this declaration, could hesitate to say it was a declaration against the defendant in her own right, and not as administratrix. The declaration then stated what was the original demand against John Hughes, whose representative the defendant was, and charged, that after his death, she having obtained the administration of his effects, and possessed herself of them, became liable to answer this demand as administratrix, and being so liable she promised to pay it. By these words it was submitted, the plaintiffs had stated how long she continued liable to pay the debt as administratrix only, and when she made herself liable to pay it personally; so long as she was liable to be called upon in the character of administratrix, and to pay it out of effects which belonged to John Hughes only, she was stated to be liable as administratrix; but the instant she made an express promise to pay the debt, she became personally liable, and then was no longer charged as administratrix; the allegation that she promised was general, without reference to the administration, or to the assets which she had as administratrix; but if it had been alledged, that she promised to pay in her own right, or out of her own effects, the addition of those words would only have been the addition of that which was necessarily implied and understood without them.

The second objection, that the promise was void, was supported on two grounds; 1st, That it did not appear by the declaration, that the promise was in writing; or 2dly, That there was any consideration for the promise. As to the first ground, it is an adjudged point, that the statute of frauds, which requires such promise to be in writing, makes no alteration in the mode of pleading; and therefore, though the promise be not expressly alledged in the declaration to have been made in writing, yet it must necessarily be presumed to have been so; for if it [31] had not been so proved at the trial, which in fact it was, the plaintiffs could not have obtained a verdict; and after a verdict, every thing is presumed which was necessary to be proved on the trial. And as to the second ground it was submitted, that in the case of a promise in writing, which this must be taken to be, it is not necessary to alledge any consideration in the declaration; but if it were necessary, there was a sufficient consideration for the promise appearing upon this declaration. In reason, there is little or no difference between a contract which is deliberately reduced into writing, and signed by the parties, without seal, and a contract under the same circumstances, to which a party at the time of signing it puts a seal, or his finger on cold wax. In the case of a deed, i.e. an instrument under seal, it must be admitted that no consideration is necessary; and in the year 1765, it was solemnly adjudged in the court of King's Bench (*Pillans v. Van Mierop*. 3 Burr. 1663), that no consideration was necessary when the promise was reduced into writing. That opinion has since been recognized in the same court, and several judgments founded upon it; all which judgments must be subverted, and what was there conceived to be settled law, totally overturned, if the plaintiffs in this cause were not entitled to recover. But further: if a consideration were necessary, a sufficient one for the promise appeared upon the declaration in this case. The defendant was the administratrix of John Hughes, she had effects of his in her hands, she was liable to be called upon by the plaintiffs in an action, to shew to what amount she had assets, and how she had applied them; and under these circumstances, she promised to pay the demand which the plaintiffs had against her. But it was said, that it did not appear on the declaration, that she had effects of John Hughes, sufficient to pay all his debts. To what amount she had effects, or what debts were due from Hughes at his death, was known to the defendant only, and not to the plaintiffs. They applied to the person against whom they had a right of action, she promised to pay them, and under that promise they rested satisfied. This promise, if it did not import an admission of assets, must naturally be understood to mean, that the defendant would pay the debt whether she had assets or not; and if it was not so meant, it could only be intended to amuse, mislead, and deceive the plaintiffs. And after such a promise, the defendant ought not to be permitted to say, that she had not sufficient assets to pay this debt.

On the other side it was said (J. Wallace, E. Bearcroft), that in order to subject the proper estate of the defendant, the administratrix, to the payment of the debt of the intestate, stated in the declaration, in consequence of the promise made by her to the plaintiffs, it was necessary, 1st, That there should be a sufficient consideration for the promise, in point of law; and 2dly, That such promise, or some memorandum or note thereof, should be in writing, signed by the defendant, or some other person authorized by her.

[32] As to the first point, the duty of an executor or administrator is to collect the effects of the deceased, and apply the same as far as they will extend, to the payment of the debts of the deceased, in a due course of administration, and to distribute the surplus, if any, amongst the legatees or next of kin; no creditor can claim from the representative beyond the amount of the effects, and yet there may be inducements to a representative to enter into an engagement with a creditor, for the positive payment of his debt, in consideration that the creditor will give him time for such payment, or will abstain from pursuing legal measures to recover his demand, or the like; and the creditor grants the indulgence. In these cases, there is a reasonable foundation to interpret the promise of the executor, as an additional security to the creditor; who, in confidence thereof, accedes to terms of forbearance and delay, which may be attended with the loss of witnesses, and other consequences injurious to the creditor. But the present case did not afford a pretext of any benefit or indulgence stipulated for by the defendant, or any thing to be done or omitted by the plaintiffs, as a consideration for the promise stated to have been made by the defendant; and which the plaintiffs contend, ought to subject her, out of her own estate, to the payment of the debt claimed; though it appeared upon the record, that the defendant had faithfully discharged her duty, and honestly applied the effects of the deceased in the payment of his debts, in a proper course of administration. It was clear, that neither the plaintiffs or their attorney, or any other concerned for them, had at the commencement of this suit, or for some time afterwards, any idea of the defendant's being liable, out of her own effects, to satisfy the demand. She was charged to be liable as administratrix, and being so liable, promised to pay; which must be understood in the same character, and out of the effects of the deceased; other counts were added, which charged her merely as administratrix, and if the first count charged her in a different light, requiring a different judgment, the declaration was insufficient to support any of the demands. She pleaded matters in her defence to the action, which were admissible only in that character, and the plaintiffs took issue upon them; thus far it was certain both parties understood the promise stated in the declaration, and the effect of it, in the same light. The plaintiffs however, in the subsequent proceedings, adopted a different conduct, and had been forced to contend, that the defendant was liable to the payment of the debt and costs out of her own effects, and entered a judgment against her; not even adhering to the established course of proceeding, in a case where an executor or administrator is liable out of his own effects to satisfy a debt of the deceased, which directs the debt and costs to be levied out of the effects of the deceased, if there be sufficient for the purpose, and if not, then to be levied of the proper effects of the representative; but the judgment was entered so as [33] to subject the person or effects of the defendant in the first instance to an execution, without regard to the effects of the deceased.

And as to the second point, that the promise ought to be in writing; it was said, that this requisition was founded in positive law, for the protection of executors and administrators, by the statute 29 Charles II. c. 3. The necessity of an undertaking in writing was not disputed; but it was contended, that there was no occasion expressly to alledge in the declaration, that such promise was in writing; it was sufficient to prove it at the trial, and after a verdict it must be presumed, that a promise in writing was proved. In some cases it is certainly not necessary to alledge the promise to be in writing, and after verdict such intentment shall be made; but that is, where the plaintiff could not maintain his action unless the promise was in writing, nor could he obtain a verdict without proof of it, as where one person undertakes for the debt or default of another; but in an action against an executor or administrator, the plaintiff may maintain his action upon the parol promise of the defendant, and take a judgment to levy his

debt upon the assets of the deceased; and therefore to warrant a judgment, charging the proper estate of the executor or administrator, it must appear that the promise was in writing, which was not alledged in the present case.

After hearing counsel on this writ of error, the following question was put to the judges, viz. "Whether sufficient matter appears upon this declaration, to warrant, after verdict, the judgment entered up against the defendant in her personal capacity?" And the lord chief baron of the court of Exchequer having delivered the unanimous opinion of the judges in the negative, it was ORDERED and ADJUDGED, that the judgment given in the court of Exchequer, reversing the judgment of the court of King's Bench, should be affirmed; and that the record should be remitted, etc. (MS. Jour. *sub anno* 1777-8, p. 941.)

[34] CASE 7.—ANDREW FOLEY,—*Plaintiff*; JOHN BURNELL and another,—*Defendants* (in Error) [27th April 1789].

[Mew's Dig. vi. 1337; xv. 1687, 1688: 4 Bro. P. C. 319.]

[Whenever an executor assents to a bequest in his testator's will, there is an end of his interest in the thing bequeathed, and he cannot afterwards dissent. And it is equally true, that the executor's assent to the first devisee, is an assent to the remainder over.]

\*\* This case cannot be understood without a reference to that in the subsequent part of this work; the arrangement by which this is made to precede may seem displeasing, but is owing entirely to the original editor, Mr. Brown.—As to the point above determined, see post tit. *Legacies* (5 Bro. P. C. 51).

JUDGMENT of the Exchequer Chamber, (affirming judgment of B. R.)  
AFFIRMED.\*\*

Notwithstanding the determination of the house upon the former appeal, (Vid. post, title *Heir Looms*) the present plaintiff in error brought an action of detinue, as executor, in the court of King's Bench, for recovery of the plate in question. On the trial of which action at the assizes for Worcester, in March 1786, the jury found a special verdict, stating the will of the late Lord Foley to the same effect as in the former case, with this addition:

The jurors further find, that on the decease of the said testator, the said Robert Foley and Andrew Foley the plaintiff in error, took possession under the said devise of the said mansion-house at Stoke aforesaid, with the appurtenances, and continued the possession thereof during the life of the said Robert Foley; and, that since his death, the said Andrew Foley, the plaintiff in error, has been in the possession thereof, under and by virtue of the said devise, and now is in the actual possession thereof; and, that during the life-time of the said Robert Foley, they the said Robert Foley, and the said Andrew Foley, the plaintiff in error, and since the death of the said Robert Foley, he the said Andrew Foley, the plaintiff in error, have, and has kept servants at the said mansion-house at Stoke, to look after the same, and have and hath paid them wages for the same, and have and hath paid the land tax for the same; and that the said Edward Foley, by the permission of the said Robert Foley, and Andrew Foley, the plaintiff in error, hath resided at the said mansion-house at Stoke whenever he pleased, and hath paid the common tenants taxes for the same.

And the jurors further find, that one of the said services of plate in the said will mentioned, upon the death of the said testator, was by the said Robert Foley, and Andrew Foley, the plaintiff in error, taken to and placed in the said mansion-house at Stoke, there to be held and enjoyed according to the direction of the said will, and that the said Edward Foley having been permitted to make use of such plate whilst at Stoke, without the knowledge, privity, or consent of the said Andrew Foley, the plaintiff in error, and Robert Foley, or either of them, on the first day of January 1779, removed part of the said service of plate from Stoke afore-[35]—said, to a house he then resided at in Portland-place, in the county of Middlesex,

where the same was seised under and by virtue of an execution as hereinafter mentioned.

That the said Edward Foley had a son born on the 27th of August 1779, which son died in fourteen days after his birth, viz. on the 10th of September 1779. The special verdict then states two judgments in the court of Common Pleas against the present Lord Foley and Edward Foley, at the suit of John Grant, Esq. and execution issued thereon by writs of *fi. fa.* in Middlesex. By virtue of which said writs, the said John Burnell and Henry Kitchen, since deceased, being sheriff of the said county of Middlesex, and the said James Armstrong as their bailiff, on the 12th of March 1779, took the goods and chattels in the declaration mentioned, being part of the said service of plate so removed from Stoke as aforesaid, by the said Edward Foley, to Portland-place, in execution for the several debts and costs aforesaid; but the said James Armstrong was restrained from selling the said goods and chattels, and from making any returns to the said writs by virtue of an injunction from his majesty's high court of Chancery, obtained by and on the behalf of the said Andrew Foley, and Thomas Foley, his son, an infant.

That on the 15th of March 1779, the said Andrew Foley, the plaintiff in error, gave the said John Burnell and Henry Kitchen notice, that the said plate was not the said Edward Foley's, but was part of the testator's plate, and left by him as an heir loom as aforesaid.

That the said two writs of *fi. fa.* in Trinity term 1782, were set aside by the court of Common Pleas, by reason that memorials of the said judgments being given for the purpose of securing certain annuities, had not been registered and inrolled pursuant to the statute.

And the jurors further find, that the said John Burnell, and Henry Kitchen and James Armstrong, continued in the possession of the said goods and chattels; and when and so soon as the said injunction was dissolved, and memorials of such judgments having been duly registered and inrolled as the statute requires, viz. on the 7th of May 1783, another writ of *fi. fa.* was issued, returnable on the morrow of the Ascension then next following, upon one of the said judgments, which writ was duly delivered to Sir Robert Taylor, Knight, and William Cole, Esq. then being sheriff of the said county of Middlesex, to be executed in due form of law, by virtue of which said writ the said James Armstrong as bailiff or servant of the said last mentioned sheriff, and by his command, on the 13th of May 1783, seised and took the said goods and chattels so seised under the said former executions as aforesaid, in execution, for the said last mentioned debt and costs, and sold the same for that purpose, and the sheriff returned that he had levied of the goods of the said Edward Foley £842 and 4s.

And the jurors further find, that the said Andrew Foley the plaintiff in error, on the 27th of April 1785, demanded the said [36] goods and chattels of the said John Burnell, Henry Kitchen, and James Armstrong, who then had the same in their custody, and refused to deliver the same to him, and that the same are of the value of £842 and 4s. And then the jury conclude generally in the usual manner, submitting the matter of law to the judgment of the court upon the facts found.

In Easter term 1786, the parties were prepared to argue (E. Bearcroft, F. Power, J. Poole) this special verdict in the court of King's Bench, but the court thought proper to give judgment for the defendants, without hearing any argument on the special verdict, conceiving that the question had been agitated in this house in a suit relating to the same plate, on an appeal from a decree of the court of Chancery, and determine, against the plaintiff. Whereupon the plaintiff Andrew Foley brought a writ of error in the court of Exchequer Chamber, and assigned errors. And when the cause was brought on in the Exchequer Chamber in Michaelmas term 1788, that court thought proper to confirm the judgment of the court of King's Bench, without hearing any argument on the special verdict, for a similar reason to that given by the court of King's Bench.

The plaintiff Andrew Foley being advised that the question decided in the former suit was totally different from that which was now submitted to their lordships on this record, brought his writ of error in parliament. And on his behalf it was insisted, that he being surviving devisee of the house at Stoke, and a considerable real estate on peculiar trusts, which required of him that he should be

in the actual possession, had also a right to the possession of the plate, by the will annexed to the house, and directed "to be enjoyed by the several persons, who from time to time shall successively be entitled to the possession of it." It was expressly found by the special verdict, that immediately on the decease of the testator, the trustees took possession under the devise of the house at Stoke, with the appurtenances; and that Mr. Andrew Foley was now in possession of it. During the continuance of the trust, Mr. Edward Foley was a mere stranger, and had no property in possession either in the house at Stoke, or the furniture. The trustee might let the house, if he thought it would be for the honour or interest of his family to do so, and he might let the use of the plate with it, Mr. Edward Foley's residence there being stated to be merely by the permission of the trustee. That it was stated to be part of the plate which had been placed in the house at Stoke to be enjoyed according to the directions of the will. To that disposition of it, the executors (two of whom were the trustees themselves) appear to have consented. Nothing was stated to have happened, which could alter the nature of the property: the removal, especially without the consent of the lawful possessor, could not have that effect, nor subject the plate to an execution for Mr. Edward Foley's debt, any more than it would have been had it remained at Stoke. That the defendants first obtained the possession of the plate unlawfully, under colour of a proceeding which was set aside, as being illegal. They ought [87] then to have restored it to the plaintiff in error, of whose title they had sufficient notice. No subsequent proceeding could support a possession originally obtained by wrong; if they had parted with the possession they would still have been liable; but it was stated, that they had the plate on the 27th of April 1785. And it was submitted (J. Scott, J. Mansfield), that the question had not been in any respect determined in the suit which was in this house in 1785, on an appeal from a decree of the court of Chancery. That was a bill brought by the plaintiff in error, and his eldest son, as remainder-man, to have the plate secured for them, in case they should ever be intitled to the possession of the house at Stoke under the limitations in the will. It was determined that they were not entitled to that remedy. Mr. Andrew Foley never meant to impeach the rectitude of that decision in the present action, which was brought on a present subsisting legal right.

On the other side, in addition to the arguments made use of on the former occasion, it was said to be clear, that the moment an executor assents to a bequest, mentioned in the will of his testator, there is an end of the interest of the executor in the thing bequeathed, and he cannot afterwards dissent. It is equally true too, that the executors assent to the first devisee is an assent to the remainder over. Now it was found by the special verdict, that the executors named in the will and codicil of the late Lord Foley, had actually assented that Edward Foley should have the possession of the plate in question; and therefore the defendants in error contended, that, by such assent, the executors were precluded from saying they had any interest in the plate; and consequently, that the plaintiff in error could not maintain this action: and that the very same question now agitated by the plaintiff in error, was made the ground of an appeal from a decree of the court of Chancery to their lordships, in a cause in which the plaintiff in error, and his son Thomas Foley, were plaintiffs, and the defendant in error, with others, were defendants, after the cause had been twice heard in the court of Chancery, and the opinion of that court had been twice given upon the same point against the plaintiff in error and his said son; and upon that appeal the decree of the court of Chancery was affirmed.

After hearing counsel on this of error, it was ORDERED and ADJUDGED, that the judgment given in the Exchequer Chamber, affirming a judgment of the court of King's Bench, should be affirmed with £50 costs. (MS. Jour. *sub anno* 1789. p. 589.)

## FACTOR.

[38] CASE 1.—RICHARD BECKFORD,—*Appellant*; WILLIAM BECKFORD,—*Respondent* [28th April 1783].

[Mew's Dig. xv. 1481.]

[A. by will devises all his estates to his eldest son in tail male, with remainders over; part of the property consisted of an estate in Jamaica, and therefore the testator added the following clause: "And I recommend to my executors, that all sugars, rum, and other plantation produce that is sent to the port of London, be consigned to the house of Collet, Evans, and Co. until such time as any of my sons shall set up in the business of a sugar factor; then my desire is, that the consignments may pass through his or their hands." C. a natural son of the testator's, set up the business of a sugar factor, during the minority of the devisee, and accordingly got the consignments. Upon the devisee's coming of age, C. accounted with him, but insisted on being entitled to his commission not only upon the produce which he had actually sold, but also upon the produce which had been consigned to him, but was not then arrived in the port of London. Held, that the words of the above clause were not imperative, or amounted to words of bequest in favour of C. but were recommendatory only. Held also, that C. was entitled to a commission only upon what he had actually sold, and not upon what was only consigned, but not delivered to him.]

DECRETAL ORDER of Chancery AFFIRMED.

William Beckford, late of Fonthill Gifford, in the county of Wilts, Esq. deceased, being in his life-time seized of considerable real estates in the kingdom of Great Britain, and of divers plantations and estates in the island of Jamaica; did duly make and publish his last will and testament in writing, bearing date the 19th day of June 1765, executed and attested so as to pass real estates; whereby, among other things, he gave and devised (subject and charged in his said will is mentioned) all his manors, plantations, slaves, lands, tenements, hereditaments, and real estates whatsoever, with the appurtenances, unto his son William Beckford, and to the heirs male of his body lawfully issuing; with remainder to the heirs male of the said testator's own body lawfully issuing; with remainder to his natural or reputed son Richard Beckford, and the heirs male of his body lawfully issuing, with divers remainders over; and the testator gave and bequeathed all the rest and residue of his goods, chattels, and personal estate whatsoever and wheresoever, unto his executors therein-after appointed, in trust, to get in and dispose of, and convert the same into money with all convenient speed, (except such good, chattels, and things, as they should think proper to preserve in specie, which he left to their discretion,) and to apply the same in the first place to the payment of his debts, and such of the thereby given legacies as were directed to be paid in a limited time, and afterwards to the payment of the other legacies, as they should become payable; and as to the overplus, (if any,) and also as to the goods, chattels, and things, which should be preserved in specie as aforesaid, in trust for his said son William Beckford, and to be paid and delivered to him when he should attain the age of twenty-one years; and in case of his death under that age, then in trust for the person, who, under his will, should next become entitled to his real estates thereby devised, and should attain the age of twenty-one years: and he did thereby appoint the right honourable the Lord Bruce, Sir John Gibbons, Henry Hoare Esq. the reverend Dr. Charles Wake, William Matthew Burt Esq. and George Cooke Esq. (who died in the testator's life-time,) executors of his will, and guardians of the persons and estates of his said sons and daughters during their respective minorities; and he thereby declared his will and mind to be, that his said executors, and the survivors and survivor of them, should have the whole and absolute management of all the estates and premises thereby devised, during the respective minorities of his said sons therein

beforenamed, with power to let and set the same as they should find or judge most for the advantage of the persons entrusted therein: and in his will was contained a clause in the words following; "And I recommend to my executors, that all sugars, rum, and other plantation produce, that is sent to the port of London, be consigned to the house of Collett, Evans, and Company, until such time as any of my sons shall set up in the business of a sugar factor; then my desire is that the consignments may pass through his or their hands."

The testator died on the 21st of June 1770, without having revoked or altered his will; and all the then surviving executors, viz. the Lord Bruce, Sir John Gibbons, Henry Hoare, William Matthew Burt, and Dr. Charles Wake, duly proved the same, and undertook the executorship thereof; but soon afterwards Lord Bruce, now Earl of Aylesbury, and Henry Hoare Esq. declined to act further in the trusts of the said will, and the other three trustees and executors, Sir John Gibbons, Dr. Charles Wake, and William Matthew Burt, differed among themselves about the management of the testator's estates in Jamaica, and thereupon the said William Beckford, the respondent, then an infant, by his sister and next friend, exhibited his bill of complaint in the high court of Chancery against the trustees and executors and other proper parties, praying, that an account might be taken of the personal estate of the testator and the produce and interest thereof, and of the rents, produce, and profits of all the said testator's real estates; and that proper directions might be given for the management and receipt and disposition of the rents and profits thereof for the future, during the plaintiff's minority; and if it should appear to be necessary, that proper persons might [40] be appointed by the court for such purposes, and that a receiver of the said estates might be also appointed; and that out of the income of the testator's estate, a suitable allowance might be made for the plaintiff's maintenance and education, and that the savings might be preserved for the plaintiff's benefit till he should attain the age of twenty-one years; and in case it should be necessary, that proper directions might be given for the immediate care of the plaintiff's person and education, and a proper person be appointed to undertake and superintend the same.

The appellant Richard Beckford put in his answer on the 8th of April 1771, and stated, that he had taken upon him the business of a sugar factor; and insisted, that, under the testator's will, he was entitled to the consignment to him of all the produce of the testator's estates in the West-Indies, which should be made to the port of London.

An application was made to the court on the 31st of May 1771, to have receivers appointed of the infant's estates; and, by an order of that date, receivers were appointed of the English estates, and the order proceeds; "and the said defendant Richard Beckford being entitled under the said testator's will to the consignments of the produce of the West India estate; it is further ordered, that he do account annually before the said master for such consignments as come to his hands, or to the hands of any other person by his order, or for his use, and pay the balances into the Bank."

The plaintiff's bill was afterwards amended, and the appellant answered, and again stated, that he was then in trade as a sugar-factor, and in partnership with David Evans, and that the partnership commenced on the 1st of May 1771, and thereby insisted that he had a right, under the will of the testator, to the disposal of the produce of the testator's plantations in Jamaica.

By the decree made on hearing the cause by the Master of the Rolls, on 25th November 1773, it was, among other things, ordered, that the receivers appointed of the testator's real estates in England, pursuant to the order made in the said cause the 31st of May 1771, should be continued, and pass their accounts before the master, and pay the balances thereof into the Bank, pursuant to the orders of the court for that purpose; and it was ordered that the defendant Richard Beckford, who was under the testator's will, and by virtue of the said order of the 31st of May 1771, consignee of the produce of the testator's West India estates at the port of London, and also the defendants Lovell and Savage, who had been appointed consignees of the produce of the said estates at the ports of Bristol and Liverpool, pursuant to an order made in the cause the 28th of November 1772, should be continued, and pass their accounts before the said master, and pay the

balances thereof into the Bank from time to time, pursuant to the directions of the several orders made in the said cause for that purpose.

[41] On the 28th of September 1781, the respondent William Beckford attained his age of twenty-one, whereupon he became entitled to be let into possession of all his estates; and having observed that the method of transacting his affairs during his infancy, in regard to his Jamaica property, had been for the agents to send the chief part of the produce to England, and then to draw bills of exchange for the money they wanted in the island of Jamaica, and that such bills of exchange had, by order of Dr. Wake, been paid by the appellant, without having had any account whatever settled of such expenditure during his infancy, and that the money so paid to answer bills of exchange amounted to the sum of £140,000 sterling, and upwards; the respondent was very anxious to get possession of all his property, as well real as personal, and particularly of what was then upon the seas coming from Jamaica: and accordingly he applied to the court of Chancery to have those purposes effected; and by an order of the 8th of Nov. 1781, it was ordered, that the receivers of the English estates should deliver up the possession of the same estates to the plaintiff, and pass their accounts, and pay the balances to him, and that possession of the estates belonging to the plaintiff in Jamaica should be delivered to the plaintiff, or to whom he should appoint; and it was further ordered, that the bills of lading of the goods and merchandizes arising from the plaintiff's estates in Jamaica, and the policies of insurance of such goods and merchandizes under the circumstances admitted on all sides, should be delivered by the said defendant Richard Beckford, to the plaintiff; and the defendant Richard Beckford, in passing his account before the master was to have all proper allowances.

The appellant Richard Beckford accordingly delivered to the plaintiff such of the bills of lading as had come to his hand, and the policies of insurance made thereon, and the master proceeded to take the defendant Richard Beckford's further account, being from the 20th of June 1781; and on the 6th of March 1782, the master made his report of the said accounts, and stated a balance to be due from the said Richard Beckford thereon of the sum of £5584 4s. 3d. and further stated that the said Richard Beckford had claimed before him to be allowed for all commissions and profits which had arisen, or which should or might arise from the sales of the produce consigned by the bills of lading which had been delivered up by him to the plaintiff, under the order of the 8th of November 1781, as also of the produce consigned by the bills of lading received by the respondent himself, since he attained the age of twenty-one, or by any other person for his use, alledging, that the said produce was admitted by the said William Beckford in court to have been severally made and shipped during his minority; and also for all commissions and profits which had arisen, or which should or might arise from the settlement of any losses, averages, returns, etc. in consequence of the insurances made by the appellant by the policies, [42] which had also been delivered to the respondent in pursuance of the said order; and the appellant Richard Beckford had also claimed to be allowed for all commissions and profits which had arisen, or which should or might arise from the sales of the produce consigned by the bills of lading received by the respondent himself, or by any other person for his use, alledging that the said produce was severed, made, and shipped during the respondent's minority; and the said appellant had further claimed before him to be allowed for all commissions and profits whatsoever which should or might arise from the sales of the produce which should or might arrive at the port of London, consigned from the estates in Jamaica, late of William Beckford Esq. deceased, father of the said Richard Beckford, and which were made and severed from the said estates, during the minority of William Beckford, and further alledging, that unless he was permitted to retain the sum of £1500 and upwards, out of the balance of the then present account, he should have nothing remaining in his hands to satisfy such claims, in case they should be established. The master further stated, that inasmuch as these claims depended entirely upon the construction of the will of the late William Beckford, he had not presumed to take upon himself to determine that question of construction upon which they depended.

By an order of the 8th of March 1782, it was among other things ordered, that



it should be referred back to the master to review his report respecting the claims of the appellant, and that the appellant should be at liberty to proceed before the master to substantiate his said claims, and any of the parties should be at liberty to exhibit interrogatories before the master, and examine witnesses touching the allowance or disallowance of the said claims.

The master made his further report on the 3d of July 1782, stating, that he had been attended by the solicitors for the plaintiff and for the defendant respecting the claims of the said defendant, which were as follow: viz. the defendant Richard Beckford claimed to be allowed for all commissions and profits which had arisen, or which should or might arise from the sale of produce consigned by the bills of lading which had been delivered up by him to the plaintiff, under the order of the 8th of November 1781, the said produce having been admitted by the plaintiff in court to have been severed, made, and shipped during his minority, and also for all commissions and profits which had arisen, or which should or might arise from the settlement of any losses, averages, returns, etc. in consequence of the insurance made by the said defendant by the policies, which had been also delivered up to the plaintiff, in pursuance of the said order, the sum of £631 17s. 8d. and also to be allowed for all commissions and profits which had arisen, or which should or might arise from the sales of the produce consigned by the bills of lading received by the plaintiff himself, or by any other person for his use, which said produce was also severed, made, and shipped during the plaintiff's mi-[43]-nority, the sum of £516 9s. 5d. and also to be allowed for all commissions and profits whatsoever, which should or might arise from the sales of the produce, which should or might arrive at the port of London, consigned from the estates in Jamaica, late of William Beckford deceased, and father of the said Richard Beckford, and which were made and severed from the said estates during the minority of the plaintiff William Beckford, which the said defendant estimated at the sum of £500. And the master further certified, that the said defendant Richard Beckford had laid before him the probate of the will of the testator, William Beckford deceased, and an order dated the 31st of May 1771, and the decree made in this cause, dated the 25th of November 1773, and had attended him by counsel for the purpose of substantiating his said claims, and that the respondent had laid an affidavit of Thomas Collett, of Chelsea, in the county of Middlesex, merchant, before him, whereby the deponent swore that he was in the West India trade, from about the year 1723, and settled in London as a West India merchant about the year 1747, and continued in that business till the year 1774, and that during all his experience and knowledge of the said trade, it was, and continued to be the established custom and usage of West India merchants, to charge a commission of one half per cent. for the trouble in having insurances made on West India produce, and also to charge a commission of two and a half per cent. for selling West India produce, which last mentioned commission of two and a half per cent. was exclusive of, and over and above the commission of one half per cent. for having the insurance made, and that the commission of two and a half per cent. became due only on the actual *bona fide* sale of the merchandize, and receipt of the money, or when due, and not otherwise; and that the said commission of two and a half per cent. was the recompence the merchant was entitled to for his care and trouble in entering the goods, paying the duties, and negotiating the sale of the West India produce, and making out the sales thereof to the buyer, and receiving the money; and that such commission, according to the custom of merchants, became due to the person who entered and received the goods and transacted the business; and that in case of an insurance being made on West India property by one merchant, and the bills of lading were delivered to another, the merchant who made the insurance was entitled to the commission of one half per cent. for doing that business, and the merchant who in fact received and sold the produce, and negotiated the business in regard to the sales and receipts of the money, was entitled to the commission of two and a half per cent. that commission being estimated and understood by every one, as he verily believed to be a proper and reasonable recompence to the merchant for his labour, care, and attention, for entering and receiving the goods, negotiating the sale, making out the sales, and receiving the money, and all the intermediate duty, from the prime entry, to the payment over of the net proceeds to the owner

both inclusive. The master further stated, that he had, in obedience to [44] the said order, reviewed his said report respecting the several claims made by the appellant Richard Beckford, and that he had thought fit to disallow the same, conceiving that the said appellant Richard Beckford was not entitled to any commission upon the produce of the respondent's estates, of which the bills of lading were delivered to the respondent, pursuant to the order of the court.

To this report the appellant took three exceptions as to the claims made by him: First, for that the master had by his said report disallowed the sum of £631 17s. 8d. claimed by the defendant for the commissions and profits on the sales and disposal of the produce consigned by the bills of lading, delivered up by him to the plaintiff under the order of the 8th of November last, which said produce was admitted by the plaintiff in court to have been severed, made, and shipped during the minority, and also for the commissions and profits on the settlement of losses, average, returns, etc. which had been effected under, and by virtue of the insurances made by the said defendant; the policies for which were also delivered up by the said defendant to the plaintiff, in pursuance of the said order, which the master ought not to have done. Secondly, for that the master, by his said report, had disallowed the sum of £516 9s. 5d. claimed by the defendant, for the commissions and profits on the sales, and disposal of the produce consigned by the bills of lading received by the plaintiff himself, or by some other person or persons for his use, which said produce was severed, made, and shipped during the plaintiff's minority, which the master ought not to have done. And thirdly, for that the master, by his said report, had disallowed the sum of £500 claimed by the defendant, for the commissions and profits which had arisen, or which should or might arise from the sales and disposal of the produce which had arrived, or which should or might arrive at the port of London, consigned from the estates in Jamaica, late of William Beckford deceased, the father of the said Richard Beckford, and which was made and severed from the said estates during the plaintiff's minority, which the master ought not to have done.

On the 18th of July 1782, the matter of the exceptions came on to be argued before the lord chancellor Thurlow, in the presence of the counsel for the plaintiff and the defendant Richard Beckford; and the first exception being opened, upon debate of the matter, and hearing the testator's will, and the master's report, bearing date the 3d day of July instant, read, and what was alledged by the counsel for the parties, his lordship held the said exception to be insufficient, and did therefore order that the same should be over-ruled. And the defendant's second and third exceptions being opened, upon debate of the matter, and hearing of what was alledged by the counsel for the parties, his lordship also held the said second and third exceptions to be insufficient, and did therefore order that the same should be over-ruled, and the deposit paid to the plaintiff.

[45] The appellant being advised that he was well entitled to the said allowances so claimed by him before the master, and disallowed by the court, and that the last-mentioned order was erroneous, appealed therefrom, insisting, that the words in which the testator had expressed his desire that, after any of his sons should set up in the business of a sugar-factor, the consignments of all sugar, rum, and other plantation produce that should be sent to the port of London, should pass through his hands, were *imperative, and amounted to words of bequest* in favour of the appellant, who had set up in such business; and the decree and orders made in the cause had accordingly declared him to be *entitled to the same under the said testator's will*; the appellant had therefore, under the testator's will, a right to the benefit of the consignments of all the produce of the estates severed during the respondent's minority, as valid as that which the respondent had to those estates. But if the words of the testator's will were to be considered as *recommendatory only* to his executors, the acting executor had in fact complied with such recommendation, and had ordered that the produce of the West India estates severed during the minority, which should be sent to the port of London, should be consigned to the appellant, and had never revoked such orders or such consignments; and the orders given by him during the minority could not be revoked by the respondent, either before or after he came of age. That if the respondent upon his coming of age, could countermand the consignments actually made, or could direct that

the produce not shipped should be consigned to any other person, or could insist upon receiving the produce into his own hands, and thought fit so to do, such countermand, with respect to the produce actually consigned, and such directions, with respect to the produce not shipped, must be made and given, and such claims to receive the produce into his own hands could only be enforced, SUBJECT to all the rights, demands, and beneficial interest which the appellant had under the testator's will, the orders and decree above stated, the directions given by the acting executor, and the usage of trade, if the appellant was willing to perform the duties incumbent upon him as consignee of the produce shipped and to be shipped, and which in the present case he was ready to execute. And it was apprehended that neither the respondent nor the acting executor, even if the appellant had no such rights under the testator's will, or the proceedings in the cause, could have compelled the appellant BY LAW to deliver up the bills of lading actually received by him, without satisfying him the demands stated in the first claim made before the master; and that IN EQUITY, in the circumstances of this case, and under the said will and proceedings, the appellant had a right to the allowances demanded in the second and third claims, in respect of the produce consigned to the respondent in consequence of directions which it was not competent to him to give, and in respect of the produce made and severed during the minority of the respondent, which was not arrived at the port [46] of London, inasmuch as such produce of both sorts ought to have been consigned to the appellant.

On the other side it was said (Lld. Kenyon, J. Mansfield, J. Madocks) to be undisputed that the respondent, upon his coming of age, had a right to call for the bills of lading and policies of insurance upon the sugars then at sea; and accordingly the order for the delivery of them to the respondent was not complained of, and this order was executed before the sugar arrived. The nature of the appellant's demand was of commission for selling sugars which he never sold, and for settling losses upon policies which he never settled. He did not set up any claim to the commission paid by the respondent to the factors who sold the sugars, and settled the policies, by which he admitted their right to the commission upon the actual sales and settling the policies; and contended, without a colour of reason, that the respondent ought to pay double commission; one to the appellant, although he did not transact the business, and another to the factors, who actually did it. So far as the appellant actually did business, he had been allowed his commissions by the master. That the recommendation by the will of the appellant to be the consignee, did not differ this case from that of a common factor, who, according to the proof stated in the master's report, is entitled to commission only upon actual sales and settlements of policies; for a consignee being a merchant, or factor, to whom the agent of the estate in the West Indies directs the bills of lading, and orders insurances to be made in pursuance of the authority he receives from his principal, the owner of the estate, the respondent's guardians, under whose authority the consignments were made agreeably to the testator's recommendation, were, during the respondent's minority, in the nature of stewards of the estate for his benefit; but upon his coming of age their authority ceased, and the respondent, as the absolute owner, was authorized to direct or revoke the consignments. The testator's recommendation did not extend to the respondent, being confined by the will to the executors who were the guardians; so that as soon as the respondent attained twenty-one, the will ceased to have any operation upon the consignments, and made this the case of a common factor.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (MS. Jour. *sub anno* 1783, p. 459.)

[47] CASE 2.—GEORGE FARQUHAR KINLOCH, and others,—*Plaintiffs*; JAMES CRAIG,—*Defendant* (in Error) [14th May 1790].

[Mew's Dig. xi. 1012, xii. 603.]

[A. consigns goods to B. and C. as his factors, who are under acceptances for him to more than the amount before the goods arrive. B. and C. become bankrupts; A. also becomes bankrupt. Held, that the assignee of A. has a right to stop the goods *in transitu*, for the bill of lading not having been endorsed, B. and C. had neither the legal or actual possession of them; and their acceptances did not constitute such a payment as would give them a lien on the goods.]

\*\* See 3 Term Rep. 119 & 783, S. C. in which the points determined appear to be accurately as follows:

A Factor has no lien on goods for a *general* balance, unless they come into his *actual* possession. And if, in consideration of goods being consigned to him, he accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his actual *possession*; the consignor may stop them *in transitu*. 1 Term Rep. 119.

If a Factor accept bills drawn by his principal upon the faith of consignments agreed to be made by the principal to the factor, and both of them become bankrupts, before a cargo consigned come into possession of the factor, his (the factor's) assignees have no property in such cargo, and cannot recover the produce of it against the assignees of the principal if they have sold it, and received the purchase money. 1 Term Rep. 783.

See the succeeding case of *Lickbarrow v. Mason*.

JUDGMENT of the Court of King's Bench AFFIRMED.\*\*

In Michaelmas term 1788, an action was brought in the court of King's Bench by the now plaintiffs in error, as the assignees of David Sandeman and Andrew Graham, bankrupts, against James Craig the defendant in error (being the trustee of the sequestrated estate of John Stein, a bankrupt, in Scotland), for the purpose of trying the right to the proceeds of a cargo of spirits, shipped on board the *Ceres*, and consigned by the said John Stein, then residing in Scotland, to the said David Sandeman and Andrew Graham, as his factors in London; which cargo was stopped by the said James Craig before it was landed, and afterwards sold for the use of the person or persons entitled to the same, in consequence of an agreement between the plaintiffs and defendant for that purpose. The declaration contained counts for money had and received to the use of the bankrupts, and for money had and received to the use of the plaintiffs as assignees. The defendant pleaded the general issue.

The cause came on to be tried by a special jury at the sitting in London after Michaelmas term, before the right honourable Lloyd Lord Kenyon, lord chief justice of the court of King's Bench, when a verdict was found for the plaintiffs with the approbation of his lordship. But in Hilary term 1789, a rule to shew cause why a new trial should not be granted was obtained on the part of the defendant, which was afterwards made absolute, the lord chief justice being absent. Accordingly the cause [48] came on again to be tried by a special jury, at the sitting after Hilary term at Guildhall, in the city of London, before Lord Kenyon, when a special verdict was found upon the recommendation of his lordship, in which the following facts were stated:

That David Sandeman and Andrew Graham being merchants in England, using the trade of merchandise by way of bargaining, exchange, and otherwise, in gross and retail, and being indebted to William Maddock and John Barr, in the sum of £100 and upwards, for a just debt, and being also indebted to divers other persons, did on the 24th day of March 1788, become bankrupts within the true intent and meaning of the statutes made and provided, and now in force, concerning bankrupts: and being such bankrupts, and so indebted to the said William Maddock and John Barr, a commission of bankruptcy, sealed with the great seal of Great Britain, on the petition of the said William Maddock and John Barr, in due form of

law issued out of his majesty's high court of Chancery, on the 26th day of March, in the year 1788, against the said David Sandeman and Andrew Graham, directed to certain commissioners therein named, who thereupon in due form of law adjudged and declared the said David Sandeman and Andrew Graham bankrupts, within the true intent and meaning of the several statutes then in force concerning bankrupts, some or one of them: and afterwards, on the 23d day of April, in the year aforesaid, by bargain and sale in due form of law, bargained, sold, and assigned all the personal estate, debts and effects of the said David Sandeman and Andrew Graham, to the said George Farquhar Kinloch, John Pooley Kensington, and Thomas Everett. That the said James Craig, the defendant in error, was the trustee and sequestrator of the estate and effects of one John Stein, according to the laws and customs of Scotland duly chosen, constituted, and appointed, under a sequestration in due manner awarded and issued out of the court of session in Scotland, according to the laws and customs of Scotland, on the 29th day of February, in the year 1788, against the said John Stein. That the said David Sandeman and Andrew Graham, some time in the year 1783, became the factors and agents in London of the said John Stein, who resided in Scotland, and were employed in that capacity by the said John Stein in selling and disposing of divers cargoes of spirits which were shipped and sent by him from Scotland to the said David Sandeman and Andrew Graham, as such factors and agents in London. That the said David Sandeman and Andrew Graham were in like manner engaged and employed as agents and factors in London for one James Stein a brother of the said John Stein, who also resided in Scotland, in selling and disposing of cargoes of spirits, in like manner shipped and sent by him, and were at that time, and until the said David Sandeman and Andrew Graham became bankrupts, the sole and only agents and factors employed in London by the said John Stein and James Stein; and were by agreement between the said John Stein and James Stein, and the said David Sandeman and Andrew Graham, [49] paid every year the salary or yearly sum of £1200, of which said sum the said James Stein paid four-sevenths, and the said John Stein the other three-sevenths, being two pounds for every hundred of the amount of the money produced by the sales of the said cargoes of spirits received by the said David Sandeman and Andrew Graham, as such factors and agents from the said James Stein and John Stein, estimating the same at the annual amount of £60,000. That in confidence and on the faith and credit of such cargoes of spirits being from time to time shipped and sent by the said John Stein to the said David Sandeman and Andrew Graham for sale, as such factors and agents as aforesaid, they the said David Sandeman and Andrew Graham, from time to time, accepted bills of exchange drawn by the said John Stein on them the said David Sandeman and Andrew Graham; it being agreed between them that they should, from time to time, be indemnified against such acceptances by the sales of the cargoes of spirits so shipped and sent by the said John Stein to them the said David Sandeman and Andrew Graham, as his factors and agents as aforesaid: and if by short consignments or bad sales of the said cargoes, the sums of money due on bills of exchange so accepted by the said David Sandeman and Andrew Graham, exceeded the sums of money produced by the sales of the said cargoes of spirits, the said John Stein remitted and sent to the said David Sandeman and Andrew Graham, as it had been agreed, the sums necessary for the payment of the said bills of exchange; and the said David Sandeman and Andrew Graham charged one quarter per cent. thereon, over and above the said annual sum of £1200 so received by them as factors and agents aforesaid. That in the course of the said transactions between the said John Stein and the said David Sandeman and Andrew Graham, it frequently happened that no bills of lading of the cargoes of spirits so shipped and sent by the said John Stein to the said David Sandeman and Andrew Graham, were transmitted to the said David Sandeman and Andrew Graham by the said John Stein, or any other person for him: and when bills of lading of the cargoes of the spirits so shipped and sent by the said John Stein to the said David Sandeman and Andrew Graham, were sent, the said bills of lading were in general not indorsed to the said David Sandeman and Andrew Graham, or any other person, though the cargoes were thereby made deliverable to the said John Stein or his assigns. That from the year 1783, the time when the said David

Sandeman and Andrew Graham became the factors and agents of the said John Stein, and were employed in the selling and disposing of the cargoes of spirits so shipped and consigned to them by him the said John Stein, to the 26th day of March, which was in the year of our Lord 1788, when they the said David Sandeman and Andrew Graham became bankrupts, 84 consignments of cargoes of spirits were made and shipped by him the said John Stein to them the said David Sandeman and Andrew Graham; out of which said consignments, 34 were made, [50] shipped, and sent to the said David Sandeman and Andrew Graham, without any bills of lading of the cargoes of spirits so consigned and shipped being transmitted or sent, and 40 more of which said consignments were made, shipped, and sent to the said David Sandeman and Andrew Graham, accompanied with bills of lading not indorsed, and the remaining 10 only were sent with bills of lading which were regularly indorsed. That no bills of lading of the cargoes of spirits so shipped and consigned by him the said John Stein to them the said David Sandeman and Andrew Graham were ever deemed necessary or asked for by the captains of the ships in which the said cargoes of spirits were sent; and when bills of lading of the said cargoes were sent, they were sent merely to produce to the underwriters or persons insuring the said cargoes of spirits, in case of loss. That on the 4th day of February, which was in the year of our Lord 1788, when advice was received by the said David Sandeman and Andrew Graham as such factors and agents of the consignment of the cargo of spirits hereinafter mentioned having been made to them by the said John Stein, the said David Sandeman and Andrew Graham, upon the faith and credit of consignments of spirits being shipped and sent to them by the said John Stein, according to their usual course of dealing, had accepted, and were under acceptances of bills of exchange drawn by the said John Stein, and on his account, to the amount of £28,488 16s. 8d. of lawful money of Great Britain; and at that time the said David Sandeman and Andrew Graham, as such agents and factors as aforesaid, only possessed funds to the amount of £2382 19s. 7d. belonging to the said John Stein. That they the said David Sandeman and Andrew Graham, after notice of the consignment of spirits hereafter mentioned, accepted other bills drawn by the said John Stein on them the said David Sandeman and Andrew Graham to the amount of £1410 12s. 7d. making the amount of their acceptances for the said John Stein on the credit of the consignments of cargoes of spirits to be made by him the said John Stein to them the said David Sandeman and Andrew Graham £29,899 9s. 3d. That on the 4th day of February, which was in the year of our Lord 1788, the said David Sandeman and Andrew Graham received a letter from the said John Stein, signed, as was frequently the case, by his the said John Stein's clerk, dated the 31st of January, advising the said David Sandeman and Andrew Graham of a consignment of a cargo of spirits to be sent by him the said John Stein, from Scotland, to them the said David Sandeman and Andrew Graham, in London, as his the said John Stein's factors and agents, by a ship called the *Ceres*; part of which said letter is expressed in the words and figures following; that is to say, "The *Ceres* began to load spirits for you this day, and will be forwarded with all possible expedition: the *Mary* and *Margaret* will follow her hard." That on the 11th day of February, in the year last aforesaid, another letter was received by the said David Sandeman and Andrew Graham from the said John Stein, signed by the [51] clerk of the said John Stein, dated the 7th of February, part of which said letter is in the words and figures following:—"On the 25th ult. I drew on you to David Robertson a 75d/d per £620 12s. 7d. and this day to Captain John Palmer, at 60d/d per £30 at your credit £650 12s. 7d. which please to honour, and place to our account: the *Ceres* will be fully loaded to-morrow, and will sail on Saturday, when you shall have invoice and bill of lading." That the said bill of £620 12s. 7d. was accepted by the said David Sandeman and Andrew Graham, and composes part of the said sum of £1410 12s. 7d. That, by another letter from the said John Stein to the said David Sandeman and Andrew Graham, signed by the clerk of the said John Stein, dated the 9th day of February 1788, the bill of lading of the before-mentioned consignment of a cargo of spirits by the ship *Ceres*, was sent to the said David Sandeman and Andrew Graham, and received by them on the 14th day of February in the year last aforesaid, which said letter is now produced and read in evidence; and part of which said letter follows in the words and figures

following; that is to say, "I refer you to mine of the 7th curt. Inclosed is bill of lading for 276 puncheons of aqte per the *Ceres*, Captain Jameson, who is in the roads, and will sail the first fair wind, being now at N.E. pretty fresh. This day I valued on you to order of Captain William Slaughter, at 60d/d per £32, which please honour and place to my account. You may commune with Mr. S. (meaning the said John Stein) as to insurance." That the bill of lading inclosed in such letter, and now produced and read in evidence, is expressed in the words and figures following; that is to say, "Shipped, by the grace of God, in good order and well-conditioned, by John Stein, in and upon the good ship called the brig *Ceres*, whereof is master, under God for this present voyage, Thomas Jameson, and now riding at anchor in the harbour of Kennet Pans, and by God's grace bound for London, to say two hundred and seventy-six puncheons British spirits, being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at the aforesaid port of London (the danger of the seas only excepted) unto the said John Stein, or his assigns, he or they paying freight for the said goods per agreement, with primage and average accustomed: in witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the other two to stand void; and so God send the good ship to her desired port in safety. Amen. Dated in Kennet Pans, 9th February 1788. Thomas Jameson." Which said bill of lading was not indorsed either by the said John Stein to the said David Sandeman and Andrew Graham, or to either of them, or to any other person whomsoever. That the said David Sandeman and Andrew Graham received in a certain other letter from the said John Stein to the said David Sandeman and Andrew Graham, bearing date the 16th day [52] of February 1788, an invoice of the *Ceres'* cargo of spirits so shipped and consigned by the said John Stein to the said David Sandeman and Andrew Graham, as aforesaid; which invoice was entitled thus: "Invoice of 276 puncheons aqte on board the brig *Ceres*, Thomas Jameson master, for London, consigned to Messrs. Sandeman and Graham for sales on account of John Stein." That the said John Stein was, when the said David Sandeman and Andrew Graham received the said last-mentioned letter, in London; and the said David Sandeman and Andrew Graham shewed the said John Stein the said letter, and the bill of lading inclosed therein, and conversed with him the said John Stein respecting the insurance of the said cargo of spirits which was effected in the names of the said David Sandeman and Andrew Graham by the direction of the said John Stein, on the next day, being the 15th February, for £4000 of lawful money of Great Britain; the premium of which insurance the said David Sandeman and Andrew Graham charged to the said John Stein's account: that the policies of insurance on the consignments of the said cargoes of spirits so shipped and consigned by the said John Stein to the said David Sandeman and Andrew Graham, were always so filled up, the said David Sandeman and Andrew Graham being the persons to receive the losses (if any happened) in discharge of the acceptances so made by them as aforesaid, of bills of exchange drawn by the said John Stein on them the said David Sandeman and Andrew Graham: that the said David Sandeman subscribed the said policy as an underwriter thereon; but that the said David Sandeman having subscribed and underwritten his name to the said policy of insurance, and thereby made himself an assurer under the same, is not contrary to the usual custom of merchants, although the underwriter may be himself the assured: that the said John Stein continued in London until the 18th day of February, which was in the year of our Lord 1788; and previous to his the said John Stein's departure from London to Scotland, he the said John Stein strongly recommended it to the said David Sandeman and Andrew Graham to unload the *Ceres*, then about to sail for London as aforesaid, of her cargo of spirits immediately on her arrival at London, to avoid a new duty of 6d. per gallon on spirits which was very soon to take place: that in consequence of the balances and large sums of money due and owing by the said John and James Stein to the said David Sandeman and Andrew Graham, as such factors and agents as aforesaid, and the said John Stein and James Stein being dilatory in remittances, the said David Sandeman and Andrew Graham, on the 20th day of February, which was in the year of our Lord 1788, were obliged to stop payment: that if the said John Stein and James Stein had enabled the said David

Sandeman and Andrew Graham to pay the said bills of exchange, for which they had made themselves liable by acceptances for and on account of the said John Stein and James Stein as aforesaid, the said David Sandeman and Andrew Graham would, at the time they so stopped payments as aforesaid, have been [53] worth upwards of £12,000. That the said David Sandeman and Andrew Graham committed no act of bankruptcy until the 24th day of March, which was in the year of our Lord 1788; and that on the 21st day of February, which was in the year of our Lord 1788, the said ship called the *Ceres*, with the said consignment of a cargo of spirits as aforesaid, arrived in the river Thames, at London; and on the 22d day of February the said Thomas Jameson, the captain and commander of the said ship, came to the said David Sandeman and Andrew Graham, and requested them the said David Sandeman and Andrew Graham immediately to unload the said ship; and the said David Sandeman and Andrew Graham told the said Thomas Jameson to lay out in the stream, and not come to the wharf, as they could not then unload the ship, there being a duty of two shillings per gallon to be paid; which the captain accordingly did: that the said David Sandeman and Andrew Graham having so stopped payment as aforesaid, told the said Thomas Jameson, that they the said David Sandeman and Andrew Graham did not think it proper, in their situation, to give directions to him the said captain of the said ship for the unloading the said cargo of spirits; and the said David Sandeman and Andrew Graham suffered the said goods to remain on board the said ship. That on the 23d day of February, which was in the year of our Lord 1788, the said David Sandeman went to Scotland, and in his absence the said Thomas Jameson, the said captain of the said ship, came frequently to the accompting-house belonging to the aforesaid David Sandeman and Andrew Graham, and was very anxious to have the said cargo of spirits unloaded out of the said ship, that he the said Thomas Jameson might return with the said ship to Scotland. That on the 8th day of March, which was in the year of our Lord 1788, the aforesaid captain Jameson wanting money, received from the said David Sandeman and Andrew Graham the sum of £6 6s. of lawful money of Great Britain, on account of the freight of the said cargo of spirits so being on board the *Ceres* as aforesaid, and gave a receipt for the same as follows: "Received, London 8th March 1788, of Messrs. Sandeman and Graham, £6 6s. on acct. of freight. Thomas Jameson." That after the sequestration had been granted and awarded against the said John Stein in Scotland as aforesaid, and the said James Craig the defendant in error was appointed sequestrator, and trustee of the estate and effects of the said John Stein as aforesaid, he the said James Craig, as such sequestrator, claimed the said cargo of spirits, and in consequence thereof the said cargo of spirits was not landed or delivered to the said David Sandeman and Andrew Graham, or their assignees: that the said cargo of spirits, after the said David Sandeman and Andrew Graham became bankrupts, was sold, and the sum of £4050, being the amount of sales of the said cargo, was received by the said James Craig for the use of such person or persons as was or were entitled to the same; and that the said bills of exchange, so drawn by the said John Stein on the said David Sandeman and [54] Andrew Graham, and accepted by the said David Sandeman and Andrew Graham, for account of the said John Stein, to the amount of £29,899 9s. 3d. of lawful money of Great Britain as aforesaid, have been proved as debts under the commission of bankruptcy so awarded and issued against the said David Sandeman and Andrew Graham as aforesaid, although the said David Sandeman and Andrew Graham, at the time they so became bankrupts as aforesaid, had only the sum of £2382 19s. 7d. in their hands, as such agents and factors as aforesaid, belonging to the said John Stein: that the said spirits remained in the said ship in the possession of the captain until they were sold; and that the said David Sandeman and Andrew Graham never had possession thereof: that the said George Farquhar Kinloch, John Pooley Kensington, and Thomas Everett, assignees as aforesaid, before the commencement of this action, required the said James Craig to pay the said sum of £4050 of lawful money of Great Britain, produced by the sales of the said cargo of spirits as aforesaid, to them the said George Farquhar Kinloch, John Pooley Kensington, and Thomas Everett, as assignees as aforesaid, claiming to be intitled to the same for the use of the creditors of the said David Sandeman and Andrew Graham; which the said James Craig refused to do.



In Easter term following, final judgment was entered up in the court of King's Bench for the defendant, without any argument or opposition (T. Erskine, E. Law, G. Wood); the majority of the judges of that court having before pronounced judgment on the question, when the new trial was granted; and upon that judgment the present writ of error was brought; in support of which it was argued, that the right of a consignor of goods to stop them *in transitu* upon the insolvency of the consignee, extends only to cases where there has been neither a legal delivery to the consignee, nor payment made, or other act equivalent thereto done on account of them. That the cargo of the *Ceres* was, in the present instance, sufficiently delivered to, and in the possession of Sandeman and Graham, under the circumstances of this case, to repel the exercise of such a right on the part of the consignor: a bill of lading is by no means necessary for the purpose of transferring the property from the consignor to the consignee; it is an instrument merely expressing the terms upon which the master of a vessel undertakes for the custody and safe delivery of goods entrusted to him upon freight; neither is it essential to the transfer of property between a consignor and consignee of goods, that such transfer should be effected or evidenced by an instrument in writing; a mere naked delivery of possession to a third person, as to the captain of the *Ceres* in the present instance, for the use of a consignee, is virtually a delivery to such consignee himself, and the goods consigned, in case of the insolvency of either party, cannot after such delivery be stopped *in transitu*, if the consignee has paid for them, or, which is equivalent thereto, has, at the request of the consignor upon the credit of them, accepted the consignor's [55] drafts payable to third persons, equal to the value of the goods: after such a payment or acceptance of drafts, a consignment, although made by parol, is not afterwards liable to be countermanded or defeated by the consignor, even in the event of the consignee becoming insolvent. In the present instance, the jury have found sufficient facts to oust any right of countermand on the part of the consignor, upon the principle before stated, and to render the consignment indefeasible: for they have found that which is equivalent to payment, viz. that upon the credit of these consignments, they did accept the consignor's drafts to third persons to a large amount; and even after notice of the cargo in question being consigned to Sandeman and Graham, the credit which they had before given to John Stein on the ground of expected consignments was further extended by their acceptance of other bills drawn on his account to a large amount: all which acceptances far exceed the amount of the cargo in question. They have also found, that notice of some of the bills which were drawn upon the consignees, accompanied the notice of the consignment itself, and was communicated by the same letter. That notice of a further draft on the consignees was conveyed to them with the bill of lading in another letter. That an invoice was transmitted to Sandeman and Graham recognising the cargo as consigned to them, and thereby supplying the omission of an indorsement upon the bill of lading itself. That directions were given them by John Stein the consignor, that the insurance should be made in their own names. That the same person advised them to unload the cargo immediately, to avoid the payment of some higher duties, which were shortly about to attach on the cargo in question. These acts amount, on the part of the consignor, to as effectual a transfer as could be made of a cargo not then arrived, and of course incapable of a more immediate and actual delivery; and on the part of the consignees, the enlarged credit given to John Stein by the acceptance of further bills after notice of this consignment, and the policy effected in their own name, which, since the passing a late act of parliament, could only be valid upon a supposition of their being actually interested on their own account in the subject insured, amount, without more, to a clear acceptance of such transfer, and an adoption of the possession thus virtually delivered to them. That although, in general, a factor's lien upon the goods of his principal only attaches upon the goods when the factor has got the actual possession of them; yet, by a particular course of dealing, or by a special agreement between the factor and his principal, he may acquire a lien upon his principal's effects in the hands of a third person, and before any actual delivery to the factor. In the present case, the jury have found a particular course of dealing, as well as special agreement, which gives the factors a lien upon the goods from the moment they were shipped; and from that

period, their title to indemnity commenced, and could not be defeated by any subsequent insolvency.

[56] But it is objected that the acceptance of a bill of exchange is not payment. Now, although that observation may be true with respect to its raising a debt, it is not so with regard to its supporting a claim upon specific goods; for, though the becoming liable to advance money on account of another is no good ground of action till the money be really advanced; yet if the liability be incurred upon the faith of a consignment, the consignor cannot in justice be permitted to stop the consignment, unless he at the same time relieves the consignee from the obligation entered into in confidence of his receiving it. It is not sufficient, in order to support a right of stoppage *in transitu*, to shew that the consignor may not perhaps in the event be fully paid for his goods; but it must appear that the consignee has not, upon the faith of their being consigned to him, taken any step to his own prejudice for the benefit of and at the request of the consignor; yet this was certainly the case in the present instance; for if the goods in question be taken from Sandeman and Graham, their estate will be left exposed to the payment of the amount of the bills accepted, without a possibility of redress or right of action against any person but Stein, who, by the sequestration in Scotland, is stript of all his property. That the payment of the six guineas for the freight, which was made by Sandeman and Graham some time before their bankruptcy, vested the whole of the cargo in them, and amounted to an actual delivery of the cargo, so as to give them upon the general rule of law, as factors, a lien on the cargo as goods in their possession, for their general balance, and for an indemnity against their acceptances.

On the other side it was contended (F. Bower, H. Russell), that the cargo was not in fact consigned to the bankrupts Sandeman and Graham, but to the order of John Stein, who had not indorsed the bill of lading, and who might have indorsed it to any body else. That even if the cargo had been regularly consigned to Sandeman and Graham, they having become insolvent, it was competent to the consignor John Stein, or his representatives, to stop it at any time before it absolutely came into their possession, and this cargo never did come into the possession of Sandeman and Graham. That the bankrupts Sandeman and Graham having accepted bills drawn on them under the circumstances found by the verdict, gave them no title to the cargo; for those acceptances only constituted a liability to pay, and did not amount to payment, and by their having stopped payment before the cargo was delivered, it was clear that these acceptances would not be paid, and that the consignor John Stein, as the drawer, or his estate, would be liable to the payment of these bills. That the assignees of Sandeman and Graham could not have any other legal title to the cargo against the trustee of John Stein's insolvent estate, than they would have had against John Stein if he had remained solvent; in which last case he could not have been compelled to part with his goods to bankrupts, and to receive a dividend only on the amount of them, whilst he would himself be liable to pay the bills which he had drawn on Sandeman and Graham in respect of these goods; and that Sandeman and Graham had no claim to the cargo by way of lien, as factors, because there can be no lien without possession.

After hearing counsel on this writ of error, the following question was put to the Judges: "Whether the money received by the produce of the cargo of the *Ceres* in the special verdict mentioned, was upon the matter had and received to the use of the plaintiff?" And the lord chief baron having delivered the unanimous opinion of the judges in the negative, it was thereupon ORDERED and ADJUDGED, that the judgment of the court of King's Bench should be affirmed; and that the record should be remitted, etc. (MS. Jour. *sub anno* 1790. p. 51.)

CASE 3.—WILLIAM NOWELL LICKBARROW, and another,—*Plaintiffs*; EDWARD MASON, and others,—*Defendants* (in Error) [14th June 1793].

[Mew's Dig. iv. 700; xii. 608; xiii. 343, 350, 568. In addition to references noted above, see also 5 T.R. 683; 6 T.R. 131; 2 H.Bl. 211; 6 East 20; 1 R.R. 425; 1 Sm.L.C. 10th Ed. 674; Rul. Cas. iv. 756. See *Arnold v. Cheque Bank*, 1876, 1 C.P.D. 587; *Glyn v. East and West India Dock Co.*, 1880-2, 5 Q.B.D. 134; 6 Q.B.D. 480; 7 A.C. 602; *Sewell v. Burdick*, 1884, 10 A.C. 74; *Kemp v. Canavan*, 1863, 15 I.R.C.L. 216; Sale of Goods Act 1893 (56 and 57 Vict. c. 71) ss. 39 (1), 44, 45, 46 (2), 48.]

\*\* The Consignor may stop goods *in transitu*, before they get into the hands of the Consignee, in case of the insolvency of the Consignee: but if the Consignee assign the bills of lading to a third person, for a valuable consideration, the right of the Consignor as against such assignee is divested. —There is no distinction between a Bill-of-lading indorsed in blank and an indorsement to a particular person.

JUDGMENT of The Exchequer Chamber (reversing judgment of K. B.) REVERSED.

The report of this case, as originally argued in K. B. is given in 2 Term Rep. 63. Lord Mansfield was not present; but the judgment given by Buller J. went very fully into the whole merits of the question. He particularly remarked on the circumstance of there being *four* bills of lading; as according to the common course of merchants there are usually only *three*. This did not influence the judgment; but it was suggested by Mr. J. Buller that in cases of instruments, partly written and partly printed, such a variation from custom might lead to fraud.

The judgment in the Exchequer Chamber, as delivered by Lord Loughborough at considerable length, is reported in 1 H. Black. Rep. 357; and in the notes there, are the cases of *Fearon v. Bowers*, at Guildhall, 1753, before Lee C. J., and *Assignees of Burghall v. Howard*, before Ld. Mansfield, at Guildhall, Hil. 32 Geo. 2. both which cases (particularly the former) were in point, in favour of the defendants.

See further on this question of stopping goods *in transitu*, *Salomons v. Nissen*, 2 Term Rep. 674. and *Ellis v. Hunt*, 3 Term Rep. 465.\*\*

2 Term Rep. 63. 1 H. Black. Rep. 357.

The plaintiffs in error, in Easter term 1787, commenced an action in trover in the court of King's-Bench, by bill against the defendants in error, and therein declared that they were possessed of 21 lasts, and 29 and a fourth sacks of horse beans, 20 lasts 34 sacks of pigeon beans, 200 faggots, 130 matts, 12 deals, 2 stencheons, and 2 laths; which said goods and merchandises afterwards came to the hands of the defendants in error, and that they had refused to deliver the said goods to the plaintiffs in error, and had converted the same to their own use; to which said [58] action the defendants in error pleaded not guilty; and issue being joined thereon, the cause afterwards, at the sitting after Easter term 1787, came on to be tried at Guildhall, London, before a special jury of merchants, when the defendants in error demurred to the evidence given on the part of the plaintiffs in error to support the said issue, and the plaintiffs in error joined in that demurrer, the record of which evidence, demurrer, and joinder in demurrer, are as follows; to wit\*:

\* The short state of the facts is as follows:—Turing and Son, merchants, at Middleburgh in Zealand, on the 22d July 1786, shipped the goods in question, on board the *Endeavour*, for Liverpool, by the order and directions, and on the account of Freeman of Rotterdam. Holmes, as master of the ship, signed *four* several bills of lading for the goods under order or to assigns; two of which were indorsed by Turing and Son in blank, and sent on the 22d July 1786, by them, together with an invoice of the goods, to Freeman, who afterwards received them; another of the bills of lading was retained by Turing and Son, and the remaining one was kept by

"Afterwards, on the day and in the year, and at the place within mentioned, before the Hon. Francis Buller, the justice within written, etc. stating the calling and swearing of the jury in the usual manner; and the said William Nowell and Ralph, to prove and maintain the issue within joined on their part and behalf, alleged and shewed in evidence to the jury aforesaid, that on the 22d day of July, in the year of our Lord 1786, certain persons carrying on trade and commerce in the name, stile, and firm, of James Turing and Son, at Middleburgh, in the province of Zealand, did there ship the said goods and merchandizes within mentioned on board a certain ship called the *Endeavour*, whereof was then master James Holmes, for Liverpool, in the county of Lancaster, by the order and directions, and on the account of one James Freeman, then of Rotterdam, in Holland, merchant. That the said James Holmes, as master of the said ship, by one William Rudolph, then signed four several bills of lading for the said goods and merchandize, of the following te-[59]-nor and effect; (that is to say,) 'Shipped by the grace of God, in good order and well-conditioned, by James Turing and Son, in and upon the good ship called the *Endeavour*, whereof is master, under God for this voyage, James Holmes, and now riding at anchor in the harbour of Middleburgh, and by God's grace bound for Liverpool; to say, 21 lasts, 29 and a fourth sacks horse beans, 20 lasts 34 sacks pigeon beans, together with 200 faggots, 130 matts, 12 deals, 2 stenchcons, and 2 laths for dunnage, and being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned, at the aforesaid port of Liverpool, (the dangers of the seas only excepted,) unto order or to assigns, he or they paying freight for the said goods 35s. sterling per last, with ten per cent. primage, and 1s. sterling per last hat money, to be discharged in fourteen days, and if longer detained, to be paid two guineas a day in name of demurrage, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which four bills of lading been accomplished, the other three to stand void, and so God send the good ship to her desired port in safety, Amen. Dated in Middleburgh, 22d July 1786.' Quantity unknown, which the said Edward Mason, Cornelius Bourne, and John Pilkington, by their counsel, admitted to be true. And the said William Nowell and Ralph, by their counsel, further shewed in evidence to the jury aforesaid, that two of the said bills of lading were afterwards indorsed by the said James Turing and Son, in blank, (that is to

Holmes. On the 25th July 1786, Turing and Son drew four several bills of exchange upon Freeman, amounting in the whole to £477 in respect of the price of the goods, which were afterwards accepted by Freeman. On the 25th July 1786, Freeman sent to the plaintiffs the two bills of lading so indorsed, together with the invoice, in order that the goods might be taken possession of, and sold by them on Freeman's account; and on the same day Freeman drew three sets of bills of exchange to the amount of £520 on the plaintiffs, who accepted, and afterwards duly paid them. The plaintiffs are creditors of Freeman to the amount of £542. On the 15th August 1786, and before the four bills of exchange, drawn by Turing and Son on Freeman, became due, Freeman became a bankrupt: those bills were regularly protested, and Turing and Son were afterwards obliged as drawers, to take them up and pay them. The price of the goods so shipped by Turing and Son is wholly unpaid. Turing and Son hearing of Freeman's bankruptcy, on the 21st August 1786, indorsed the bill of lading, so retained by them, to the defendants, and transmitted it to them with an invoice of the goods; authorising them to obtain possession of the goods on account of and for the use and benefit of Turing and Son, which the defendants received on the 28th August 1786. On the arrival of the vessel with the goods at Liverpool on the 28th August 1786, the defendants applied to Holmes for the goods, producing the bill of lading, who thereupon delivered them, and the defendants took possession of them for and on account of, and to and for the use and benefit of, Turing and Son. The defendants sold the goods on the account of Turing and Son, the proceeds whereof amounted to £557, etc. Before the bringing of this action, the plaintiffs demanded the goods of the defendants, and tendered to them the freight and charges; but neither the plaintiffs or Freeman have paid, or offered to pay, the defendants for the goods. To this evidence the defendants demurred; and the plaintiffs joined in demurrer.

say), in the words following, 'James Turing and Son;' and that on the said 22d day of July, in the said year of our Lord 1786, the said two bills of lading so indorsed were transmitted and sent by the said James Turing and Son to the said James Freeman, at Rotterdam together with an invoice of the said goods and merchandize within mentioned, and were there duly received by the said James Freeman; that the said James Turing and Son retained another of the said four bills of lading so signed as aforesaid, in their custody and possession, and that the remaining one of the said four bills of lading was kept by the said James Holmes, as master of the said ship, which the said Edward, Cornelius, and John, by their counsel, also admitted to be true. And the said William Nowell and Ralph, by their counsel, also alledged, and further shewed in evidence to the jury aforesaid, that after the said goods and merchandizes were so shipped by the said James Turing and Son, for Liverpool aforesaid (that is to say), on the 25th day of July, in the said year of our Lord 1786, the said James Turing and Son drew four several bills of exchange, bearing date respectively the same day and year last aforesaid, upon the said James Freeman, for several sums of money, amounting in the whole to the sum of 5250 guilders, Holland currency, being of the value of £477 of lawful money of [60] Great Britain, for and in respect of the price of the said goods and merchandizes within mentioned, so as aforesaid shipped by the said James Turing and Son, at and by the request and direction of the said James Freeman; and that the said four bills of exchange so drawn as aforesaid, were afterwards duly accepted by the said James Freeman at Rotterdam aforesaid, which the said Edward, Cornelius, and John, by their counsel, also admitted to be true.

"And the said William Nowell and Ralph, by their counsel, also alledged and shewed in evidence to the jury aforesaid, that the said James Freeman, on the 25th day of July, in the said year of our Lord 1786, transmitted and sent to the said William Nowell and Ralph, at Liverpool aforesaid, the said two bills of lading so indorsed as aforesaid, and so as aforesaid received by him from the said James Turing and Son, together with the said invoice of the said goods and merchandizes within mentioned, in the same state in which he the said James Freeman received them from the said James Turing and Son, in order that the said goods and merchandizes might upon their arrival at Liverpool be taken possession of and sold by the said William Nowell and Ralph, on his the said James Freeman's account, and that the said James Freeman, on the same day and year last aforesaid, drew upon the said William Nowell and Ralph, three sets of bills of exchange, bearing date the same day and year last aforesaid, to the amount of £520 of lawful money of Great Britain; and that the said William Nowell and Ralph afterwards accepted the said last-mentioned bills of exchange, and the same have been duly paid by them the said William Nowell and Ralph, and that the said William Nowell and Ralph are at this day creditors of the said James Freeman, to the amount of £542 16s. 6d. which the said Edward, Cornelius, and John, by their counsel, also admitted to be true.

"And the said William Nowell and Ralph, by their counsel, also alledged and shewed to the jury aforesaid, that on or before the 15th day of August, in the year of our Lord 1786, and before the said four bills of exchange so as aforesaid drawn by the said James Turing and Son upon the said James Freeman, for and in respect of the price of the said goods and merchandizes so shipped by them as aforesaid, or either of them, became due and payable, the same James Freeman became a bankrupt, and absconded and concealed himself, and all the said last-mentioned bills of exchange were duly and regularly protested, for the non-payment thereof by the said James Freeman, and the said James Turing and Son have since been compelled and obliged as drawers of the said bills of exchange, to take up and pay the same; and that the price of the said goods and merchandizes so shipped by them as aforesaid, is now due and owing to the said James Turing and Son, and is wholly unpaid and unsatisfied, which the [61] said Edward, Cornelius, and John, by their counsel, also admitted to be true.

"And the said William Nowell and Ralph, by their counsel, alledged and shewed in evidence to the jury aforesaid, that the said James Turing and Son having received advice of the said James Freeman so being become a bankrupt and insolvent on the 21st day of August, in the year of our Lord 1786, indorsed the said bill of lading so as aforesaid retained by them in their custody and possession,

to the said Edward, Cornelius, and John, in the words and figures following (that is to say); 'Deliver the within contents to Mess. Mason and Bourne, and Mr. John Pilkington (jointly and severally), and to their order, and to no other—James Turing and Son: ' and that the said James Turing and Son, on the same day and year last aforesaid, transmitted and sent the said bill of lading last mentioned, so indorsed as aforesaid, to the said Edward, Cornelius, and John, together with an invoice of the said goods and merchandizes, and a power of attorney, bearing date the same day and year last aforesaid, signed by the said James Turing and Son, whereby the said James Turing and Son impowered and authorized the said Edward, Cornelius, and John, to obtain possession of the said goods and merchandizes within mentioned, for and on the account of them the said James Turing and Son, and for their use and benefit; and that the said Edward, Cornelius, and John, duly received the same on the 28th day of August, in the said year of our Lord 1786, at Liverpool aforesaid, which the said Edward, Cornelius, and John, by their counsel, also admitted to be true.

"And the said William Nowell and Ralph, by their counsel, alledged and shewed in evidence to the jury aforesaid, that the said ship called the *Endeavour*, whereof was master the said James Holmes, on the 11th day of August, in the year of our Lord 1786, with the said goods and merchandize on board the same, set sail and departed from Middleburg aforesaid; and afterwards (that is to say), on the 28th day of August, in the year of our Lord 1786, arrived with the said goods and merchandize on board the same at Liverpool aforesaid: that thereupon the said Edward, Cornelius, and John, for and on the account of the said James Turing and Son, then and there applied to the said James Holmes, as being master of the said ship, for the delivery of the said goods and merchandize to them, and then and there produced and shewed to the said James Holmes, the said last-mentioned bill of lading so indorsed as aforesaid, and the said power of attorney. That thereupon the said James Holmes did deliver the said goods and merchandizes to the said Edward, Cornelius, and John; and the said Edward, Cornelius, and John took possession of the said goods and merchandize by virtue of the said last-mentioned bill of lading and the said power of attorney, for and on the account of, and to and for the use and benefit of the said James Turing and Son.

[62] "That they the said Edward, Cornelius, and John, have since sold and disposed of the said goods and merchandizes by the directions, and for and on the account, and to and for the use and benefit of the said James Turing and Son, and that the proceeds thereof amount to the sum of £557 11s. 8d. of lawful money of Great Britain, which the said Edward, Cornelius, and John, by their counsel, also admitted to be true.

"And the said William Nowell and Ralph, by their counsel, also alledged and shewed in evidence to the jury aforesaid, that before the exhibiting of the bill of the said William Nowell and Ralph, against the said Edward, Cornelius, and John, they the said William Nowell and Ralph demanded the said goods and merchandize of the said Edward, Cornelius, and John, and tendered to the said Edward, Cornelius, and John, the freight and charges so incurred by them in respect thereof, and that neither the said William Nowell or Ralph, or the said James Freeman, have paid, or offered to pay, to the said Edward, Cornelius, and John, or either of them, or to the said James Turing and Son, or either of them, for the said goods and merchandizes, or any sum of money on account or in respect thereof, other than and except the said freight and charges so incurred by the said Edward, Cornelius, and John, which the said Edward, Cornelius, and John, by their counsel, also admitted to be true; whereupon the said defendants in error, by their counsel, demurred to the evidence aforesaid, above shewn to the jurors; and the plaintiffs in error joined in demurrer, and the jury assessed contingent damages to the said plaintiffs in error, to the sum of £542 16s. 6d. besides costs."

The court of King's Bench afterwards in Michaelmas term 1787, having heard the demurrer to evidence solemnly argued twice by the counsel on both sides, gave judgment for the plaintiffs in error to recover their damages, amounting to the sum of £544 16s. 6d. and also £69 13s. 6d. costs, amounting in the whole to £614 10s. But the said defendants in error brought a writ of error to reverse the above judgment, returnable in the Exchequer Chamber, and assigned errors

therein, and the plaintiffs in error joined. The case was argued in the Exchequer Chamber, before the judges of the court of Common Pleas, and barons of the Exchequer, and the said judgment of the court of King's Bench was, by the said court of Exchequer Chamber, in Hilary term 1790, *reversed*.

The plaintiffs in error then brought the present writ of error in parliament, and assigned errors, praying a reversal of the judgment of the said court of Exchequer Chamber.

On this writ of error the counsel for the plaintiffs (E. Bearcroft, G. Wood) went into very long arguments.—They set out with admitting the general right of the vendor to stop the goods *in transitu*, in case of the [63] insolvency of the vendee, if the price of the goods is unpaid, and there has been no legal transfer of property by the vendee before the seizure; but they insisted that the right to stop goods *in transitu* exists only as between the vendor and vendee, and that it ceases where the interest of a third person is concerned; and that the vendee, who is possessed of a bill of lading, like that stated upon the record in this cause, which is made deliverable *to order or assigns*, and indorsed in blank, *by and in the firm of the vendors*, and *delivered by the vendors to the vendee so indorsed*, acquires a legal title to the goods contained in such bill of lading; which title he may transfer to any third person for a valuable consideration, and without fraud, or notice on the part of such transfer, that the price of the goods is unpaid, and that such transfer divests the vendor of his right to stop *in transitu*. To support this position, they relied upon the cases of *Evans v. Martlett*, 1 Lord Raymond, 271. *Wright v. Campbell*, 4 Burr. 2046. and *Caldwell v. Ball*, 1 Term Reports, 205, which have decided the point.

A bill of lading may be so framed by the shipper of goods as to avoid all risk; he may make them deliverable to the vendee only, in which case his own right to seize *in transitu* will in every event remain, or what would still be more fair and equally void of all danger, he may state upon the bill of lading the account and credit upon which the goods specified in the bill of lading were sold, and whoever afterwards gives credit to the bill of lading would do it subject to those rights which were disclosed by the bill; for if the assignee of the vendee has notice at the time of the transfer of the bill of lading that the price of the goods is unpaid, the plaintiffs in error admit that if the vendor seizes the goods *in transitu* he may hold them even against the assignee of the vendee, until his debt is paid, because it was fraudulent in the assignee of the vendee to attempt to get goods into his hands which he knew had not been paid for. On the other hand, if the vendor makes the bill of lading deliverable to order or assigns, and afterwards indorses the bill with his own name, as Turing and Son, the original shippers of the goods in question, did, he gives the vendee an authority to part with the goods at any time; and if a loss happens, it is not competent to the vendor to complain of what it was in his power to have prevented, if he had used due caution in drawing up the bill of lading.

It is not necessary to say what would be the effect of a bill of lading made deliverable to order or assigns, but not indorsed by the vendors, or whether such a bill of lading would by the delivery give title to the holder thereof, so as to divest the vendor of the right to seize *in transitu*; but they, Turing and Son, by having actually indorsed the bill of lading in this cause with their own names, have thereby made it negotiable for the purpose of giving a good title to the goods to a *bonâ fide* purchaser against themselves, and have narrowed their right to seize *in transitu*.

[64] The right of the vendee under a bill of lading differs very materially from that of a bailee; the latter has the actual possession of the goods, but not the right of property, except such as arises from a lien upon them to the extent of his demand; whereas the vendee of goods consigned by a bill of lading has, by the delivery of the bill of lading, a possession which is *tantamount* to the actual possession of goods at land, and he has the whole interest and property in the goods vested in him by the bill of lading, insomuch that in an action of trover, which cannot be maintained unless the plaintiff has property, the bill of lading is evidence of the vendee's property to maintain that action; and the case of *Hibbert v. Carter*, 1 Term Reports, 745. establishes the position, that by the indorsement of the bill of lading, the property is so completely transferred to the indorsee, that the shipper of the goods has no longer an insurable interest in them.

The plaintiffs in error have acquired their title fairly and honestly, and have paid a very large sum of money, amounting to upwards of £520, upon the faith of the bill of lading, which Turing and Son put into the hands of Freeman, with their indorsement thereon. By that act they enabled Freeman to go to market with the goods, and authorized him to consider the goods as his own; Turing and Son trusted to Freeman's personal security, by taking his acceptances, to the amount of the cargo; but the plaintiffs in error trusted to the bill of lading, which conveyed that title to the goods which Turing and Son parted with; and whenever it becomes a question which of two innocent persons shall suffer, it is but just that the man who has given credit, and who had issued an instrument by which he has enabled another to gain credit, should be the sufferer.

The question considered in a commercial view, is of great magnitude and importance; for if it should be established as a rule of law, that the vendor of goods may, notwithstanding he has delivered a bill of lading to the vendee, deliverable to order or assigns, regularly indorsed with his own name, seize those goods *in transitu*, and defeat the right of a *bonâ fide* purchaser from the vendee, it will strike deeply at the very root of commerce; for in that case no merchant will be able to raise money upon a cargo of goods to answer the necessary exigencies of trade, until the actual arrival of the ship at the port of destination; neither can the cargo be disposed of at sea, although the sale might be extremely advantageous to the vendee by the rise of markets, for no merchant or trader would buy or lend money upon a commodity, a sure title to which cannot be made out; the consequence will be, that the greatest merchant in London has no resource in case his ship should by accident be kept at sea to a period beyond the time limited for the payment of the goods. The great object of commerce is a quick and speedy sale of goods; and it frequently happens that a merchant disposes of his cargo by means of a bill of lading, to a very great advantage, [65] and has received the price of the goods before the ship arrives in port, and the merchant is thereby not only relieved from the danger of temporary inconveniences, but is likewise enabled to extend his capital, and to enter into further mercantile concerns; whereas if he cannot transfer the goods whilst at sea, by his bill of lading, he may be ruined before his cargo comes to hand; and finally the indorsement of the bill of lading was the defendant's own act, which gave notice to all the world that the property in the goods was absolutely transferred and gone from the shippers.

On the other side it was strongly but unsuccessfully contended (T. Erskine, S. Shepherd), that the defendants in error, being merely the agents of Turing and Son, (the vendors or consignors of the goods,) and having taken possession of them on their account, and for their benefit, the question must be considered as between Turing and Son and the plaintiffs in error. That a consignor of goods, sold to a vendee who becomes insolvent before actual delivery to him, has by law a right to stop such goods *in transitu*, and retain possession in default of payment; and the transmission of a bill of lading by the consignor to such vendee, cannot vest in the vendee such a property in the goods as to divest the vendor's right so to stop and retain them.

It has never yet been decided that a bill of lading is a negotiable instrument, but merely assignable, and therefore an indorsement or assignment of such bill of lading cannot convey to the indorsee or assignee thereof, greater rights or property in the goods to which such bill relates, than the original possessor or indorser of such bill had: and the right or property of the original holder or consignee of the bill in the goods to which it relates, being subject to the right of the vendor to stop such goods *in transitu*, it follows that the right or property of the assignee or indorsee of such bill of lading, must also be subject to the same right. Turing and Son, therefore, never having received value for the goods in question, and Freeman, the vendee, having become insolvent before the actual delivery thereof to him, the defendants in error, as the agents of Turing and Son, and under their authority, had a right to take possession of the goods, and retain them against Freeman the vendee, and all persons claiming under him, till the price thereof was paid to Turing and Son.

After hearing the counsel on this writ of error, the following question was put to the judges: "Whether the evidence given on the part of the plaintiff, and confessed



by the demurrer on the part of the defendant, be sufficient in law to maintain the plaintiff's action?" And the judges having delivered their opinions *seriatim* with their reasons upon the said question, it was thereupon ORDERED and ADJUDGED, that the judgment given in the Exchequer Chamber, reversing a judgment of the court of King's Bench given for the plaintiff, be reversed: and it was further ORDERED, that the court of King's Bench do award a *venire facias de novo*, and proceed according to law; and that the record be remitted, etc.

## FINE.

[66] CASE 1.—EDWARD BOURNE and others,—*Plaintiffs*; PHILIP HUNT,—*Defendant* (in Error) [22nd January 1703].

[A. tenant in tail, levied a fine to the use of B. *for the life of B.* with warranty; and afterwards he levied another to the *use of himself and his heirs*, with warranty; and then sold the lands to C. and his heirs. Held, that the first fine made a *discontinuance*, but only during the life of B. for it remains no longer a discontinuance, when the wrongful estate which caused it is gone; and that the second fine did not enlarge the discontinuance, because the estate raised by the fine returned back to the conusor, and by consequence, the warranty annexed to it was extinguished.]

**\*\*JUDGMENT of C. P. (affirmed in K. B.) AFFIRMED.**

The points determined in this case are thus stated in the margin of Mr. Rose's edition of Comyns's Reports, vol. i. p. 93. "Tenant in tail of lands in *ancient demesne* levies a fine, in the court of ancient demesne, for three lives with warranty; levies a second fine with warranty to the use of himself and his heirs; and then bargains and sells to one and his heirs. The following points were determined: 1st, That fines may be levied in courts of ancient demesne. 2dly, That such fines are no bar to the issue in tail; but that they work a discontinuance. 3dly, That the discontinuance determined with the three lives, and that the second fine made no discontinuance. 4thly, That the issue in tail have 20 years to make their entry after the expiration of the lease for lives."—All these points appear to be established by the affirmance of the judgments in the House of Lords.

The tenure of *ancient demesne* being a species of privileged villenage, the tenants thereof could not sue or be sued for their lands in the king's courts of common law; but had the privilege of having justice administered to them in the court of the manor by *petit writ of droit close*, directed to the bailiffs of the king's manors, or to the lord of the manor whereof the lands were held.—In consequence of this principle, no fine could be levied by a tenant in ancient demesne in the Court of Common Pleas; but as such tenants were allowed to commence actions in the court of the manor, they were also permitted to compound their suits, by which means fines have at all times been levied of lands held in *ancient demesne* upon little writs of *right close* in the court of the manor.—The reason that these fines work a discontinuance is, because the freehold is recovered in the action; every recoveror being supposed to recover a fee-simple, and the recovery of the fee-simple must work a discontinuance.—Cruise on Fines, ed. 1786. pp. 93, 96.

The abridged notes in 2 Vin. relate to *ancient demesne*: in 8 Vin. to *discontinuance*.—In 13 Vin. 213. c. 6, it is stated that a fine levied in ancient demesne has *all the effects* of a fine levied in C. B. *except that it is no bar*, which is only by force of stat. 4 H. 7. c. 24.—In the same vol. p. 311. c. 4. "How fines shall enure," the effect of this case is stated in the words above used by Mr. Brown, but which do not seem to include *the whole* of the points determined.—In 15 Vin. is considered only the point of *limitation of time*, as to the entry of the issue.\*\*

1 Salk. 57. 244. 339. 422. Viner, vol. 2. p. 489. ca. 4: p. 502. ca. 24. vol. 8. p. 527. ca. 32: vol. 13. p. 213. ca. 6: p. 215. ca. 5: p. 218. ca. 4: p. 233. ca. 27: p. 234. ca. 4: p. 276. ca. 7: p. 311. ca. 4: p. 358. ca. 1: vol. 15. p. 114. ca. 3. \*\* 3 Salk. 34: Holt. 60. 255: 1 Lutw. 770: 1 Com. 93. 123.\*\*

Thomas Andrews, being seised in fee of lands held of the manor of Wormlow, in the county of Hereford, which is *ancient demesne* of the crown; did, on the 14th of February, 14 Jac. 1. convey the same to trustees, and their heirs; to the [67] use of himself, and Eleanor his wife for their lives; remainder to the use of Mary, the daughter of the said Thomas Andrews, and the heirs of her body by John Gwyllym, begotten, and to be begotten; remainder to the use of the heirs of the body of the said Mary; remainder to the heirs of the body of Elizabeth Tomkins; another daughter of the said Thomas Andrews; with other remainders over; remainder to the right heirs of Thomas Andrews.

Soon after making this settlement, a marriage took effect between the said John Gwyllym and Mary Andrews; and there was issue of this marriage, Thomas Gwyllym, the eldest son.

After the death of Thomas Andrews and Eleanor his wife, and of John Gwyllym and Mary his wife, this Thomas Gwyllym entered, and was seised of the premises in fee tail; and, on the 29th of May 1646, he, and Mabel his wife, levied a fine in the court of *ancient demesne*, held for the said manor of Wormlow; and thereby granted the lands in question to William Nurse and Sarah his wife, and John Nurse their son, for the term of their lives, and the life of the longest liver of them, under the yearly rent of £6. But this rent was not the *ancient rent*, nor had the lands been usually demised; so that the lease was not warranted by the statute 32 Hen. 8.

The lessees, by virtue of this fine, entered and enjoyed; and Thomas Gwyllym being seised of the *reversion* of the premises, he and his wife, on the 2d of June, 24 Car. 1. levied a fine, *sur conuzans de droit*, etc. of these lands, in the said court of *ancient demesne*, to the use of himself and his heirs; and by a deed of bargain and sale inrolled, dated the 1st of November following, he conveyed the same lands to Thomas Payne, and his heirs; and by another deed, dated the 9th of November 1649, Thomas Gwyllym released all his right, title, and interest in the premises, unto the said Thomas Payne and his heirs.

On the 23d of June 1663, Thomas Gwyllym died; leaving issue Thomas, his eldest son and heir; who, on his death, left issue Richard Gwyllym.

The grantee of the reversion, and his descendants respectively, received the reserved rent of £6 until the 17th of September 1693, when the last of the three lives dropped; whereupon the said Richard Gwyllym entered, and made a lease of the lands to the defendant Philip Hunt; who soon afterwards brought his ejectment against the present plaintiffs, who claimed under John, the son of Thomas Payne, the grantee; and, after a special verdict, finding the above facts, had been several times solemnly argued in the court of Common Pleas, judgment was, in Trinity term 1700, unanimously given for the lessor of the plaintiff. And this judgment was, in Trinity term 1703, affirmed by the court of King's Bench, on a writ of error.

But, to reverse this judgment, and the affirmance of it, a writ of error was brought in parliament; and, on behalf of the [68] plaintiffs in error, it was said (T. Powys, R. Eyre), that there were three questions in this case; 1st, Whether the first fine, levied by the tenant in tail in *ancient demesne*, worked a discontinuance? for, if not, then the plaintiff's title of entry, commencing above 20 years before, was barred by the statute of limitations. 2d, Whether the discontinuance, if any, determined with the estate for three lives, granted by that fine, or still continued, to bar the entry of the issue in tail; either by means of that fine, or the second fine with warranty, or any other conveyance, in the cause? 3d, Whether, as the plaintiff had lapsed the 20 years, given him by the statute to bring his *formedon*, and so was barred of his right of action, he was not also, for the same reason, barred of his right of entry? As to the first question, it was argued, that a court of *ancient demesne* has no power to take a fine, being disabled by the stat: 18 Ed. 1. which enacts, "That no fine shall be levied, without writ original, and this before the justices of the Common Pleas, or in eyre, and not elsewhere;" and that this

statute being penned in the negative, would prevail against any custom pretended, or even found, to support such fines; and, being general, would destroy the power of that court, to take a fine to any effect whatsoever. But if such a court could take fines, by virtue of a custom, yet that this particular fine was not levied pursuant to the custom; because it did not appear to be founded on a writ of *right close*; which writ is in the nature of a commission, authorising the lord to take the fine; if therefore the court had no jurisdiction to take a fine, or if the custom of the manor was not pursued, the fine was consequently void, and could never work a discontinuance. That the reason given by Lord Coke, 1 Inst. 333. why any fine works a discontinuance, is, that it is a feoffment of record; but this fine could not be said to be in the nature of such a feoffment, because levied in a court which was not a court of record; and, not being within the reason, ought not to be within the rule, of other fines of record, which do discontinue estates; and if, for these reasons, there could be no discontinuance, the consequence was, that the right of entry of the issue in tail commenced immediately upon the death of the tenant in tail; which happened in 1663, above 20 years before the issue entered, and therefore this entry was barred by the statute of limitations. As to the *second* question, it was insisted, that the discontinuance, if any, did not determine with the estate for three lives, but still continued to bar the entry of the issue in tail, by the common law; because a fee passed by the first fine to the conuzee, by force of the words *conuzans de droit*, which are ever intended of the fee; the words *right* and *fee* being synonymous terms, as appears from 1 Inst. 345, b. and *right* is the proper term of art, to carry the fee in the acknowledgment of a fine, and so constantly used; and if the fee passes by that conveyance or act, which originally causes the discontinuance, that discontinuance must be for the whole fee; and, on this [69] account, differs from all the cases in Littleton, sect. 620, 1, 2. where the first grant passed only an estate for life, and therefore originally made a discontinuance for that life only. But if, in this case, the first fine alone would not work a discontinuance in fee, yet the second fine and warranty would, in order that the warranty might be preserved; and which would be lost and void, if the issue might enter, for then the conuzee has no opportunity of making use of it; and, for this reason, in Littleton, sect. 601. the warranty is held to be a discontinuance, where the grant, without the warranty, would be none; and the same is also laid down in divers other books, in parallel cases. And, as to the *third* question, it was contended, that the entry of the lessor of the plaintiff was barred by the statute of limitations; which enacts, "That no person shall enter into any lands, but within 20 years after his right or title shall first descend or accrue." In this case, the first right or title that descended, was a right of action, viz. to a *formedon*, which accrued to the issue, immediately on the death of the tenant in tail, which happened above 35 years ago; and the issue, having neglected for above 20 years to sue for the estate, was thereby barred, not only of his action, but of his entry also. For otherwise a man might enter into lands, when he had no way by law to recover them, having lost that remedy by his own default; which would be absurd and inconvenient, with respect to purchasers, and the disturbance of long possessors. And in the case of Saul and Clarke, Jones, 208, it was adjudged, where tenant in tail leased for life, and afterwards granted the reversion by fine, and died without issue, and he in reversion did not bring his *formedon* in five years, as he might; that he could not enter after the death of the lessee for life, though then the discontinuance determined as here; because the reversioner had but one right, though several remedies, and having pretermitted the first, was foreclosed of the second by the statute.

On the other side, it was contended (T. Parker), that the only question in this case was, whether the lessor of the plaintiff might lawfully enter, after the determination of the estate for three lives, granted by the first fine; for it was not pretended, that a fine levied in a court of *ancient demesne* would bar an estate tail at this day. That the first fine made a discontinuance of the estate, and took away the entry of the issue in tail, during the lives of the lessees only; but that the grant of the reversion, by the second fine, did not make a discontinuance in fee; and consequently, when the last life dropped in September 1693, the discontinuance was determined, and the right of entry revived; and therefore Richard Gwyllym, the issue in tail, might lawfully enter, and was not barred by the statute of limitations, his right not accruing till 1693.

After hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the court of Common Pleas, and the affirmance thereof in the court of Queen's Bench, should be affirmed. (Jour. vol. 17. p. 381.)

[70] CASE 2.—WINIFRED CLERK,—*Appellant*; JOHN WARD,—*Respondent* [1st February 1706].

[Mew's Dig. xv. 349.]

[A fine being fraudulently obtained, and erasures in several parts of it, to make it correspond throughout, is a crime in the persons concerned, but not relievable in a court of equity; being examinable only in the proper court where the fine was levied.]

\*\* DECREE of Lord Keeper (Wright) AFFIRMED.

But though the court of Chancery does not absolutely set aside a fine so fraudulently obtained, nor send the party aggrieved to the court of C.P. to get it reversed, yet it considers all those who have taken an estate by such a fine, *with notice of the fraud*, as trustees for the persons who have been defrauded, and decrees a re-conveyance of the lands; on the general ground of laying hold of the ill conscience of the parties to make them do that which is necessary for restoring matters to their situation. Cruise on Fines, 314: See *Wright v. Booth*, Toth. 101: *St. John v. Turner*, 1 Eq. Ab. 259: 1 Vez. 289: *Woodhouse v. Brayfield*, 2 Vern. 307. See also, Cruise, 38. as to erasures in the caption.\*\*

The witnesses to a will subscribe their names at a window, in a passage where they could see but part of the bed on which the testator lay, and he could not, as he lay there, see them attest his will; this will was set aside, as not being duly executed.

Preced. in Chan. 150. 2 Eq. Ca. Ab. 474. ca. 1. Viner, vol. 13. p. 374. ca. 8. S. P.

Augustine Bee, being seised in fee of lands in Lincolnshire, of about £150 per ann. and having four children, Richard, John, Winifred, and Eleanor, made his will in February 1680, and thereby devised his lands to Richard, his eldest son, and his heirs, chargeable with a portion of £350 to his daughter Winifred, and £300 to his other daughter Eleanor, payable in manner therein mentioned; and on failure of such payment, he directed the lands to be sold for that and other purposes.

On the testator's death, Richard, his eldest son, entered, but soon afterwards died without issue, and without having paid either of his two sisters portions; whereupon the lands descended to John, his brother and heir in fee, chargeable with these portions.

Winifred, the eldest daughter, married Nathaniel Clerk, by whom she had issue the appellant, her only child; and Eleanor, the youngest, married the respondent.

In May 1695, John Bee died without issue, leaving Winifred and Eleanor, his two sisters and coheirs at law; but having by his will devised all his lands to the appellant's father, and the respondent, in trust to be sold for the payment of his debts, and appointed them his executors.

There being some circumstances attending the execution of this will which rendered its validity doubtful, the respondent prevailed on his wife, when in so weak and languishing a condition that her life was despaired of, to levy a fine of one moiety of the premises, and to execute a deed, declaring the uses thereof, to herself and the respondent, for their joint lives; remainder to the heirs of her body by him; remainder to the heirs of her body; remainder to the heirs of the body of the respondent; remainder to her own right heirs for ever. This fine was acknowledged at Edmonthorpe, in the county [71] of Leicester, above 80 miles from London, on the 23d of January 1695; *being the very same day on which the dedimus was tested*; but, in order to conceal this fact, the teste of the *dedimus*, and also the teste and return of the writ of covenant, were *erased* and *altered* to the 13th of January; however, Eleanor died on the 25th, before the fine had passed the king's silver-office.

On a discovery of these matters some time afterwards, the appellant (her father and mother being both dead) exhibited her bill in the court of Chancery, against the respondent; praying that the will of John Bee, and also the said deed and fine, might be set aside; and that she might be let into the possession of all his real estate, and have an account of the rents and profits thereof, accrued due since his death.

The cause being at issue, came on to be heard at the Rolls, on the 29th of January 1699; when his honour directed an issue, *devisavit vel non*: and referred it to a master to inquire when the *dedimus* was sued out, and the caption of the fine taken, and when it passed the king's silver-office; and whether the caption and teste of the *dedimus*, and the teste and return of the writ of covenant, was altered, and wherein, and to state the same specially to the court.

At the following Lent assizes, for Lincoln, the issue was tried; when it appearing, that the witnesses to the will *subscribed their names at a window in a passage, where they could see but part of the bed on which the testator lay; and he could not, as he lay there, see them attest his will*; the jury found a verdict against it. And, on the 11th of June 1700, the master reported the several erasures, and other circumstances above mentioned, concerning the fine.

The defendant having obtained an order for re-hearing the cause, the same, together with the equity reserved, and the special matter of the master's report, came on to be heard before the Lord Keeper Wright, on the 26th of February 1700, when it was decreed, that the said will should be set aside; and an account was directed to be taken of the rents and profits of the real estate, and one moiety thereof was ordered to be paid to the plaintiff. But, as to so much of her bill as sought relief, touching the other moiety of the estate, it was ordered to stand dismissed; and the consideration of costs was reserved till after the master should have made his report.

From this decree the plaintiff appealed; insisting (J. Howe), that the deed and fine ought to have been set aside, and possession of the whole estate decreed to her, because John Bee's will was set aside as fraudulently obtained by a trial at law upon full evidence. That there was no sufficient authority to take the fine at the time when the conveyance was taken; and that the several erasures [72] manifestly imported a fraud; and, in fact, the fine passed the king's silver-office after Eleanor's death. As to the objection that this fine being a record of the Common Pleas, ought not to be impeached by the court of Chancery; it was answered, that the *dedimus* and writ of covenant issue out of the court of Chancery, which court may well examine alterations and erasures in their own writs; and as the deed and fine were so unduly obtained, it was conceived a court of equity might well decree a re-conveyance of the estate to the appellant. And as to the other objection, that there was no precedent of the court of Chancery's having ever set aside a fine, it was said there were many precedents of that court's having set aside judgments, and no precedent of their refusing to set aside a fine so unduly and fraudulently obtained; and that, as this case was attended with such peculiar circumstances, it was very proper for relief in a court of equity.

On the other side it was contended (L. Carter), that the will was wholly out of the case; and therefore the mentioning it could only be designed by way of reflection on the respondent; who, if it had been established, could have received no great advantage from it, because the estate was loaded with a debt of £400, besides £250 for legacies. That as to the fine, there was no proof of any ill practice used in levying it; but on the contrary, it was fully proved to have been duly acknowledged by the respondent and his late wife; and that she was well pleased therewith, being what she desired to have done when in health. That the fine was duly entered and recorded in the court of Common Pleas, and if there was any error or unfair practice in the proceedings, the appellant had her proper remedy at law, to have it reversed or set aside; but a court of equity was never known to examine the regularity of passing any fine or judgment in the courts of law, that being the proper business of those courts. And that all this was debated and considered at the hearing of the cause, when the court saw no reason to reverse the fine, nor was it very proper to desire it in a court of equity, whose business was rather, in case there had been any error or defect in the proceedings, to have supplied and made them good according to the intention of the parties.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 18. p. 224.)

[73] CASE 3.—LORD VISCOUNT SAY and SEALE, and others,—*Plaintiffs*; HENRY LLOYD and others,—*Defendants* (in Error) [24th May 1712].

[Mew's Dig. vii. 21, 79.]

[By the chirograph of a fine, the caption appeared to be on the 23d of October 1701, whereas in fact the fine was not acknowledged till the 2d of March following, and this was offered to be proved. But the court refused to admit the evidence, being of opinion that no proof of the time of acknowledging a fine ought to be admitted contrary to, or against the chirograph thereof; and that the record, which is the chirograph of a fine, cannot be falsified until it is vacated or reversed.]

**\*\*JUDGMENT OF K. B. AFFIRMED.**

It is a principle of the common law, that the evidence of a record is of so high and certain a nature, that its authenticity is never permitted to be called in question. 2 Inst. 260. a.

In 13 Vin. it is stated, "that the *concord* of the fine was of one term, and the *recordat*, of another term following; and therefore the question was, of which term this should be said to be a complete fine. *Per Cur.* It is a fine of that term when the concord was made, and of which the writ of covenant was returnable; for the *concordia facta in curiâ* is the *complete fine*;—the *cessit recordat*, is the leave of the court to enroll it."\*\*

1 Salk. 341. 10 Mod. 40. Viner, vol. 13. p. 350. ca. 2.

This was an ejectment brought by the defendant Lloyd, as lessee of the other defendants, for the recovery of certain lands in the county of Oxford; and, on the trial at the bar of the court of Queen's Bench, on the 6th of November 1711, the title appeared to stand thus:—In 1686, William Lord Viscount Say and Seale, being seised in fee, of the premises in question, made a settlement thereof, to the use of himself, for life; remainder to his first and other sons successively, in tail male; remainder to his uncle, John Fiennes, for life; remainder to his first and other sons successively, in tail male; with other remainders over. That Lord William had only one son, Nathaniel; who on his father's death entered, and was seised, and afterwards died without issue; leaving the defendants Cecil Fiennes and Cecil Mignon, his cousins, and co-heirs at law. That John Fiennes had one son, the present plaintiff, who on the death of Lord Nathaniel, succeeded to the honour, and also claimed this estate, as heir male of his father. But, in bar of this title, it was alledged, that Lord Nathaniel, in October 1701, levied a fine, and in Michaelmas term following, suffered a recovery of the premises in question, whereby he barred the subsequent remainders, and acquired an estate in fee: and to prove this, the chirograph of a fine was produced, importing, that Nathaniel Viscount Say and Seale levied that fine to Bezaleel Knight on the 23d of October 1701; and the exemplification of a common recovery was also produced, which appeared to have been suffered on the 18th of November 1701; and that Jonathan Johnson was the demandant, Bezaleel Knight tenant, and Lord Nathaniel vouchee.

[74] On this state of facts, the single question between the parties was, Whether Bezaleel Knight had the freehold in him on the 18th of November 1701, when the recovery was suffered, or not? if he had, then the recovery was good, and had barred the present lord's title; if he had not, the recovery was void, and his lordship's title was not barred.

The counsel for the present lord insisted, that Knight was *not tenant of the freehold* at the time of suffering the recovery; for that the fine given in evidence to make him so, was not, in fact, acknowledged by Lord Nathaniel, until the 2d day of March 1701, which was four months after the 18th of November 1701, when the recovery was suffered. And, to support this fact, they offered to produce and prove,

1st, the record of the cognizance or acknowledgment of the fine, *under the hand of the Lord Chief Justice Trevor*; whereby it appeared, that the acknowledgment thereof by Nathaniel Viscount Say and Seale was made and taken before the said lord chief justice, *on the 2d day of March 1701, and not before*. 2d, That that acknowledgment of the fine was *the very true acknowledgment or cognizance* of the concord upon which the fine given in evidence passed, and upon which the chirograph of that fine was made and ingrossed. And 3d, They offered to produce the files of the court of Common Pleas, of the acknowledgments of *all* the fines in Michaelmas term 1701, whereby it would appear, that Nathaniel Viscount Say and Seale *did not acknowledge any fine whatsoever of or in that term, or at any time before the suffering the common recovery*.

And, as to this recovery, it was contended, that the deed for making a tenant to the precipe was void; because Nathaniel Viscount Say and Seale *did not* thereby convey the lands, or the freehold thereof, to the said Bezaleel Knight, and his heirs. And this objection was founded upon the following inaccuracy in the wording of that deed: "Witnesseth, that in consideration of 5s. by the said Bezaleel Knight, to the said Lord Nathaniel, in hand paid; as also for the cutting off all intails, and for the barring of all remainders and reversions, of, in, and upon all and singular the premises; and for settling and assuring the same to the said Lord Nathaniel, and his heirs, doth bargain, sell, and confirm, unto the said Bezaleel Knight, and his heirs, etc."

But the court of Queen's Bench refused to admit any of the matters offered against the fine to be given in evidence; being of opinion, that no proof or evidence of the time of the acknowledgment of the fine ought to be admitted contrary to or against the chirograph thereof; and that the record, which is the chirograph of the fine, cannot be falsified, until it is vacated or reversed. And as to the objection made to the bargain and sale, they over-ruled it; whereupon the jury found a verdict for the lessors of the plaintiff, and judgment was entered up accordingly.

[75] To reverse this judgment, the present writ of error was brought; and the special errors assigned upon the record (J. Pratt, N. Lechmere), were, 1. Because the records and matters offered by the plaintiff, to be given in evidence, were not admitted or allowed by the court to be given in evidence, or to be propounded to the jury, to prove the true time of acknowledging the fine by Lord Nathaniel. And 2. Because the jury were not informed by the court, that the deed inrolled was a void deed; and that the Lord Nathaniel did not thereby convey the freehold to Bezaleel Knight.

In support of these errors, it was insisted, that as the fine was not, in fact, acknowledged till the 2d of March 1701, it could not transfer the freehold of the lands to Knight, three months before the time of that acknowledgment; and that the plaintiff was admitted to the proof of this fact, by the statute of 23 Eliz. cap. 3. sect. 5. whereby, *for the avoiding of false practices, deceits, devices, and misdemeanors, dangerous to the assurance of men's lands*, it is enacted, "That any person that shall, at any time hereafter, take the knowledge of any fine, or warrant of attorney, of any tenant or vouchee, for suffering of any common recovery, or shall certify them, or any of them; shall, with the certificate of the concord or warrant of attorney, certify also the day and year wherein the same was knowledged." For if a man cannot give in evidence the time of acknowledging a fine, in order to avoid deceit imposed on him by that fine, this statute seems to have been made for no manner of purpose. And as to the deed of bargain and sale inrolled, that could not convey any estate to Knight antecedent to the recovery, because it was not mentioned therein, that *any person* did bargain and sell the lands in question; there appeared indeed the verbs *bargain* and *sell*, but it was not said *who* bargained and sold; and consequently Lord Nathaniel did not bargain and sell. That the present controversy was between the plaintiff, who was the *heir male* of the family, and on whom the honour had descended; and the *heirs female*, who would, by a fraudulent fine and recovery, and a lame deed, wrest and take away that estate from him which was the only support of the honour; and therefore it was hoped, that the judgment would be reversed.

On the other side it was contended (E. Northey, R. Raymond), that the caption of the fine ought not to be admitted against the record of the indenture of the

fine; for it would shake all family settlements, and introduce the greatest uncertainty and confusion in all conveyances by fines, upon which the most considerable estates in the kingdom depended; and that an attempt to set aside a fine *upon evidence* was never before made. That in the indentures of all fines, the concord is recorded to be made in court; whereas the captions of the acknowledgments of all fines (except a very few) are taken out of court, either before the lord chief justice of the Common Pleas, or commissioners in the country. [76] And, upon a writ of error, no error can be assigned in the caption varying from the record, as that would be an error contrary to the record; but if in the present case the fine was irregular, the proper method was, to apply to the court of Common Pleas, where the same was levied; and not attempt in a summary way, to invalidate it by evidence upon a trial of an ejectment. And as to the deed, it appeared *prima facie*, that the consideration money was paid by Knight to Lord Nathaniel; and that it was for barring all intails and remainders in the premises, and assuring the same to Lord Nathaniel and his heirs. That it appeared, as well by the deed itself, as by the evidence on the trial, that the manors and lands therein mentioned, were the estate of Lord Nathaniel; and that the intent of the deed was to make Knight tenant of the freehold, in order that Johnson might demand against him, and that he should vouch Lord Nathaniel; and therefore the court was unanimously of opinion, that the freehold was well conveyed to Knight by this deed.

After hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the court of Queen's Bench should be affirmed; and that the record should be remitted, to the end execution might be had thereupon, as if no such writ of error had been brought into the house. (Jour. vol. 19. p. 458.)

CASE 4.—LORD BLANY and others,—*Appellants*; NICHOLAS MAHON and another,—*Respondents* [27th March 1723].

[Mew's Dig. vii. 23.]

[Where a fine and recovery is of so many acres in S. the party interested shall have his election where and in what parts of the estate the fine and recovery should operate.]

\*\* DECREES, etc. of Irish Court of Chancery, *in part*, REVERSED.

A fine does not *ascertain*, but only *comprises* the lands whereof it is levied; so that it is in all cases extremely proper to have a declaration of uses, that the precise lands comprehended in the fine, and intended to pass by it, may be precisely ascertained. See Cruise on Fines, cap. 7.

The point of this case in 2 Eq. Ca. Ab. 758. c. 5. and 22 Vin. 521. p. 27. is relative to *waste*; viz. "that where there is an arrear of a charge upon a real estate, an injunction shall go to prevent cutting of timber on the premises chargeable;" a point not apparently regarded in the judgment of the House of Lords.\*\*

An issue to try whether *a particular manor was intailed by a particular deed* is not proper, being rather a point of law than a matter of fact; or at least so complicated as not to be fit for the inquiry of a jury.

Viner, vol. 13. p. 275. ca. 2: vol. 18. p. 217. ca. 5: vol. 22. p. 521. ca. 27: 2 Eq. Ca. Ab. 475. ca. 1: 758. ca. 5.

Henry Vincent, Lord Blany, deceased, father of the respondent Elinor, and uncle of the appellant Lord Blany, being seised, part in fee-simple, and part in tail, of a considerable estate, in the county of Monaghan, in Ireland; by deeds of lease and release, dated the 23d and 24th of November 1687, between himself of the first part, the Right Honourable Lord Forbes, and Thomas Moore Esq. of the second part, and [77] Peter Purify and Jeffry Lyone of the third part; did, in consideration of a marriage had between him and Lady Margaret his then wife, eldest daughter of the said Thomas Moore, and of £2000 marriage-portion, and in pursuance of articles



before marriage, convey to the said Lord Forbes and Thomas Moore, all those the several manors of Mucknoe and Castle-Blany, and also the plough-lands of Bally-lack and Ballytean, and all other the said Lord Blany's lands, tenements, and hereditaments whatsoever, upon the trusts following, viz. to the use of him the said Lord Henry for life; and as to the castle and house of Castle-Blany, and out-houses, gardens, closes, and demesnes, thereto belonging, to the use of Lady Margaret, for her life: and to the further intent, that the said Lady Margaret, in case she should survive Lord Henry, might have, receive, and take, one yearly rent-charge of £400 issuing out of the lordship of Mucknoe, during her life, in full satisfaction of all dower, thirds, etc.; and as to the said lordships and manors, after the death of Lord Henry, to the use of his first and every other son, in tail male; and for want of such issue, to the use of William Blany Esq. brother of Lord Henry, and his issue male; and for want of such issue, to the right heirs of Lord Henry, for ever. Provided, that if Lord Henry should die without issue male, the trustees should stand seised of all the said lordships and manors, etc. subject to the said £400 per ann. rent-charge, to the use and intent for raising portions and yearly maintenance, out of the rents, issues, and profits of the premises, for daughters, as follows: viz. "if there be but one daughter, then for the raising of £3000 sterling, portion for her, out of the rents, issues, and profits of the said lands and premises, to be paid unto her at her age of 18 years, or day of marriage, which shall first happen; and if there be more, then for the raising of the sum of £4000 sterling, to be likewise raised out of the rents, issues, and profits of the said lands and premises; the eldest daughter to receive the sum of £300 sterling, more than any other of the said daughters, and the remainder to be equally divided between the said younger daughters; the said several portions to be paid to them respectively, at their several ages of 18, or days of marriage, which shall first happen. And if it shall happen that any of the said daughters shall die before they are married, that then the said portion of such daughter or daughters so dying unmarried, shall survive and be paid to the surviving daughter, if but one, or to and among the surviving daughters, if more than one, equally to be divided between them, and paid to them in manner and form aforesaid, together with their other portions. And to the further use and intent that each of the said daughters shall, until their several and respective portions be satisfied and paid unto them as aforesaid, receive out of the premises, over and above their said respective portions for their several and respective maintenances, the yearly sums hereafter-mentioned; (that is to say,) £30 sterling per ann. [78] to each of them until they respectively attain the age of 10 years, and from thenceforth the yearly sum of £50 sterling to each of them until their several and respective portions be satisfied and paid unto them in manner and form aforesaid."

In this deed there was a covenant from Lord Henry, to levy a fine of the premises to the said Lord Forbes and Thomas Moore, or one of them, by such name and names, quantity, quality, and contents of acres as they should think fit; to make them tenants of the freehold, till a recovery should be had of the premises, or any part thereof, to the said Peter Purify and Jeffry Lyone, to the uses in the said deed expressed. And in Michaelmas term 1687, a fine and recovery was levied and suffered accordingly.

In 1689, Lord Henry died, without issue male; leaving two daughters, Elizabeth and the respondent Elinor; Elizabeth died about three years afterwards, and thereby the respondent Elinor, who was about three months old at the time of her father's death, became entitled to the £4000 portion and maintenance, according to the above proviso.

On the death of Lord Henry, the title descended to the above named William Blany, his brother, who, under the limitations of the above settlement, became entitled to all the said premises; and accordingly held and enjoyed the same till 1706, when he died, leaving the appellant Lord Blany his son and heir; who, by his mother the appellant Lady Mary, as his guardian, or otherwise, became possessed of the said premises.

The trustees of the said settlement declining to act, the parties who so possessed from the death of Lord Henry, neglected and refused to pay the respondent Elinor, her maintenance of £30 per ann. for ten years, and £50 per ann. for eight years;

and also to pay her said portion of £4000 when she attained her age of 18 years, which was in the year 1707: and she having, in the year 1709, intermarried with the other respondent Nicholas Mahon, they, in June 1710, exhibited a bill in the court of Chancery in Ireland, against the appellants, and the trustees of the settlement, and also against Charles Deering Esq. and Lady Margaret Blany his wife, who was the relict of Lord Henry, and several others; setting forth, *inter alia*, the said deed of settlement; and that the said Deering and Lady Margaret had sold the £400 per ann. charged on the estate during the life of Lady Margaret, to Lord William Blany, who had mortgaged the premises to Deering and Lady Margaret for £2000 which, with other pretended prior incumbrances bought in, and of which assignments had been taken, were intended to be set up, to postpone the payment of the respondents demands; though the said purchase of £400 per ann. if made, was merged in the estate, and the other pretended incumbrances had been long since discharged, by the rents and profits of the premises; and therefore praying, that the trustees might execute their trust; that the premises might be sold to pay the re-[79]-spondents demands; and that the appellants might account for the profits.

The appellant Lady Mary, and the said Charles Deering, and Lady Margaret his wife, by their answer to this bill, admitted the respondent Elinor to be the surviving daughter and heir of Henry Lord Blany; and that she was married to the other respondent, and entitled to the said portion and maintenance according to the settlement: but the appellant Lady Mary denied that Lord Henry was seised in fee of the premises; for she insisted, that he was only seised thereof as tenant in tail, by virtue of a settlement made in 1662, by Richard Blany Esq. afterwards Lord Blany, who was the father of Lord Henry, and was seised in fee of the premises; and that therefore, notwithstanding Lord Henry's settlement in 1687, only 2000 acres of the premises, therein comprised, were charged with the said portion, (though the premises in all were 20,000 acres,) the fine and recovery containing no more; and she also insisted upon several incumbrances, which she was advised were payable before the respondents demands. All the defendants admitted, that Lord William had purchased the £400 per ann. rent-charge, for £2200 and mortgaged the premises for the same to Deering and Lady Margaret; who thereupon levied a fine of the rent-charge to trustees, for the use of Lord William.

In September 1713, the respondents filed a supplemental bill, reciting the former, and setting forth, that on view of the settlement, Lord Henry appeared to have been seised in fee of Ballylacky, and other lands, not mentioned in the former bill; and that though it was pretended he was but tenant in tail of the premises, which were in all 20,000 acres, and therefore could charge the said portion on no more than the 2000 acres passed by fine and recovery, yet all the said lands were chargeable with the respondents demands; and therefore prayed, that the said lands might be sold, and the portion and maintenances paid.

The appellant Lord Blany (being of age) and the other appellant Lady Mary answered this supplemental bill; and insisted that Lord Henry was but tenant in tail male by the deed of 1662, and therefore could charge no more of the premises with the respondents demands, than the 20 messuages, 10 tofts, 200 cottages, 200 gardens, and 2000 acres of land, comprised in the said fine and recovery; and that though the whole lands were above 20,000 acres, yet such as were left out of the said fine, were not liable to the respondents demands.

On the 27th and 29th of January, and 3d and 6th of February 1718, the cause was heard before the Lord Chief Baron Gilbert, and Mr. Justice Macartney, and George Warburton Esq. three of the commissioners for hearing causes; who ordered and decreed that the respondent should have and recover [80] £4000 with interest, from the time it became due by the settlement; and also the maintenances of £30 and £50 per ann. with interest for the same, to be charged on the 20 messuages, 10 tofts, 200 cottages, 200 gardens, and 2000 acres of land, in Mucknoe, Castle-Blany, alias Ballylurgan, Ballylacky, and Ballytean, comprised in the fine, equally and in proportion, to each denomination in the said fine mentioned, and also to be a charge on the remaining part of the lands of Ballylacky: but the Lady Margaret's jointure was to be a charge, prior to the respondents demands, on all the lands charged therewith by the deed of 1687; and referred it to a master to ascertain the value of the premises, and whatsoever remained after payment of the said £400

per ann. to Lady Margaret was to be paid to the respondents; and if they should not be paid their principal, interest, and costs, before the death of Lady Margaret, then it was ordered, that the premises should be sold, after her death, to discharge the respondents demands, the denominations chargeable therewith to be set out by two surveyors. And in order to ascertain whether the manor of Mucknoe was liable to the respondents demands, an issue was directed to be tried in the county of Monaghan, *whether all the lands under the territory of Mucknoe were part and parcel of the reputed manor of Castle-Blany in 1662, or a reputed manor by itself.*

The respondents, instead of trying this issue, petitioned for a re-hearing; alleging, that if the cause was fully laid before the court, the facts, as to Mucknoe being a separate manor, and liable, would appear too plain to require any such issue to be directed. Accordingly, the cause was re-heard on the 24th of February 1719, and 26th and 27th of May 1720, before the lord chancellor; when the respondents produced a patent 9 Jac. I. anno 1611, empowering Edward Blany Knt. to name Mucknoe a manor; and also several deeds and fines, levied in the years 1658, 1687, and 1695, by Lord Edward, Lord Henry, and Lord William, the appellant's father, wherein Mucknoe was passed as a separate manor from Castle-Blany; but the appellants insisting that it passed by the deed and fine in 1662, as parcel of the manor of Castle-Blany, and was therefore intailed; though the fact was proved otherwise, by the before mentioned patent, deeds, and fines, and though Mucknoe was not by any denomination or description mentioned in the said deed or fine of 1662, yet the appellants still insisted on a trial at the peril of costs. Whereupon, the decree of the 6th of February 1718, was affirmed, except as to the issue thereby directed; which was altered as follows, viz.—*Whether the territory of Mucknoe, in the pleadings mentioned, was intailed by the deed bearing date the 19th of January 1662, in the pleadings also mentioned?* And this issue was ordered to be tried by a jury of the city of Dublin, at the bar of the court of Common Pleas.

[81] This issue was accordingly tried, on the 4th of July 1720, before Mr. Justice Macartney and Mr. Justice Gore; when the jury returned the following verdict, viz. *We find the territory of Mucknoe, in the pleadings mentioned, was not intailed by the deed dated 19th of January 1662, in the pleadings also mentioned.*

On the 12th of the same month of July, the cause was heard on the certificate of the said verdict, when the verdict was confirmed; and it was ordered, that the respondents demands should remain a charge on the territory of Mucknoe, subsequent to the Lady Margaret's jointure; and the master was to ascertain the value of the lands, pursuant to the former decree; and an injunction was ordered to put the respondents in possession of the territory of Mucknoe, etc. unless cause; which injunction was discharged on the 16th of July 1720.

The appellant Lord Blany made no objection to the verdict or decree, except as to interest; which, being decreed at £10 per cent. though it was the lawful interest due on the respondents demands, he hoped to have lessened; and therefore petitioned the court for a re-hearing, as to that point only; and the cause being accordingly re-heard on the 15th of November 1720, the lord chancellor ordered interest for the said portion and maintenance, at £8 per cent. only.

The master accordingly proceeded to take the account; and by his report, dated the 30th of January 1720, he certified, that there was due to the respondents for portion and maintenance, and interest at £8 per cent. to the 14th of November 1720, £9355 12s.

This report was, on the 9th of March 1720, absolutely confirmed; and it was then ordered, that the respondent should accordingly have and recover against the appellants, out of the lands in the former orders mentioned, the balance so reported due, with interest for the same, to the said 9th of March 1720; which being £110 18s. and added to the former, made in the whole £9466 10s. The said sum, with interest, to remain a charge on the 20 messuages, 10 tofts, 200 cottages, 200 gardens, and 2000 acres in Mucknoe and Castle-Blany, alias Ballylurgan, Ballylacky, and Ballytean, comprised in the fine levied in the year 1687, equally, and in proportion to each denomination; and also to be a charge on the remainder of the lands of Ballylacky, and the territory of Mucknoe; Lady Margaret Blany's jointure, to be a charge prior on all the lands of Mucknoe, and the house and demesnes of Castle-Blany.

From all these decrees and orders, both parties appealed; and, in support of the *original* appeal, it was insisted (P. Yorke, C. Talbot), that the second issue, directed by the order of the 27th of May 1720, viz. *Whether the territory of Mucknoe was intailed by the deed* [82] of the 19th of January 1662, was not properly triable by a jury, being rather a point of law, than a matter of fact, or at least so complicated, as not to be fit for the inquiry of a jury; nor could the point intended be well tried on this issue, because the fine was omitted, by which the estate passed, and which contributed as much to the creating of the intail, as the deed: besides, the trial ought to have been by a jury of the county in which the lands lay, the matter in question being only, whether Mucknoe was parcel of the manor of Castle-Blany. That by the deed of 1687, the portions and maintenances were to be raised out of the rents, issues, and profits of the estate; and Lord Henry, who made that settlement, intending to continue the estate in his name and family, expressly provided, that if the profits of the estate should not be sufficient to answer the said payments in their full proportion, then the trustees should distribute the profits towards payment of the portions and maintenances, as to them should seem convenient, and that they might give preference to such payments, as the exigency of the occasion should require; and it was fully in proof, that the yearly rents and profits of the estate, were not for many years sufficient to pay the yearly interest of the incumbrances, prior to the respondents demands; and therefore so high an interest as £8 per cent. per ann. ought not to have been decreed for the portion, or any interest for the maintenance.—That the rents of the premises ought not to have been decreed to be applied towards satisfaction of the respondents demands till the prior incumbrances had been first satisfied; and that the appellant Lord Blany, being tenant in tail, there was no reason to restrain him, by any interlocutory order, from selling the woods.

To this it was answered (R. Raymond, T. Lutwyche), on the other side, that issues are frequently directed, wherein matters of law are intermixed with matters of fact, and yet are very proper; because the judges, in their charge to the jury, always explain to them what the law will be, if they find the facts: so in this case, if they believed Mucknoe to be a reputed manor of itself, they were to find it was not intailed by the deed of 1662; but, if it was part and parcel of another manor, intailed by that deed, that then it was intailed. That as to the fine being made part of the issue, it could by no means be necessary; since the fine and deed was but one conveyance, and the intail was created by the deed: besides, it appeared so plainly by the deeds, records, and other evidence, that Mucknoe was a distinct estate from Castle-Blany, that no issue need to have been directed; and it was not pretended, but that the issue was fairly and fully tried upon the merits, and therefore the appellants acquiesced in it, without any application for a new trial: and the court ordered the trial to be by a jury of the city of Dublin, in order that the cause might be tried by an impartial jury; the [83] appellants having too great interest in the county of Monaghan, where the lands lay, to expect a jury entirely impartial. That there were no incumbrances proved prior to the respondents, as to which there were proper parties before the court for relief; save only such as had been paid by Lord William or others, out of the profits of the estate, or by the personal estate of Lord Henry, and except Lady Margaret's rent-charge of £400 per ann. bought in by Lord William, and kept on foot as a charge by the appellants, and £500 due to the executors of Mrs. Bladen; for the first of which, provision was made by the decree; and as to the latter, the respondents had allowed a deduction for the interest of it; and upon a sale of the premises, there would be sufficient to discharge that and all other incumbrances. As to the excessive interest complained of, the appellants had a re-hearing upon that point, when it was reduced from £10 per cent. to £8 per cent.; and which latter rate of interest was so far from being excessive, in regard to the appellants, that, as the case was circumstanced, it was a very great hardship on the respondents; the portion and maintenance being payable out of an estate, proved to be £1200 per ann. but worth £2000 per ann. if now to be let, to which the respondent Elinor was heir at law; and about £4000 of the interest complained of, having accrued due since the commencement of the suit; so that it would have been much more for the respondents benefit to have received the portion and maintenance when due, than even £10 per cent. interest for the same at this time.

And in support of the *cross* appeal it was contended, that the decree should have charged all the lands in the deed of 1687, with the portion, maintenance, and interest, agreeable to the intention of the parties thereto; or at least so much of the intailed lands, as the fine and recovery could, by the most liberal and beneficial construction comprise, and not equally in proportion to each denomination; for the court should have expounded the fine and recovery, to extend to as much of the intailed lands, as the number of messuages, tofts, cottages, gardens, and acres therein-mentioned, would admit, to satisfy the intentions of the parties for the effectual passing the intailed lands; the party interested having the election where, and in what parts of the estate, he would have the fine and recovery to operate: and if any of the fee-simple lands ought to be construed to be within the fine and recovery, yet it should be but a small parcel, sufficient only to satisfy the words, as the fee-simple lands were well charged by the deed, without the help of the fine and recovery; and therefore to answer the intention of the parties such a construction should obtain, as would make the settlement effectual. That the respondents ought not to be postponed in payment of the sum decreed them, by the lands remaining unsold, till Lady Margaret's death; but an immediate sale ought to have been decreed, subject to the rent-charge; especially considering how long the respondents had been kept out of their right by the appellants [84] means, and for which reason also they ought to have been decreed £10 per cent. as the legal interest due on their demands. And, that the injunction obtained by the respondents to stop the cutting of the woods ought not to have been discharged; because the woods grew on the premises chargeable, and were of considerable value; and by the destruction of which, the value of the premises would be much diminished: it was therefore hoped, that the said orders and decrees would be amended or varied, as the circumstances of the case should require.

After hearing counsel on both these appeals, it was ORDERED and ADJUDGED, that the original appeal of the Lord Blany and the Lady Dowager Blany should be dismissed; and that the said decrees and orders, so far as the same were complained of in the said appeal, should be affirmed; and as to so much of the said orders and decrees, as decreed the several sums of money and the interest thereof, decreed to be recovered by the said Nicholas Mahon and Elinor his wife, who were plaintiffs in the said court of Chancery, to be a charge on the 20 messuages, 10 tofts, 200 cottages, 200 gardens, and 2000 acres of land, in Mucknoe and Castle-Blany, alias Ballylurgan, Ballylacky, and Ballytean, being the particulars mentioned in the fine levied in pursuance of the deed of settlement of 1687, equally, in proportion to each denomination in the said fine mentioned; and so far as the said decrees or orders postponed the sale of the lands liable to the said sums decreed to be recovered by the said Nicholas Mahon and Elinor his wife, till after the death of Margaret Lady Dowager Blany, it was ORDERED, that the same should be reversed: and it was further ADJUDGED, that the manor, lands, and territory of Mucknoe and Ballylacky, and all other messuages, lands, tenements, and hereditaments, of which the said Henry Lord Blany was seised in fee at the time of the deed of settlement aforesaid, and which were thereby subjected to the raising the said portion and maintenances of the said Elinor; and so much of the messuages, lands, tenements, and hereditaments, lying in the other manor, towns, and places named in the said fine, being part of the estate intailed by virtue of the deed and fine of 1662, as would answer to the full and complete number of messuages, acres, and other particular descriptions in the said fine, were well charged with the portion and maintenance of the said Elinor, and were liable to be sold during the life of Margaret Lady Dowager Blany, for payment thereof with interest, subject to her rent-charge of £400 per ann.: and it was further ORDERED and ADJUDGED, that all the lands so adjudged to be charged with the said portion and maintenance, and not liable to the £400 per ann. settled on the said Margaret Lady Dowager Blany, or so much thereof as should be necessary, should be forthwith sold, subject to all prior incumbrances affecting the same to the best bidder, for raising the said portion and arrears of maintenance, with interest, according to the last decree; and if the lands not chargeable with the £400 per ann. should not be [85] sufficient for that purpose, that then the estate charged with the said £400 per ann. or so much thereof as should be necessary, should likewise be forthwith sold for the purposes aforesaid,

subject to the said £400 per ann. and all prior incumbrances affecting the same; and with these variations, the rest of the said decrees and orders were affirmed; and the court of Chancery in Ireland was to take care that this judgment should be put into effectual execution. (Jour. vol. 22. p. 131.)

CASE 5.—SAMUEL BERINGTON,—*Plaintiff*; JOHN PARKHURST and others,—*Defendants* (in Error) [16th May 1738].

[There must be an *actual entry* to avoid a fine; and no ejectment can be maintained where the demise is laid before the time of such *actual entry*.]

\*\* Judgment of K. B. AFFIRMED.

The point is thus stated in Cruise on Fines, p. 304.—The delivery of a declaration in ejectment does not amount to such an entry as will avoid a fine, even though the defendant appears to it, and confesses lease, entry, and ouster; for there must be an actual entry made *animo clamandi*, whereas in ejectment there is only a fictitious or supposed entry for the purpose of making a demise; and the entry must be made before the time when the demise is laid. See 1 Vent. 42: 3 Burr. 1897: Doug. 483, 5: and the note at the end of this Case.

No Entry is necessary where the fine is levied without proclamations; for the stat. 4 H. 7. c. 24, does not extend to such a fine; and it may be avoided at any time within 20 years. *Jenkin v. Prichard*, 2 Wils. 45.

The Entry to avoid a fine must be made by the person who has a right to the lands, or by some one appointed by him; for a person who has a right of entry may empower another to enter for him. 1 Inst. 258. a

The other questions in the several books, referred more particularly to the laying the demise in actions of ejectment.\*\*

2 Strange, 1086: Viner, vol. 1. p. 292. ca. 23. \*\*And. 125: Ann. 162.

2 Kely. 9. 100.\*\*

John Dormer Esq. having three sons and two brothers living, and two nephews, the sons of a deceased brother; and being desirous to settle the ancient family estate in the males of his name and blood, in case there should be no issue male of his own sons; did, upon the marriage of his eldest son, Sir John Dormer Bart. with Susanna, one of the daughters and coheirs of Sir Richard Brawne, and in consideration thereof, and of £5000 the marriage portion, by indenture of feoffment, dated the 13th of August 1662, made between the said John Dormer and Sir John Dormer his son and heir apparent, of the first part; the said Susanna Brawne of the second part; Sir Robert Jenkinson and Sir William Child, of the third part; and John Cave and Thomas Marriott, of the fourth part; limit, settle, and convey, (amongst other lands,) the manor of Shipton-Lee and Lee-Grange, and divers lands, tenements, and hereditaments, the estate and inheritance of the said John Dormer and Sir John Dormer, or one of them, in the county of Bucks, (subject to an estate in part of the premises, to the said John Dormer, the father, for life,) to trustees and their heirs, to the uses following; viz. to the use of the said Sir John Dormer, and his assigns, for 99 years, if he should [86] so long live, with remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said marriage, in tail male successively; remainder, as to part of the premises, to the trustees for 99 years, for raising daughters portions; remainder, as to all the premises, to the first and other sons of the said Sir John Dormer, by any other wife, in tail male successively; remainder to Robert Dormer, second son of the said John Dormer, (afterwards one of the justices of the court of Common Pleas,) for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Robert, in tail male successively; remainder to Fleetwood Dormer, third son of the said John Dormer, for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said

Fleetwood, in tail male successively; remainder to the said John Dormer, and the heirs male of his body; remainder to Peter Dormer, brother of the said John Dormer, for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Peter, in tail male successively; remainder to Fleetwood Dormer, afterwards Sir Fleetwood Dormer, another brother of the said John Dormer, for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Fleetwood, in tail male successively; remainder to Bennet Dormer, who was the eldest son of Euseby Dormer deceased, another brother of the said John Dormer, for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Bennet Dormer, in tail male successively; remainder to Euseby Dormer, second son of the said Euseby Dormer, and father of the lessor of the plaintiff, for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Euseby, in tail male successively; remainder to the heirs of the body of the said John Dormer; remainder to the right heirs of the said John Dormer.

There was issue of this marriage one son, afterwards Sir William Dormer, and one daughter, Susanna, who married Francis Sheldon Esq. and by whom she had several children, who enjoyed other parts of the family estate, as heirs general of John Dormer, who made the settlement.

It happened, that the several successive limitations in this settlement, precedent to the estate limited to Euseby Dormer the nephew, determined in his life-time, by the deaths of all the prior remainder-men without issue male; the last of such estates which subsisted, being the term of 99 years, vested in Mr. Justice Dormer, who died without any issue.

John Dormer, the lessor of the plaintiff and eldest son of the said Euseby Dormer, who was forced to litigate three years in the court of Chancery, to obtain a discovery of the settlement, of [87] which there were no less than three duplicates in the hands of the defendants, who used all manner of dilatories to avoid producing it; being advised that, upon the death of his father, which happened on the 3d of September 1729, he was become seised of an estate tail in the premises, by virtue of the said settlement; did, in Michaelmas term 1731, cause declarations in ejectment to be delivered to John Parkhurst Esq. and Sir John Fortescue Aland Knt. and Catherine Dormer, and their tenants, for the manor of Shipton-Lee and Lee-Grange, and divers messuages, lands, and tenements, and also 5s. rent and view of frank-pledge, with the appurtenances, lying in Shipton, Lee-Grange, and Quainton, in the county of Bucks; and also of all manner of tithes growing and renewing in Shipton-Lee; and in Hilary term following, the said John Parkhurst and his wife, Sir John Fortescue Aland and his wife, and Catherine Dormer, and their tenants, made themselves defendants, and entered into the common rule for confessing lease, entry, and ouster; and issue was thereupon joined.

In Michaelmas term 1735, the cause came on to be tried at the bar of the court of King's Bench, by a special jury of the county of Bucks; when the jurors found, that as to the tithes, rent, and view of frank-pledge, in the declaration specified, the defendants were not guilty; and as to the trespass and ejectment in the manor, and the residue of the tenements and premises in the declaration specified, they found a special verdict to the following effect; viz.

"That on the 13th of August 1662, John Dormer Esq. and Sir John Dormer, being seised of the premises in the declaration in fee, made such deed of settlement thereof, as is above set forth; and that livery of seisin and possession of the premises was made to the trustees in due form of law.

"That by virtue of the said feoffment and livery of seisin, the said trustees afterwards, on the said 13th of August 1662, entered upon and were seised of the premises; and that after making the said settlement, viz. on the first day of October 1662, a marriage was solemnized between the said Sir John Dormer and Susanna.

"That in Michaelmas term, in the 14th year of King Charles II. a common recovery was duly suffered of the premises, to the uses in the said feoffment; and that by virtue of the said feoffment, livery of seisin, and recovery, the said Sir John Dormer, on the 1st day of December 1662, entered into and was possessed of so

much of the premises, as were limited to him for the term of 99 years, if he so long lived. And that the said John Dormer Esq. afterwards, and before the said marriage, entered and was seised of so much of the said premises as were limited to him for the term of his life.

"That on the 1st of September 1670, the said Susanna Dormer died; and that on the 23d of September 1675, Sir John Dormer [88] also died; and that he left issue by the said Susanna, Sir William Dormer Bart. his only son and heir at law, who attained his age of 21; and that on the 23d of September 1675, the said Sir William entered into the premises so limited to the said Sir John Dormer his father for 99 years, if he so long lived, and was seised thereof in fee tail.

"That on the 1st of October 1679, John Dormer Esq. also died seised of such his estate in the residue of the premises; and left the said Sir William Dormer, his grandson, the heir male of his body, and also his heir at law; and that, on the 2d of October 1679, the said Sir William Dormer entered into all the premises whereof the said John Dormer, his grandfather, died seised, and was seised thereof as of fee tail; and thereby became seised of all the premises in the declaration specified.

"That John Dormer Esq. had three sons; viz. Sir John Dormer, Robert Dormer, and Fleetwood Dormer, in the said indenture of feoffment named; and that after the death of Sir John Dormer, and in the life-time of Sir William Dormer, viz. on the 22d of October 1723, the said Fleetwood Dormer died, without issue male; and that on the 10th of September 1678, Peter Dormer, in the said indenture of feoffment named, one of the brothers of the said John Dormer Esq. died without issue male; and that on the 16th of September 1696, Fleetwood Dormer, also named in the said feoffment, and another brother of the said John Dormer Esq. died without issue male; and that on the 1st of November 1680, Bennet Dormer Esq. named in the said settlement, and one of the sons of Euseby Dormer, deceased, (which said Euseby was one of the brothers of John Dormer Esq.) died without issue male; and that on the 9th of March 1725, Sir William Dormer died seised of the premises without issue male.

"That after Sir William Dormer's death; viz. on the 9th of March 1725, Robert Dormer entered upon the said premises, and was possessed thereof for the term of 99 years, if he so long lived; and had issue male Fleetwood Dormer his only son; and that in Easter term, in the 12th year of King George I. a fine, with proclamations, was levied of the premises, between Dormer Parkhurst Esq. and John Parkhurst jun. Esq. and the said Robert Dormer and Fleetwood his son; and that in the same Easter term, a common recovery was also suffered of the premises by the said Robert and Fleetwood, with double voucher.

"That on the 22d of June 1726, Fleetwood Dormer, the son, died without issue male, and that the said Robert Dormer, the father, survived him; and afterwards, on the 16th of September 1726, the said Robert Dormer, the father, died without issue male, and left issue four daughters; viz. Mary Dormer, dame Elizabeth, wife of the said Sir John Fortescue Aland, Ricarda the wife of the said John Parkhurst, and the said Ca-[89]-therine Dormer; and that after the death of the said Robert Dormer, the said Sir John Fortescue Aland and Elizabeth his wife, the said John Parkhurst and Ricarda his wife, and the said Catherine Dormer, entered into the premises and received the profits thereof; and afterwards in Easter term 1730, levied a fine with proclamations of the said premises.

"That on the 3d of September 1729, Euseby Dormer, the nephew of the said John Dormer Esq. died, leaving issue male of his body John Dormer, the lessor of the plaintiff; and that before the death of the said last mentioned Euseby Dormer, the said term of 99 years, by the said feoffment limited for raising daughters portions, was duly surrendered and extinguished.

"That on the 10th of September 1731, the said John Dormer, the lessor of the plaintiff, entered into the premises, with intent to make the demise in the declaration mentioned, to the said Samuel Berington, in order to enable the said Berington to bring this action of ejectment, *but did not then make an actual entry for the purpose of avoiding the said fines*; and thereupon the said John Dormer, the lessor, became seised thereof, as the law requires; and being so seised, he afterwards demised the premises to the said Berington, as in the declaration stated.

"That the said John Dormer, the lessor of the plaintiff, made three several



actual entries upon the said premises, claiming title thereto; viz. the first entry on the 6th of January 1731, the second on the 6th of October 1732, and the third entry on the 5th of October 1733."

The occasion of finding this special verdict was, that upon the trial, two points were insisted upon for the defendants: I. That the remainder limited by the settlement, under which the lessor of the plaintiff claimed, was barred by the fine levied by Robert Dormer and Fleetwood his son, and the recovery suffered by Fleetwood the son in 1726. II. That though the plaintiff should not be barred by this fine and recovery, yet by it, and by the fine of the daughters of Robert Dormer in 1730, all persons who were out of possession, were barred, until an actual entry made, or at least so dispossessed, that they could not bring an ejectment; and in this case, the actual entry found, was subsequent in time to the demise in the declaration, and therefore void; in regard that by law, no person can make a good lease, who is out of possession.

In Hilary term 1736, and in Hilary term 1737, this special verdict was argued in the court of King's Bench; and though both the above points were spoke to by the counsel, yet, as the defendants were entitled to judgment, if the court should be of opinion with them upon either point; and the court being unanimously of opinion, that an actual entry was necessary to be made by the lessor of the plaintiff, before the 1st of October 1731, the date of the demise, and no such entry having been made, the [90] court, therefore, gave judgments for the defendants upon that point, without determining the other.

To reverse this judgment, a writ of error was brought in parliament; and on behalf of the plaintiff in error it was insisted (F. Chute, H. Legge), that the lessor of the plaintiff, upon the death of Euseby Dormer his father on the 3d of September 1729, became seised of an estate tail in possession in the premises in question; and was therefore at liberty to lay the fictitious demise in the declaration, at any time after his right accrued. That the defendants were no ways entitled to any estate in the premises, by virtue of the said settlement; and that the lessor of the plaintiff was neither party or privy to the fine levied by them in Easter term 1730, after his right to the premises accrued; nor could he be presumed to be cognizant of the time of levying it. That his title to an estate tail in the premises, was clearly found by the special verdict; the several intermediate remainder-men between him and John Dormer Esq. who made the settlement, appearing upon the record to have severally died without leaving any issue male of their respective bodies. That a fine with proclamations does not, by force of the statute 4 Henry VII. operate as a bar to conclude strangers, till after five years elapse without entry or action; and therefore the verdict having found, that the lessor of the plaintiff made his first actual entry on the 6th of January 1731, and before the declaration in his action, he thereby avoided the operation of the fine, and was at liberty to lay the demise in his declaration, which is a mere fiction of law, as early as he thought fit after his right accrued; in the same manner, as if his title had stood independent of such fine so rendered ineffectual within the plain intent of the statute: and if such entry was not good to maintain this demise, it must follow, that in every case where a fine is levied by a wrong-doer, and not discovered till two, three, or four years afterwards, the intermediate profits between the time of levying such fine, and the entry of the lawful owner, must be absolutely lost; though the statute gives five years to enter; and an entry at any time within the five years, purges the disseisin and the wrong from the beginning, and brings the person so entering within the saving of the statute, to all intents and purposes.

On the other side it was said (D. Ryder, J. Strange), that an actual entry is necessary to avoid a fine, before an ejectment can be brought, and it must also be before the time of the demise; because a fine is of that high nature, even at common law, that it dispossesses all persons claiming title, and consequently a lease to found the ejectment upon, cannot be made till the lessor regains the possession. As to the entries found by the verdict to have been made subsequent to the time of the demise, they were apprehended to be of no use in the present case; for the ejectment lease being originally void, could not be made good by any subsequent act; and therefore whatever effect those entries might have in other respects, they could not make the lease good. That the word *action* in [91] the statute 4 Hen. VII. has always been understood to mean *real actions*, which were then in use; and it has

often been determined, that the bringing an ejectment is not sufficient to avoid a fine.

It is, however, objected, that Robert Dormer being only tenant for years, and the freehold being limited to trustees for his life, to support the contingent uses, with remainder to his first and other sons in tail male; the fine levied by Robert and Fleetwood, who was the next remainder-man in tail, was void, or at least no freehold passed thereby; and consequently, the recovery suffered by Fleetwood, the son of Robert, was also void for want of good tenants to the precipe, it being necessary they should be tenants of the freehold.

But this objection depends upon a supposition, that there was then an estate of freehold in the trustees; and is, besides, a very unfavourable objection, because the remainder-man in tail, for whose benefit they were made trustees, joined in the fine and recovery. It is apprehended, that the freehold was then in Fleetwood, the son of Robert Dormer, and not in the trustees: the words of the settlement are, *and from and after the death of the said Robert Dormer, or other sooner determination of the estate limited to him for 99 years as aforesaid, then to the use and behoof of the trustees and their heirs, for and during the natural life of the said Robert Dormer.*\* Now, taking all the words together, they are so absurd, that they cannot be of any effect; but taking them distributively, in the first place, the limitation is *from and after the death of Robert, to the trustees for the life of Robert*, which is impossible; in the next place, suppose the words *from and after the death of Robert* were to be rejected, then it would rest upon the words, *or other sooner determination of the estate limited to him for 99 years*; and then, as it was quite uncertain whether that term of 99 years would determine before the death of Robert, the limitation to the trustees would, at the most, be but a contingent one; and if so, then as Fleetwood, the next remainder-man, was in being at the death of Sir William Dormer, his became a vested remainder, and he had thereby an estate of freehold to enable him to make good tenants to the precipe. But there was no reason to construe this limitation so favourably; for though the ancient method was, to limit an estate for years to the father, determinable on his death, then to trustees for the life of the father, to support the contingent uses, and then to the first and other sons of the father in tail; yet that method tended so much to perpetuities, which are odious in the law, and was found so inconvenient, that the constant method now is, to limit an estate to the father for life; and had the limitation been so in the pre-[92]-sent case, there could have been no doubt, but the recovery had been well suffered. Besides, the present limitation cannot, by any rule of construction whatever, be extended beyond the words of it; and if so, the recovery was well suffered, and the right of the lessor of the plaintiff barred. And in this case, the daughters of Robert Dormer, in whose favour the judgment has been given, were the granddaughters of John Dormer who made the settlement, and the heirs also of Robert and of Fleetwood, the tenant in tail; whereas the lessor of the plaintiff was only a collateral relation, and the most remote remainder-man in the deed.

After hearing counsel on this writ of error, and the unanimous opinion of the judges being delivered upon certain points of law to them proposed,† it was ORDERED and ADJUDGED, that the judgment given in the court of King's Bench should be affirmed; and that the record should be remitted: and it was further ORDERED, that the plaintiff in error should pay to the defendants in error £10 for their costs. (Jour. vol. 25. p. 257.)

\* A subsequent and very material question between these parties arose upon this limitation, and was twice solemnly determined in favour of the present plaintiff in error. See *Parkhurst v. Smith*, *post*, title REMAINDER, ca. 1.

† It appears from Strange's report of this case, (vol. 2. 1086.) that the questions put to the judges were, 1st, Whether an actual entry was necessary to avoid the fine? 2d, Whether the demise being laid before the time of the first entry, this ejectment could be maintained? To the first question, they answered in the affirmative. To the second, in the negative.

CASE 6.—ALURED PINCKE and others,—*Appellants*; EDWARD THORNYCROFT and others,—*Respondents* [28th February 1785].

[In what cases courts of equity will restrain a party from setting up a fine as a bar to an ejectment; especially where the non-claim has run pending a suit in equity between the same parties.]

\*\* DECREE of Lords Commissioners, dismissing the bill, REVERSED.

Although a bill in Equity is not such an action as will avoid a fine, if the subject matter of the suit be of legal jurisdiction, yet still in some instances the filing a bill in a Court of Equity will prevent the bar arising from a *fine* and *non-claim*: and in cases of this kind the Court will direct a trial at law, with an order that the defendants shall not set up the fine in bar of the plaintiff's claim; upon the same principle that a Court of Equity sometimes directs that the defendants in a suit at law shall not plead the statute of limitations. Cruise on Fines, 329; cites 2 Atk. 389, 390; insisted on by the counsel for the appellants.

In 1 Bro. C. R. 289. it appears that the Lords Commissioners determined "That the filing a bill for *equitable relief*, is equivalent to bringing an action, in its effect of preventing a fine from being set up as a bar; but filing a bill merely for *discovery* is not."—The present bill was for a *discovery* and *an account*; and the House of Lords reversed the Lords Commissioners' decree.\*\*

\*\* 1 Bro. C. R. 289.

Sir John Thornycroft Bart. the son of Sir John Thornycroft, late of Milcomb in the county of Oxford, Bart. was, in his life-time, as heir of his father, entitled to the remainder in fee of the estates in question in this cause, expectant on the decease of his sister [93] Elizabeth, the then wife of Roger Peter Handasyde Esq. without issue, under a settlement made by his father, by indentures of lease and release, dated respectively the 15th and 16th of March 1722, whereby the same, with divers other estates, were settled amongst other uses to the use of trustees, for 500 years, upon the trusts therein mentioned, and which term was still subsisting; remainder to the use of Elizabeth Handasyde for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in tail male; remainder to the daughter and daughters of the said Elizabeth Handasyde in tail general; remainder after the determination of other estates therein mentioned, and which were at an end, to the use of the right heirs of Sir John Thornycroft the father, for ever.

Sir John Thornycroft the son being so seised, made his will, dated 12th May 1739, whereby he devised all the estates to which he was so entitled, to the use of his wife for life; remainder to the use of the heirs of his body on his said wife begotten or to be begotten, with remainder to the use of Henry Forster, his heirs and assigns for ever.

Sir John Thornycroft the son died 24th of June 1743, without issue, in the life-time of his sister the said Elizabeth Handasyde, who upon his death became the only surviving child and right heir of Sir John Thornycroft the father.

After the decease of Sir John Thornycroft the son, divers controversies arose between Elizabeth Handasyde and Henry Forster, touching the validity of the said will, and a suit was instituted by the said Roger Peter Handasyde and Elizabeth his wife, against the said Henry Forster, in the court of Chancery, for the purpose of setting aside the same; which disputes were afterwards compromised; and Forster having agreed to accept £630 in lieu of all claims and demands under the will, did thereupon, by indentures of lease and release, dated respectively the 8th and 9th of May 1745, convey all his interest in the estates devised by the said will, unto the said Roger Peter Handasyde and Elizabeth his wife, who was the heir at law of her brother, Sir John Thornycroft, to hold to the use of the said Roger Peter Handasyde and Elizabeth his wife, their heirs and assigns for ever, as joint-tenants.

Elizabeth Handasyde survived her husband, and having no issue, made her will, dated the 24th of April 1772, in the words following: "In the name of God, Amen. I Elizabeth Handasyde, of the parish of Walton upon Thames, in the county of Surry, widow, being in health and of sound memory, do make this my last will

and testament in manner following: *Imprimis*, I give, devise, and bequeath my house and estate and manor of Melcomb, in the parish of Bloxham, in the county of Oxon, with all thereunto belonging, to Henshaw Thornycroft of the parish of Prestbury and township of Siddington, in the county palatine of Chester, and his heirs male; as also all my estate and manor of Stockwell in the parish of Lambeth, in the county of Surry, and all thereunto belonging, as also my house and [94] estates at Walton on Thames, and all thereunto belonging, and my two farms at Teaton in Northamptonshire, and Brookend in Buckinghamshire, in like manner; as also three houses in Friday-street, in the occupation of the widow Witts, Thomas Hughes, and John Johnson, as also two houses in Queenhithe, in the occupation of — Goodall; also the Boar's Head tavern in Cannon-street, in the occupation of — Raymond; also one house in Little East Cheap, in the occupation of — Girford; also an house and land at Brixton Causeway, in the county of Surry, in the occupation of William Heath, in like manner as aforesaid, to the said Henshaw Thornycroft, and his heirs male; and I do also give, devise, and bequeath all my personal estate, of what nature or kind soever, to the said Henshaw Thornycroft, who I do appoint my sole executor to this my last will and testament. As witness my hand and seal, this 24th April 1772, Elizabeth Handasyde, (L. S.) Signed, sealed, published, and declared by the testatrix in the presence of us, William Shakespear, John Stevenson, Charles Plummer."

In December 1772, the testatrix died, leaving Elizabeth Pincke, widow, (the appellant's Alured Pincke's mother,) commonly called Lady Abergavenny, (since deceased,) and the appellant, Ann Thornycroft, her coheiresses at law, and also coheiresses of Sir John Thornycroft the son, of which Henshaw Thornycroft, the devisee, was at that time fully apprized.

The testatrix died seised of estates which did not pass by the will, and upon her death Henshaw Thornycroft took possession thereof, as well as of the estates devised, knowing that Lady Abergavenny and Ann Thornycroft were the coheirs of the testatrix, and conscious that part of the estates did not pass by the will. And in order to secure such tortious possession, Henshaw Thornycroft levied a fine, with proclamations of all the testatrix's estates, as well those descended as those devised, as soon after the death of the testatrix as possible, viz. in Hilary term 1773, in hopes that the heirs at law might not come to the knowledge of their right till five years had run upon the fine.

Henshaw Thornycroft, being also executor of the will, possessed himself of all the deeds, papers, and writings, of the testatrix, and among others of all the title deeds and evidences relative both to the descended and the devised estates of the testatrix, and particularly of the said indentures of lease and release of the 8th and 9th of May 1745, whereby Forster conveyed to Elizabeth Handasyde the estates devised to him by Sir John Thornycroft.

The said Elizabeth Pincke, and the appellant Ann Thornycroft, in October 1776, filed their bill in the court of Chancery, which was afterwards amended against Henshaw Thornycroft, and thereby prayed that he might set forth the dates and short contents of all the deeds, evidences, and writings in his custody or power relating to the lands, tenements, or hereditaments of which Elizabeth Handasyde died seised, and might produce the same before one of the masters of the court; and that such of them as should be re-[95]-quired to be produced at law, might remain in the hands of the master to be produced as the court should direct; and that he might likewise discover what lands or tenements of Elizabeth Handasyde he was in possession of, which were not comprized in her will, and that he might account with the said Elizabeth Pincke, and the appellant Ann Thornycroft, for the rents and profits of the premises received by him since the decease of Elizabeth Handasyde; and might deliver up all deeds, evidences, and writings relating thereto in his custody, power, or possession.

At the time of filing this bill, it was unknown and unsuspected by the appellants that Henshaw Thornycroft had levied a fine of the estates of the testatrix, the appellants conceiving, as they reasonably might, that he relied upon the will for his title, if he had one.

The defendant by his answer filed in February 1777, *denied being in possession of any estates belonging to Mrs. Handasyde, but what were comprized in her will;*

and made no mention of his having levied any fine of such lands, or any part thereof.

At the time the heirs at law of Mrs. Handasyde filed their bill they apprehended that Sir John Thornycroft the son had died intestate, and that Mrs. Handasyde had taken the estates as his heir at law; and accordingly they stated in their bill that he died intestate, and required the said Henshaw Thornycroft to answer whether he had or had not made any will; and if any will had been made by Sir John Thornycroft the son, to set it forth. And although the probate of the will of Sir John the son, and likewise the said deeds of compromise of 8th and 9th of May 1745, (by which Foster conveyed all his interest in the estates thereby devised to him to General Handasyde and his wife,) were then in the hands of Henshaw Thornycroft; yet he, by his answer, sworn 19th of February 1777, admitted that Sir John Thornycroft the son had died without any will.

Before any further answer was put in, the heirs at law discovered that Mrs. Handasyde died seised of one of the estates in question, viz. a farm and lands in the parish of St Mary, Newington Butts, in the county of Surry, then in the occupation of Robert Goater, and which was not devised by her will, and were advised they might recover it at law by ejectment, resolving in the mean time to proceed in equity for a discovery of any other estates of Mrs. Handasyde, which might be in the same situation, and to obtain the title deeds, and an account of the rents and profits; and accordingly, about 18th January 1778, the heirs at law brought their ejectment against Goater the tenant, when Henshaw Thornycroft appeared thereto, and made himself a defendant, and pleaded as landlord of Goater; and the heirs at law being prepared to try the cause, were about to deliver a notice for the trial thereof at the then ensuing Lent assizes in 1778, for the county of Surry, when the said Elizabeth Pincke died, leaving the appellant Alured Pincke, her only son and heir at law. And her death having happened within a few weeks before the assizes, the appellants could not then proceed to trial, but they after-[96]-wards gave notice for the following summer assizes, which were in August 1778; and so little suspicion had they of a fine being levied, that they did not, before the delivery of the ejectment, make an actual entry to avoid it.

Henshaw Thornycroft, finding that if the trial should come on according to the notice, and he should rely on his own title as devisee of Mrs. Handasyde, the appellants must either try the cause upon the merits, which he did not chuse they should, or he must set up the fine and nonsuit the plaintiffs for want of an actual entry; but as the five years had not run upon the fine to make it a bar, and as, if the fine was discovered, an actual entry might be made, and a new ejectment be brought, before the five years were expired, another method was used to delay the trial till the five years were expired, and the fine become a bar. This was effected by Henshaw Thornycroft's solicitor applying, a few days before the summer Surry assizes 1778, to the solicitor for the appellants, and informing him of the will of Sir John Thornycroft the son, and stating, that such will produced upon the trial of the ejectment, and setting up the title of Forster's heirs, would nonsuit the plaintiffs. Upon which the solicitor for the heirs at law, seeing no prospect of avoiding a nonsuit, as the will shewed a clear right in Forster, and out of Mrs. Handasyde, countermanded the notice.

At this time the heirs at law of Mrs. Handasyde were wholly ignorant of the evidence then in the actual custody of Henshaw Thornycroft, which would have been an answer to the objection arising from the will, namely, the deeds of 1745, by which Forster conveyed the estates to Mrs. Handasyde: so that the will of Sir John Thornycroft the son would have been so far from impeaching the claim of the heirs at law of Mrs. Handasyde upon the trial, that *it would have formed a part of their title*. But the heirs at law being at that time totally ignorant of any compromise made between Forster and Mr. and Mrs. Handasyde, or of the deeds of 1745 having been executed, or of any act being done by Forster to part with his interest under Sir John Thornycroft's will; the discovery of the will of Sir John Thornycroft, and concealing the deeds of 1745, had their effect to impose upon the agent for the heirs at law, which was unjust; as the *deeds by which that compromise had been effected, had been, from the death of Mrs. Handasyde, in the hands, custody, or power of the then defendant, Henshaw Thornycroft.*

In Michaelmas term 1778, the five years upon the fine ran out; and the appellant some time afterwards, by mere accident, being informed that Forster had conveyed the interest so vested in him to Mr. and Mrs. Handasyde, gave notice of trial for the Lent assizes 1779, when, to their great surprize, Henshaw Thornycroft set up the fine levied by him, and thereby nonsuited the appellants; and which was the first notice or intimation the appellants had that any such fine had been levied.

[97] The suit in equity was abated by the death of Lady Abergavenny, who left the appellant, Alured Pincke, her only son and heir at law, and the only acting executor of her will, and who being advised that it was necessary to have a production of the deed of 1745, to give in evidence upon a trial at law to rebutt the will of Sir John Thornycroft, if given in evidence by the defendants at law, and to have a decree either that the will should not be set up, or if it was, that the deed should be produced at the trial, and that the fine should not be given in evidence, upon which a non-claim had run pending the suit in the court of Chancery; therefore on the 7th September 1779, the appellants filed their bill of revivor and supplement in the cause, against Henshaw Thornycroft and Mary his wife, and Joseph White, thereby stating the several circumstances aforesaid; and the original bill having already prayed a production of deeds, the supplemental bill prayed that Henshaw Thornycroft might be restrained from setting up the fine in any manner, to the prejudice of the appellants, and might pay them the costs they were put to upon the trial of the ejectment; and that he might account for the rents received by him since the death of Mrs. Handasyde, and pay what should be due on that account.

Before any answer was put in to this bill, Henshaw Thornycroft died, but not until a considerable length of time after process of attachment had issued against him for not answering.

Soon after the decease of Henshaw Thornycroft, viz. 1st November 1780, the appellants filed their bill of revivor and supplement against the respondent Edward Thornycroft, the only son and heir at law, and also the devisee and executor of Henshaw Thornycroft, and against the respondents Eleanor and Ann Thornycroft, his daughters, who respectively claimed an interest in the premises in question, under the will of their father; and the original bill having been amended to have a fuller production of deeds, the defendants were required to answer both bills.

On the 1st October 1781, the respondents answered, and thereby, amongst other things, set forth the will of Sir John Thornycroft the son, and for the first time the deeds of compromise of the 8th and 9th of May 1745, made between Henry Forster and General Handasyde and his wife, and admitted that the said deeds were then in their custody. They likewise admitted that Elizabeth Handasyde died seised of the estate at Newington Butts, and that Henshaw Thornycroft, in Hilary term 1773, levied a fine thereof, and of all other the estates of Mrs. Handasyde, to Mr. White. And the respondents also admitted, that Henshaw Thornycroft, soon after the death of Elizabeth Handasyde, possessed himself of all the estates she died seised of, but of none, as they believed, *unless it was the estate at Newington*, but what were devised by her will, and that *at the time he levied the fine, he had all the title deeds, evidences, and writings in his hands, relating to the estates Mrs. Handasyde died seised of*. The respondents, by their answer, did also admit that such notice was given for the trial of the ejectment at the summer assizes 1778, and that their solicitor [98] had some conversation with the appellants then solicitor, respecting a bill filed in the Exchequer in Hilary term preceding, by the heirs of Forster, claiming under the will of Sir John Thornycroft; but as to the particulars thereof they referred to the answer of Mr. White, and said they believed the appellants then solicitor did countermand the notice of trial; and that he did so in consequence of what passed between him and Mr. White, and Mr. White did by his answer admit, that he did suggest to the appellants solicitor that the defendant might set up the will of Sir John Thornycroft the son, upon the trial of the ejectment, and thereby nonsuit the plaintiffs. The respondents answer was not put in until after process of contempt had issued against them for not answering in due time, and was at length, upon exceptions, deemed insufficient, and the respondents submitted to put in a further answer, which they did on the 8th January 1783, after process of contempt had again been issued against them.

Although the original bill had been filed so long since as the 6th October 1776, yet the respondents and their late father, by constantly answering either untruly, evasively, or insufficiently, and by repeatedly standing out to process of contempt, had avoided giving a full and complete answer to the bill, until this last was sworn, which was near seven years after the original institution of the suit.

As soon as the last answer came in, issue was joined in the cause, and the appellants examined several witnesses, and proved themselves heirs at law of Elizabeth Handasyde, and that she died seised of the estates in question.

On the 1st July 1783, the cause came on to be heard before the Lords Commissioners, (Loughborough, Ashhurst, and Hotham,) and on the 2d of July the court were pleased to dismiss the appellants bills without costs.

Whereupon the present appeal was brought, and on behalf of the appellants it was contended (M. Kenyon, J. Madocks, J. Lloyd), that it belongs to the jurisdiction of courts of equity, not only to give relief where the party entitled to lands has a title only in equity; but also where the plaintiff in equity has the legal estate, and can recover at law, provided the deeds which are evidence of his title are in the hands of the defendant in possession of the lands. The court in such cases relieves by decreeing a production of the deeds upon a trial at law, by restraining the defendant from setting up satisfied terms, and (in case an account of the rents is also prayed) will after a recovery at law by the aid of the court, decree an account of rents and profits. In like manner, where the plaintiff has the title at law, and can make it out at law without any aid from deeds in the defendant's hands; yet if the defendant has in his hands an instrument, which will defeat the plaintiff's legal title, and has also another instrument in his hands which will restore the plaintiff's title, equity will either decree the defendant not to give the first instrument in evidence at law, or to produce both. This was the present case. For the plaintiffs, as heirs of [99] Elizabeth Handasyde, could make out their title at law to the lands, which did not pass by her will, without any aid by proving their pedigree; but it was in the power of the defendant to nonsuit the plaintiffs, by shewing that Sir John Thornycroft the son, was in his lifetime seised of the estate in question, and that he devised it to Forster, whereby Elizabeth his sister and heir at law was disinherited. But by the conveyance of 1745 from Forster to Elizabeth in fee-simple, and the production of it at law, the plaintiffs would be reinstated in their title as heirs to Elizabeth. The original bill was brought, for a production and inspection of all the title deeds, by the heirs of Elizabeth Handasyde against the devisee, to which production the heir was entitled. And the plaintiffs presuming that some aid of the court might appear to be finally necessary to try the title at law, the bill prayed an account of rents and profits and delivery of the deeds belonging to the descended estates. In the course of pursuing and obtaining this discovery, it came out, though at first denied, that Sir John Thornycroft the son made a will, and devised to Forster; and it also came out by the last answer, that Forster had reconveyed to Elizabeth Handasyde in fee. It also came out, that the lands in question were comprized in an old settlement of 1722, and in a term of five hundred years thereby created for raising annuities, which had been satisfied, but the term remained outstanding, subject to which term Sir John Thornycroft the son took the lands in question. So that it was undoubted, that if there were no other circumstances in the case, the court had a jurisdiction, and should have decreed, upon the hearing of the cause, that the bill should be retained, with liberty for the plaintiff to bring an ejectment, that the defendant the devisee should not set up the term of five hundred years, and, in case the will of Sir John Thornycroft the son should be produced in evidence, that the defendant should likewise produce at the trial the deed of 1745, and that all further directions should be reserved till after the trial was had. That the only circumstances in the present case which differed it from the above, and which were the grounds of dismissing the bill, were, that in Hilary term 1773, the next after the death of Elizabeth Handasyde, the devisee levied a fine of all the devised estates, and also of the descended estates, having entered upon both immediately after her death. The original bill was filed in 1776. The five years non-claim run from Michaelmas 1778. In October 1781, the answer came in which discovered the deed of 1745, and admitted it to have been in the hands of the devisee from the time of the death

of Elizabeth Handasyde; and the answer also stated and insisted upon the fine and nonclaim. The cause was heard the 1st July 1783, at which time the court should have added to the directions above mentioned, that the fine and nonclaim should not be insisted upon at law, instead of dismissing the bill upon the ground of such fine and nonclaim only, as a nonclaim had elapsed pending the suit in Chancery, and therefore the court [100] ought not to have permitted the defendant to take advantage of it at law.

For a court of equity will not suffer the rights of the parties to be changed, pending the suit in a case within the jurisdiction of the court, and where the court can relieve; therefore if a trust-estate is before the court in a *lis pendens*, and a sale be made of the trust estate, without actual notice of the cause to the purchaser, the court at the hearing will decree the relief against the purchaser, which the plaintiff in the cause was entitled to. But it is otherwise after the cause is at an end, for then the party must have express notice of a decree, as he must of a judgment at law, to affect him with equity. So in the case of a fine, equity will not suffer a nonclaim completed, pending the cause, to prevent the court from doing equity; otherwise, as Lord Hardwicke expressed it in 2 *Atk.* 390, it will trip up the jurisdiction of this court, if you will not allow (where it is a proper matter of equity) the bill to prevent the running of a fine. So where a court of equity has directed an action, the defendant has been restrained from setting up the statute of limitations which has run pending the suit in equity. That the present was like the case of *Dormer and Fortescue*, where the plaintiff's title accrued in 1729, under a settlement in the hands of the defendant. A fine was levied in Easter term 1730, by the defendant then in possession. In 1731 the plaintiff brought an ejectment. In 1732 he filed his bill, praying a discovery and production of the settlement, and an account of rents and profits. On the 28th, 29th, and 30th of April 1735, the cause was heard before Lord Talbot, who retained the bill, with liberty to bring an ejectment, and directed the deed to be produced before the master for inspection, and also upon the trial; and the defendant was restrained from setting up a term in the deed, prior to the plaintiff's estate, to nonsuit him; and ordered it should be admitted to be extinguished. After the decree, the cause was tried at bar in Michaelmas term 1735, and a special verdict was found; upon which one point reserved was, whether an actual entry was necessary to avoid the fine; which being held to be necessary, judgment was entered for the defendant. An actual entry was made on the 10th November 1735, and the plaintiff brought a writ of error in parliament upon the judgment, but the judgment was affirmed 16th May 1738. A new ejectment was brought as of Michaelmas 1735, laying the demise 20th of November 1735, which was tried at bar in Michaelmas term 1738, and a special verdict found; upon which judgment was given for the plaintiff in Michaelmas term 1740, and affirmed in parliament 23d February 1740. A supplemental bill was brought 31st of May 1741, stating the recovery at law, and praying an account of rents and profits. The defendant demurred, as the mesne profits were recoverable at law, and pleaded the statute of limitations to the account of rents. The court over-ruled both the demurrer and the plea 21st of March 1741-2. And 28th of April 1744, the cause [101] came on upon the equity reserved by Lord Talbot's decree, and on the supplemental bill; and on the 2d June following the court decreed an account of rents from the time when the plaintiff's title accrued. So that notwithstanding a fine was levied before the bill filed, and the cause was depending fourteen years, yet the justice of the plaintiff's case prevailed.

The will of Sir John Thornycroft the younger was disclosed to Henshaw Thornycroft by a bill filed against him by Forster's heirs, in Hilary 1778; but no mention was made of it to the appellants or their agents, until a few days before the Autumn assizes 1778. At the time when the solicitor for Henshaw Thornycroft first applied to the solicitor for the plaintiffs in the ejectment, and threatened to set up the will of Sir John Thornycroft, which caused his countermanding the notice of trial, the five years had not run upon the fine; and if Henshaw Thornycroft's agent had then also discovered the deed of 1745, the application made by the defendant's agent would not have prevented the trial of the title at law. But as such deeds were kept secret, and the defendant's agent declared he would produce Sir John Thornycroft's will upon the trial, and thereby shew the right out



of Mrs. Handasyde, it would have been idle to have gone on in the ejectment, upon a certainty of being nonsuited. Before the lessors of the plaintiff in the ejectment, or their attorney, knew or had any information of the deeds of 1745, which were for the first time discovered in 1781, the five years had run upon the fine; so that by means of the conduct of Mr Thornycroft and his solicitor, the plaintiffs were deprived of every means of trying their right to the estates, which conduct alone fully authorized a court of equity to restrain the defendants from setting up the fine, or deriving any benefit under the same, to the prejudice of the appellants.

On the other side it was insisted (J. Mansfield, J. Scott), that the title of the appellants, if they ever had any, was a clear title at law; it needed no assistance of a court of equity to bring it to a fair discussion; and accordingly the mother of the appellant Pincke, and the appellant Thornycroft, brought an ejectment, which might have been fairly tried without any such assistance; and there was now no obstacle to a legal determination of the rights of the appellants, except the fine. That there was no ground for a court of equity to interpose, to remove the legal bar created by the fine. It was apprehended that the farm at Newington was devised by the will; but, supposing the contrary, there was not in this case any circumstance which could give a court of equity a controul over the legal title of the respondents; nothing which could form an obligation upon their conscience not to set up the fine. The appellants attempted to impute fraud to Mr. Thornycroft, or his solicitor Mr. White; but the bill did not state such a case as warranted the imputation, much less was it made out in proof. A fine is matter of record open to the inspection of every one; the legislature has given it an operation to bar all claims not asserted in due time, and it is therefore the duty of every person having a [102] claim, to inform himself whether there may be such an impediment to the assertion of it. Not disclosing to an adversary that a fine has been levied, which may in time be a bar to his claim, cannot be deemed a fraud. It was endeavoured, therefore, to give to the conversation between Mr. White, and the solicitor for the adverse parties in the ejectment, of which there was no evidence but the answers, such a turn as might make it appear something like a fraud. But Mr. White merely mentioned a claim made by persons to whose apparent title he was then unable to give any answer, and which had therefore excited in his mind much apprehension for his client's title: and what he communicated was not only true, but according to the information he then had; it was the whole truth, though a subsequent accidental discovery put an end to this alarming claim, which, if it had prevailed, was superior to the title of the heirs, as well as of the devisee, of Mrs. Handasyde. It was true, the heirs countermanded their notice of trial of the ejectment; but their own judgment decided their conduct. It was asserted by the appellants, that if the ejectment had proceeded to trial, the fine must have been discovered, and five years not having then elapsed from the last proclamation, the heirs might have entered to avoid the fine. But this assertion was not founded in truth; the will of Sir John Thornycroft the son would have been a sufficient defence, and there would have been no necessity for setting up the fine. The order of dismissal expressed that the bills were dismissed without costs, because the respondents and their solicitor (who was very improperly made a defendant to the supplemental suit) did not desire costs; the appellants having accepted this favour at the hands of the respondents, and yet appealing against the order, this seemed to be a case in which exemplary costs ought to attend the affirmance of the order.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be reversed. \*\*And it was further ORDERED and ADJUDGED, that the bill should be retained for twelve months; and that the plaintiffs should be at liberty in the mean time to bring such action or actions at law as they should be advised, etc. And it was further ORDERED and ADJUDGED, that the said Edward Thornycroft should not insist in such action or actions, or on any trial to be had thereon, on the *fine* mentioned in the pleadings, or on any nonclaim which had ensued thereon, or on any other fine or nonclaim which might have incurred since filing the original bill. Cruise on Fines, 342.\*\* (MS. Jour. *sub anno* 1785. p. 107.)

## [103] FOREIGN LAWS AND CUSTOMS.

CASE 1.—SARAH MEYNELL, Widow, and others,—*Appellants*; GEORGE MOORE,—*Respondent* [27th March 1727].

[Mew's Dig. vi. 1428: See 1 Dick. 30: 3 Atk. 409.]

[By the laws of Antigua, all deeds relating to estates within that island must be registered there, in order to make them effectual.—And by the same laws, all the stock, utensils, erections, and buildings upon a plantation, are subject and liable to the payment of debts, except negroes and other slaves, which are deemed to be affixed to the freehold, and cannot be sold for that purpose, unless there is a deficiency of general assets.]

\*\* This case does not appear in any other book, and seems to be entirely confined to its own circumstances, and not to afford any precedent of general law.

ORDER of the Lord Chancellor partly reversed, but for the most part AFFIRMED.\*\*

Lawrence Crabb in 1690, went to the island of Barbadoes, and there intermarried with the appellant Sarah, who was one of the three daughters and coheirs of George Fletcher of that island.

The said George Fletcher died seised in fee of five messuages and one acre of land, with several negroes, and other live and dead stock in Barbadoes, of £470 per ann. and also of a plantation, messuages, and lands, with several negroes, and other live and dead stock in the island of Antigua; which, on his death, descended upon his three daughters; and two of them soon after dying without issue, the appellant Sarah became thereupon entitled to the reversion of all the said premises, expectant on the death of her mother, the widow of the said George Fletcher, and who afterwards intermarried with Francis Young.

Lawrence Crabb carried the appellant Sarah to Jamaica with him, and in 1691, embarked from thence for England; but in their passage, the ship and all her cargo was lost, they themselves narrowly escaping; and Crabb being in mean circumstances, the appellant Sarah's mother, in regard to his necessities, surrendered the plantation and premises in Antigua to the appellant Sarah; who, in 1695, went with her husband to Antigua, and took possession thereof; but finding the plantation unprovided with a sufficient stock, and in want of several necessities, Crabb [104] wrote to his correspondents in England, to send him coppers and other things necessary for the same; but not being able to procure any supply from them, and being by reason of his very low circumstances unable to procure the same himself, he and the appellant Sarah went to Barbadoes, to persuade her mother to agree that the appellant Sarah's estate there, which she was entitled to after her mother's death, might be sold, and the money arising therefrom applied in erecting proper buildings upon, and to supply and stock the plantation in Antigua. This the mother at first declined; but at last she consented to such sale, on Crabb's agreeing, that the money arising therefrom should be employed in supplying and stocking the Antigua plantation, and that then the buildings, negroes, and stock thereon, together with the plantation itself, should be settled upon the appellant Sarah and her issue.

The Barbadoes estate was accordingly sold, and the money arising by such sale laid out in supplying and stocking the Antigua estate with the necessary works, negroes, and cattle; and according to the said agreement, Crabb and the appellant Sarah, by indenture dated the 10th of April 1699, in consideration of £1200 conveyed to Thomas Lasher, his heirs and assigns, all the said plantation in Antigua, together with all the houses, out-houses, cattle, mills, edifices, and buildings thereon, and all coppers, stills, worms, utensils, and other things whatsoever thereunto belonging; and also sixty-seven negroe slaves, with their increase, together with thirty-five neat, able, working cattle, and their increase, etc. *habend'* to the said Thomas Lasher, his heirs and assigns for ever; who, by indenture, dated the 15th of the same month, for the like consideration, conveyed the said

plantation and premises back again to Lawrence Crabb and the appellant Sarah, their heirs and assigns, *habend'* to them, their heirs and assigns, to the uses, intents, and purposes following, viz. To the use of Lawrence Crabb and the appellant Sarah, for their lives and the life of the survivor; remainder to the use of the children of the appellant Sarah in fee; subject nevertheless to the payment of such portions and legacies as the appellant Sarah should by her will appoint. And these deeds were duly recorded in Antigua, according to the laws of that island.

After this transaction, the appellant Sarah and her husband Crabb came to England, where they stayed till 1708, and were very conversant with the respondent; who during all that time never made any demand upon them, until they had actually agreed for their passage back to Antigua, and put on board divers goods and merchandize, and were ready to go on board themselves: and then, when there was no time left to settle or look into accounts, the respondent arrested Crabb, and would not discharge him till he had given bond for £2500 principal money, wherein the appellant Sarah was made to join.

In March 1709, Lawrence Crabb died intestate at Antigua, leaving the appellant Sarah his widow, and the appellant Isaac [106] their eldest son, about 16 years old, and six other children; but he left no real estate whatever behind him, save what was so settled as aforesaid. Whereupon the governor of the island, as ordinary, appointed Colonel Codrington and others to inventory and appraise his personal estate, who did accordingly truly inventory and appraise at their full value, all the intestate's personal estate, save only four negroes of his purchase, which were wholly unprofitable, and rather a charge than a benefit to the plantation, and three sucking children reckoned of no value, which were therefore omitted; the value of which personal estate, as so appraised, amounted to £440.

Soon after Crabb's death, the appellant Sarah intermarried with Richard Meynell, her second husband; whereupon one Joshua Redhead brought his action, and recovered judgment against the appellant Sarah and the said Richard Meynell, for £484 1s. 4d. and Isaac Ryall in like manner recovered judgment against them for £66. These two sums the appellant Sarah and Meynell actually paid; and the appellant Sarah, during her widowhood, also paid £137 7s. 1½d. for the funeral expences of Lawrence Crabb, and several other of his debts; so that she actually paid in discharge of the intestate's debts £150 and upwards, beyond the amount of his assets.

In Michaelmas term 1716, the respondent preferred his bill in the court of Chancery against the appellants, and the said Richard Meynell, setting forth, that by indenture dated the 1st of November 1692, from Lawrence Crabb and the appellant Sarah to the respondent, and by a fine levied pursuant thereto, they conveyed to the respondent and his heirs, all the said premises in Barbadoes and Antigua, together with all the negroe slaves and plantation utensils, and all the appellant's estate in the said island; in trust for the appellant Sarah for her life, and after her death, for the said Lawrence for his life; and after both their deaths, then as to one moiety, in trust for the heirs of the body of the appellant Sarah, and for want of such issue, to the appellant Sarah in fee; and as to the other moiety, in trust for the said Lawrence Crabb, and his heirs for ever; and that this deed and fine were duly registered in Barbadoes and Antigua.—That in 1706, Lawrence Crabb and the appellant Sarah became bound to the respondent in a bond of £5000 penalty, conditioned for payment of £2500 by annual instalments of £200. That Crabb was further indebted to him by another bond, dated the 5th of May 1708, in £218 4s. 6d. and in near £7000 above the principal and interest due on those two bonds; and therefore prayed that the appellant Sarah, and her then husband Richard Meynell, might account with the respondent for Lawrence Crabb's personal estate, and pay what was due to him for principal and interest; and in case such personal estate was not sufficient, that the reversion of the moiety of the premises in Barbadoes and Antigua, expectant on the appellant Sarah's death, and all other [106] the said Lawrence Crabb's real estate of which he died seised, might be sold, and the respondent thereout paid his said debts with interest.

To this bill the appellant Sarah, being in England, answered alone, her husband Meynell being then in Antigua; and by her answer insisted, *inter alia*, that the conveyance of November 1692, and the fine set up by the respondent, if any such there

were, were executed and levied by her during her infancy and coverture, and were not registered and recorded in the proper offices in Antigua, as several acts of that island direct; and that for want of such registry, the same could not operate upon, or bind any estate there: she further insisted, that the bond for £2500 was, as to her, void, she being then a feme covert, and entering into the same under the coercion of her husband; that the buildings, works, negroes, and cattle on the said plantation, at Lawrence Crabb's death, save only twelve negroes and three children, were part of, or the produce or increase of those left her by her father, or erected and purchased by the monies arising out of her and her mother's estate in Barbadoes, and other negroes that came to her on her mother's death; and that no part of the said buildings or works were erected, or any part of the said negroes or cattle bought at the expence or with the money of Lawrence Crabb, save only the said twelve negroes and three children; that he never had money of his own to purchase the same with, and that he never did, or could lay out any money in erecting works, or replenishing the plantation at Antigua with fresh stock, or any other necessities; and therefore she insisted, that she was entitled to the same, together with the plantation, for her and her children's benefit, freed and exempted from the debts of the said Lawrence Crabb; and she further insisted, that several consignments had been made to the respondent, in discharge of what was due to him.

Issue being joined, and witnesses examined on both sides, the cause was heard before the Lord Chancellor Macclesfield, on the 8th of May 1719: when his lordship declared, *inter alia*, that as to the real estate of the appellant Sarah, of which a fine was levied and a conveyance, as to one moiety thereof, made to Lawrence Crabb her former husband; it appeared that by the laws of Antigua, all deeds relating to estates within that island, must be registered there, to make them effectual; and that the deed of settlement under which the respondent claimed to make one moiety of the estate liable to his demands, not being registered there, as the said laws required, was thereby become void; and did therefore order, that the respondent's bill, as to such part thereof, as sought to make a moiety of the real estate liable to his demands, should stand dismissed; but as to the personal estate of Lawrence Crabb, his lordship ordered and decreed, that the appellant Sarah should come to [107] an account for the same before the master, who in taking the account, was to make the appellant all just allowances; and the master was also to take an account, and see what Lawrence Crabb was indebted to the respondent, and what the respondent had received towards satisfaction thereof; and what the master should find and certify to be due to the respondent from the said Lawrence Crabb, over and above what he had received towards satisfaction thereof, it was ordered and decreed, that the same should be paid the respondent out of the estate of the said Lawrence Crabb, which should appear to be remaining in the appellant's hands, after all just allowances made her; and the consideration of costs was reserved till after the master's report.

On the 1st of August 1723, the master made his report, and thereby certified, that he found by the proofs in the cause, and the appellant Sarah's answer, that Lawrence Crabb died possessed of a personal estate, consisting of several negroes, buildings, cattle, household stuff, and other things, the particulars and value whereof he annexed to his report by way of schedule, amounting to £4050 7s. 6d. Antigua money; and that the same, upon his death, came to the hands of the appellant Sarah; and which £4050 7s. 6d. was at the time of Lawrence Crabb's death in value £2700 5s. sterling, whereout the master had allowed the appellant £37 sterling for funeral charges, which being deducted out of the £2700 5s. there remained of the assets of Crabb come to the appellant's hands £2663 5s. And the master further certified, that he found due to the respondent from Crabb, on two bonds, and for interest due thereon to the 25th of June 1723, and by money paid by the respondent for Crabb's use and by his order, several sums which he particularly mentioned in the second schedule to his report, amounting to £4416 15s. 2d. but the respondent having admitted before the master to have received of Crabb, in his lifetime, and by goods consigned by him to the respondent, and which came to the respondent's hands after Crabb's death, £288 12s. 9d. the particulars whereof he set out by way of third schedule to his report, which being deducted out of the said £4416 15s. 2d. there then remained due to the respondent on the 25th day of June 1723, £4128 2s. 5d.

To this report the appellants took several exceptions; the first of which was, for that the master had in the first schedule to his report, charged the appellant with the several matters and things following, as part of the personal estate of Lawrence Crabb; whereas by the laws and customs of the island of Antigua, the same belonged to and were part of the freehold and inheritance of the appellants, and ought to go along with the same, being by the decree, and by the settlements therein recited, discharged from the respondent's demands; viz.

|  | £    | s. | d. |
|--|------|----|----|
| [108] A wind mill erected . . . . .                                    | 600  | 0  | 0  |
| Seven large coppers . . . . .  | 200  | 0  | 0  |
| Thirty-four working cattle at £20 per head . . . . .                   | 480  | 0  | 0  |
| A cattle mill, a curing house, boiling house and still house . . . . . | 200  | 0  | 0  |
| Two large stills, two worms, and two worm tubs . . . . .               | 130  | 0  | 0  |
| Sixty-eight negroes at £20 each, one with the other . . . . .          | 1360 | 0  | 0  |

And in which two last particulars, there was an overcharge both as to the number and value.

The third exception was, for that the master had not allowed the appellant Sarah the sum of £484 ls. 4d. being a debt due from Lawrence Crabb to Joshua Redhead, and for which he recovered a judgment at law, against her and her late husband Meynell; nor the sum of £66 paid to Isaac Ryall, in satisfaction of so much due from Crabb, and for which Ryall also recovered judgment at law against the appellant and her said husband Meynell, both which sums ought to have been allowed the appellant.

And the fourth exception was, for that the master had not, but ought to have allowed the appellant Sarah the sum of £137 7s. 1½d. it appearing from the proofs that she paid so much for the funeral expences of Lawrence Crabb, and for mourning for his family.

On the 18th of April 1724, these exceptions were argued before the Lord Chancellor King; when his Lordship was pleased to over-rule them all, and confirm the master's report *in toto*.

The appellants therefore appealed from this order, and on their behalf it was argued (C. Talbot, N. Fazakerley), that the buildings, works, coppers, stills, etc. mentioned in the first exception, were the freehold of the appellant Sarah, and part of, or belonging to her plantation, as to which the respondent's bill was dismissed; and that the same, together with the negroes and cattle in this exception also mentioned, were fully proved in the cause either to have been left the appellant Sarah by her father, or to have been erected and bought in with the monies raised by sale of other part of her real estate, and annexed to her plantation in Antigua, subject to a trust to her for her life, and afterwards for the benefit of her children; according to the agreements entered into for that purpose, previous to the sale of the Barbadoes estate. Besides, it was nowhere proved, that any of these negroes, cattle, or stock, were bought by Lawrence Crabb; on the contrary, it was fully in proof, that he never was in circumstances sufficient to purchase the same. Should it be objected, that by an act of assembly passed in Antigua, it is enacted, "That in case any person or persons, tenants for life or will, shall erect or put up any work, such as mills, coppers, or stills, for the improving his interest, all heir or heirs, or his or their representatives, shall pay the value of such mills or coppers, at appraisements, in twelve months; any law or [109] usage to the contrary notwithstanding:" that under this act, the buildings and works in question, were to be considered as personal estate of Lawrence Crabb: that negroes and cattle, though real estate to all other purposes, were personal estate as to the payment of debts; and that therefore, the report and order appealed from were right in these particulars: it might be answered, that this act was not passed until the 18th of June 1702; whereas it was fully in proof, that all the works in question were erected prior to that time, and the act had no retrospect whatsoever; but if it had, it only extended to mills and coppers erected or put up at the proper expence of the persons erecting them; but in the present case, the works were erected and put up at the expence of the appellant Sarah and her mother, being paid for out of the money arising from the sale of their real estate in Barbadoes; and therefore no part of Lawrence Crabb's

estate. As to the third exception, it was insisted, that the appellant Sarah ought to have been allowed the two sums therein mentioned, as being so much really paid by her and her husband Meynell, out of the assets of Lawrence Crabb, in discharge and satisfaction of debts really due from him, and having been actually recovered from her by due course of law, as his administratrix; and therefore the same ought to have been considered as included in the just allowances, which by the decree were directed to be made. But should it be objected, that these being simple contract debts, were of an inferior nature to the respondent's, and that the appellant Sarah ought not to have applied her intestate's assets in discharge of them, until all debts of a superior nature were first satisfied; it was answered, that these sums were recovered by due course of law, the respective creditors having duly obtained judgments for the same, as was fully proved by the respondent's own witnesses. Besides, the appellant Sarah could not give the respondent's bonds in evidence in Antigua, so as to prevent these judgments being obtained against her; and therefore she ought to be allowed whatever she had been obliged to pay under such circumstances. And as to the fourth exception, the appellant ought surely to be allowed the whole of the money therein mentioned, the same having been actually expended by her in and about the funeral of her husband Lawrence Crabb, and was but suitable to his condition; he being at the time of his death a member of the council of Antigua. It was therefore hoped, that the order appealed from would be reversed, and the exceptions allowed.

On the other side it was contended (P. Yorke, T. Lutwyche), that the goods and things mentioned in the first exception, were by the laws and customs of Antigua, subject and liable to the payment of debts; and that they were made, erected, found, and provided by Lawrence Crabb, during his intermarriage with the appellant Sarah, he being, by virtue of such marriage, and of his having issue by her, tenant for life of the plantation; consequently they were part of [110] the stock and utensils provided by him, and ought to be considered as part of his estate for the payment of his debts. That these effects were not discharged from the respondent's demands, either by the decree made in the cause, or by the settlements therein recited; such settlements being voluntary, and made after marriage. For by an act of assembly made at Antigua on the 21st of July 1692, it is enacted, "That all negroe and other slaves, after the date of that act, should be inheritance and affixed to the freehold, and the widow capable of being endowed thereof; provided always, that any executor or administrator might inventory the said negroes, but not take them into his custody; to the intent, that if there should not be sufficient goods and chattels to pay the deceased's debts, then the said negroes were liable to be taken for payment of such debts, and be chattels for that purpose, and not otherwise." That the debt of £484 1s. 1d. due from Lawrence Crabb to Redhead, and the other debt of £66 due to Ryall, were due on simple contract only, and so ought not to have been paid in a due course of administration, before debts by specialty and of a superior nature; the payment therefore of such debts by the appellant Sarah, was a misapplication of her husband's assets, for which she ought to be accountable. That as Lawrence Crabb, according to the allegation of the appellant Sarah, died insolvent, there was no manner of reason to allow her £137 7s. 1½d. for his funeral and her mourning, to the loss and prejudice of his just creditors; and that she had the less reason to complain of not having a sufficient allowance for her husband's funeral, when the master had actually allowed her £37 on that account, which was more than he ought to have done. And therefore it was conceived, that the order made on arguing the exceptions was just, and according to the rules of equity, and would consequently be affirmed with costs.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the order complained of as over-ruled the appellant's third exception, should be reversed; and that the said exception should be allowed; and that the master's report should be varied according to this judgment. And it was further ORDERED and ADJUDGED, that the said order, as to the appellant's other exceptions, should be affirmed. (Jour. vol. 23. p. 88.)

[111] CASE 2.—DAVID OGDEN,—*Plaintiff*; GEORGE FOLLIOTT,—*Defendant* (in Error) [25th February 1792].

[Mew's Dig. viii. 324, 326. See *Huntington v. Attrill* (1893), A.C. 150, 156: 6 M. and S. 99.]

\*\* A. and B. being inhabitants of the United States of America, while those states were colonies of Great Britain, and before the rebellion of them as colonies, B. executes a bond to A.—During the rebellion, after the declaration of independence by the American Congress, but before the independence of America was acknowledged by Great Britain, both parties are attainted; their property confiscated, and vested in the respective States of which they were inhabitants, by the legislative acts of those States then in rebellion; and a fund provided for the payment of the debts of B.—Afterwards the independence of America is acknowledged by Great Britain.—Under all these circumstances A. *may* maintain an action on the bond against B. in England.

JUDGMENT of the Court of King's Bench (affirming the judgment of C. P.)  
AFFIRMED.

Though all these judgments appear unanimous, the two former, and perhaps all three of them, were given in some measure upon different grounds: but it appears on the two first decisions to be a principle not judicially controverted, that “the *penal laws* of one country cannot be taken notice of, to affect the laws and rights of citizens (or subjects of such country becoming citizens) of another; the penal laws of foreign countries being strictly local, and affecting nothing more than they can reach, and can be seized by virtue of their authority.” See 3 *Term Rep.* 733, 5: 1 *H. Black. Rep.* 135.

The first report of the case, as argued originally in C. P. is given (and said by Mr. Erskine, on the best authority, to be accurate, see 3 *Term Rep.* 731. n.) in *H. Black. Rep.* 123. There it appears to have been the opinion of that Court, 1st, That the several acts of attainder and confiscation being passed by sovereign independent States, did not disable A. from suing, nor exempt B. from being sued in England. In this part of the judgment the Court of C. P. whose opinion was delivered by Lord Loughborough, apparently considered the states of America as independent at the time of the acts of attainder, *by relation* to the *subsequent* acknowledgment of their independence; a sentiment by no means acceded to as law by the Court of K. B. and pointedly denied by Lord Kenyon, in giving his opinion.

2dly, The Court of C. P. determined that it was not a good plea in bar of the action at law, that an ample fund was provided out of the effects of B. in America for the payment of his debts, to which A. *might* and *ought* to have resorted; and out of which he might have been paid; though it might be a good reason for relief in equity.—And on this latter ground an *injunction* had been granted by the Court of Chancery, to prevent execution being taken out on a judgment, obtained in an action at law on a promissory note, the circumstances of which resembled those of the present case. *Wright v. Nutt & al.* 1 *H. Black. Rep.* 136.

But the judgment of the Court of K. B. though it affirmed that of C. P. appears to have been given, on the principle that the *acts of confiscation* passed in the several States of America after their declaration of independence, and before the treaty of peace by which Great Britain acknowledged their independence, *are considered as a nullity* in the courts of law in England. 3 *Term Rep.* 726-735. And in the case of *Dudley v. Folliott*, in the Easter term preceding, (see 3 *Term Rep.* 584,) the Court having no doubt about the law, and thinking it would lead to the discussion of improper topics, *would not permit it to be argued*. That was the case of a covenant in a conveyance of lands in America, made during the time of the rebellion, (April 1780,) “that the grantor had a legal title, and that the grantee might peaceably enjoy, etc. without the least interruption, etc. of the grantor and

his heirs, or of *any other person* whomsoever." The Court were of opinion that this covenant was not broken by the States of America seizing the lands, as forfeited for an act done previous to the conveyance, notwithstanding the subsequent acknowledgment of independence.

Mr. Justice Buller, in allusion to part of the argument in the present case of *Ogden v. Folliott*, when before the Court of K. B., concluded his opinion with the following observations, which may perhaps be particularly applicable to [112] future cases: "There is, said he, a wide distinction between questions of property between one subject and another, and questions arising on the law of attainder between the Crown and a subject. And I shall never agree in extending the same rule of construction, which obtains in the former instance, to the latter case. It would be attended with peculiarly serious consequences in the present state of Europe; since then the property of foreigners, who are daily resorting for refuge to this country from confiscations at home, would not be protected against the designs of artful men who could gain possession of it by any means." 3 *Term Rep.* 734.\*\*

3 *Term Rep.* 726: 1 *H. Black. Rep.* 123.

This was an action of debt, brought by the defendant in error, in the court of Common Pleas at Westminster, against the plaintiff in error, on an obligation dated 10th day of October 1769, given to said defendant at New-York in America, by Lewis Morris, Richard Morris, and the plaintiff in error, who was security in the said obligation for the said Lewis and Richard, and for their proper debt. wherein the said obligees were jointly and severally bound to pay to the said defendant in error the sum of four thousand pounds current money of the province of New-York, conditioned for the payment of the sum of two thousand pounds current money as aforesaid, on the 10th day of October then next ensuing, with the lawful interest thereof.

The plaintiff in error pleaded five several pleas in bar to the action; the two first were pleas of payment by several of the obligors, which he failed to support, by reason of his being disappointed in obtaining evidence he expected from America: to the three other pleas, the defendant in error demurred generally, and the plaintiff in error joined in demurrer, which were argued and heard before the said court of Common Pleas, and judgment was rendered for the defendant in error; which judgment was afterwards removed by writ of error before the court of King's Bench at Westminster, which court also rendered judgment for the defendant in error; but differing in opinion with the court of Common Pleas on the principal grounds upon which that court founded their judgment.

The proceedings in the cause appear by the record, which was as follows:

"Pleas inrolled at Westminster, before the right honourable Alexander Lord Loughborough, and the rest of his brethren, justices of his majesty's court of Common Bench of Hilary term, in the twenty-eighth year of the reign of our sovereign Lord George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, etc.

"Pleas before our lord the king, at Westminster, of the term of Easter, in the 30th year of the reign of our sovereign Lord George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and in the year of our Lord 1790.

"Middlesex to wit—David Ogden, late of Newark, in the county of Essex, in the province of East New Jersey, Esquire, was summoned to answer George Folliott, of a plea, that he render to him two thousand two hundred and fifty pounds, which he owes to and unjustly detains from him, etc. and [113] thereupon the said George, by Thomas Meggison, his attorney, complains, that whereas the said David, on the 10th day of October, in the year of our Lord 1769, at New York, to wit, at Westminster, in the county of Middlesex aforesaid, by his certain writing obligatory, sealed with his seal, acknowledged himself to be held and firmly bound to the said George, in the sum of £4000 current money of the province of New York, which said £4000 current money of the province of New York, at the time of making the said writing obligatory, did amount to two thousand two hundred and fifty pounds of lawful money of Great Britain, to be paid to the said George, when



he the said David should be thereunto required: nevertheless, the said David, although often requested, hath not paid the said sum of £4000 current money of the province of New York, nor the said £2250 of lawful money of Great Britain, or any part thereof, to the said George; but to pay the same to the said George, he the said David hath hitherto wholly refused, and still doth refuse, to the damage of the said George of £4000, and therefore he brings suit, etc. And the said George brings here into court the aforesaid writing obligatory, which testifies the debt aforesaid in form aforesaid, the date whereof is the same day and year aforesaid, etc.

"And the said David Ogden, by Thomas Pearson his attorney, comes and defends the wrong and injury, when, etc. and craves oyer of the said writing obligatory, and it is read to him in these words following; that is to say, Know all men by these presents, that we Lewis Morris, of the county of West Chester, in the province of New York, gentleman; Richard Morris, of the city of New York, attorney at law; and David Ogden, of Newark, in the county of Essex, in the province of East New Jersey, Esq. are held and firmly bound unto George Folliott, of the city of New York aforesaid, in the sum of £4000 current money of the province of New York, to be paid unto the said George Folliott, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, we do bind ourselves, and each of us, our and each of our heirs, executors, administrators, and every of them jointly and severally, firmly by these presents; sealed with our seals. Dated in New York aforesaid, the 10th day of October, in the year of our Lord 1769.—He also prays oyer of the condition of the same writing obligatory, and it is read to him in these words following; that is to say, The condition of the above obligation is such, that if the above-bounded Lewis Morris, Richard Morris, and David Ogden, or either of them, their or either of their heirs, executors, or administrators, or any of them, shall and do well and truly pay or cause to be paid to the said George Folliott, his executors, administrators, or assigns, the just and full sum of £2000 current money as aforesaid, on or before the 10th day of October next ensuing, with lawful interest thereof, then the above ob-[114]-ligation to be void, otherwise to remain in full force and virtue.

"Which being read and heard, the said David says, that the said George ought not to have or maintain his said action thereof against him the said David; because he says, that the said Lewis Morris and Richard Morris named in the said writing obligatory and condition, on the said 10th day of October, in the year of our Lord 1769, at New York aforesaid, to wit, at Westminster aforesaid, in the said county of Middlesex, and as their act and deed delivered the said writing obligatory to the said George along with the said David; and that the said Lewis Morris and Richard Morris, after the said 10th day of October, mentioned in the said condition, and before the suing out of the original writ of the said George, to wit, on the 1st day of January, in the year of our Lord 1785, at Westminster aforesaid, in the said county of Middlesex, paid to the said George, the said principal sum of £2000 current money of the province of New York, in the said condition mentioned, with all interest then due for the same, according to the form of the statute in such case made and provided; and this the said David is ready to verify: wherefore he prays judgment, if the said George ought to have or maintain his said action thereof, against him the said David, etc.

"And for further plea in this behalf, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, the said David says, that the said George ought not to have or maintain his said action thereof against him the said David, because he says, that he the said David, after the making the said writing obligatory, and after the said 10th day of October, mentioned in the said condition of the said writing obligatory, and before the suing out of the original writ of the said George, to wit, on the 1st day of January, in the year of our Lord 1785, at Westminster aforesaid, in the said county of Middlesex, paid to the said George the said principal sum of £2000 current money of the said province of New York, in the said condition mentioned, with all interest then due for the same, according to the form of the statute in such case made and provided; and this the said David is ready to verify: wherefore he prays judgment, if the said George ought to have or maintain his said action against him, etc.

"And for further plea in this behalf, by leave of the court here, for this pur-

pose first had and obtained, according to the form of the statute in such case made and provided, the said David says, that he the said George ought not to have or maintain his said action thereof against him, because he says, that at and before the time of making the said writing obligatory, the said George, Lewis, Richard, and David, were severally and respectively persons residing within the United States of America, in parts beyond the seas, and continued so resident there, until, and upon, and after the 22d day of October, in [115] the year of our Lord 1779, to wit, at Westminster aforesaid. And the said David further says, that after the making the said writing obligatory, and after the said 10th day of October, in the said condition mentioned, to wit, on the said 22d day of October, in the year of our Lord 1779, the said sum of money, mentioned in the said condition then remaining, and being due and payable, and wholly unpaid to the said George, and the said writing obligatory, and all the money due thereon being the property of, and belonging to the said George, in foreign parts, to wit, at New York aforesaid, in America, and the said George then residing within the aforesaid state of New York, then being one of the United States of America, by a certain law of the said state of New York, then and there, to wit, on the said 22d day of October, in the year of our Lord 1779, at the state of New York aforesaid, in America, to wit, at Westminster aforesaid, made, entitled, "An act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this state, and for declaring the sovereignty of the people of this state in respect to all property within the same;" the said George, by the name of George Folliott, was declared to be *ipso facto* attainted of the offence of adhering to the enemies of the said state of New York, and all and singular the estate both real and personal, held and claimed by him the said George, on the said 22d day of October, in the year of our Lord 1779, being the day of passing that law, was, and was thereby declared to be forfeited to and vested in people of the said state of New York, which said law of the said state of New York, from thenceforth hitherto hath been and still is in full force and effect; and the said writing obligatory, and all the money due thereon, on the said 22d day of October, in the said year of our Lord 1779, thereby became and was, and from thenceforth hitherto hath remained and continued, and still is forfeited to and vested in the people of the said state of New York; to wit, at Westminster aforesaid, in the said county of Middlesex; and this the said David is ready to verify: wherefore he prays judgment, if the said George ought to have or maintain his said action thereof against him, etc.

"And for further plea in this behalf, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, the said David says, that the said George ought not to have or maintain his said action thereof, against him the said David; because he says, that at the time of making the said writing obligatory, and long before, the said George, and also the said Lewis, Richard, and David, were severally and respectively resident within the United States of America, in parts beyond the seas; and that the said writing obligatory was there executed by them the said Lewis, Richard, and David, and delivered to him the said George at New York aforesaid, in the said United States of America, in parts beyond the seas; and that the said sum of £2000 cur-[116]-rent money of New York, in the said condition mentioned, for the securing whereof, the said writing obligatory was given and executed, was for a debt due from the said Lewis and Richard to the said George; and for the payment whereof to the said George, the said David joined in the said writing obligatory, only as a security for the said Lewis and Richard, to wit, at Westminster aforesaid. And the said David further says, that at the time of making the said writing obligatory, and from thence continually, until the attainder of him the said David, and forfeiture of his estate hereafter mentioned, he the said David was resident in the state of New Jersey, being one of the United States of America; and was, during all that time, in possession of real and personal property within the said state of New Jersey, of much greater value than was sufficient to have paid and satisfied the said sum of £4000 current money of New York in the said writing obligatory mentioned, and all other debts due and owing by the said David to any person or persons whomsoever, to wit, at Westminster aforesaid. And the said David further says, that he being resident and possessed of property within the state of New Jersey, as

aforesaid, afterwards, to wit, on the second Tuesday in January, in the year of our Lord 1779, within the state of New Jersey aforesaid in America, was, according to the laws and statutes of the said state of New Jersey, attainted of adhering to the enemies of the said state of New Jersey; and thereby all his real and personal estate within the said state of New Jersey became and were forfeited, and vested in the said state of New Jersey for ever, to wit, at Westminster aforesaid; and it was provided by the said laws and statutes of the said state of New Jersey, that the said real and personal estates of the said David, so forfeited and vested in the said state of New Jersey as aforesaid, should be, and they accordingly were, by the said laws and statutes of the same state, made liable in the first place to the payment of all debts of and demands against the said David; such demands being made according to the terms prescribed by the several laws and statutes of the said state of New Jersey. And the said David further says, that in consequence of the said attainer of him the said David as aforesaid, all the real and personal estate of him the said David, within the said state of New Jersey, were afterwards, to wit, on the 15th day of January, in the year of our Lord 1779, in New Jersey aforesaid, seized by the said state of New Jersey, for the benefit of the said state, to wit, at Westminster aforesaid; and that the real and personal estate of him the said David, within the said state of New Jersey, at the time of his attainer as aforesaid, and also at the time of the said seizure thereof, by the said state of New Jersey, were of greater value than was sufficient to pay the said sum of £4000 current money of New York, mentioned in the said writing obligatory, and all other debts and demands, due and owing, by and which any person or persons had against the said [117] David, or his estate, to wit, at Westminster aforesaid, whereof the said George then and there had notice. And the said David further says, that after the said attainer of him the said David as aforesaid, and the said forfeiture and seizure of his said real and personal estates, the said George was at liberty, and might, according to the laws and statutes of the said state of New Jersey, have made demand of and from the said state of New Jersey, of the said sum of money due to him by virtue of the said writing obligatory, against the said real and personal estates of the said David, so forfeited and vested in the said state of New Jersey, as aforesaid, and might thereout have been satisfied and paid his said debt, to wit, at Westminster aforesaid; and this the said David is ready to verify: wherefore he prays judgment, if the said George ought to have or maintain his said action thereof against him the said David, etc.

“And for further plea in this behalf, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, the said David says, that the said George ought not to have or maintain his said action against him the said David; because he says, that at the time of making the said writing obligatory, and long before the said George, and also the said Lewis, Richard, and David, were severally and respectively resident within the United States of America, in parts beyond the seas, and the said writing obligatory was there executed by them the said Lewis, Richard, David, and delivered to him the said George, in parts beyond the seas, at New York, in the said United States of America; and that the said sum of £2000 current money of New York, in the said condition mentioned, for the securing whereof the said writing obligatory was given and executed, was for a debt due from the said Lewis and Richard to the said George; and for the payment whereof, to the said George, the said David joined in the said writing obligatory only as a security for the said Lewis and Richard. And the said David further says, that at the time of making the said writing obligatory, and from thence continually until the attainer of the said David, and forfeiture of his said estate hereafter mentioned, he the said David was resident in the said state of New Jersey, being one of the United States of America, and was during all that time in possession of real and personal property within the said state of New Jersey, more than sufficient to have paid and satisfied the said sum of £4000 current money of New York, in the said writing obligatory mentioned, and all other debts due and owing by the said David, to any person or persons whomsoever, to wit, at Westminster aforesaid. And the said David further says, that he being resident, and possessed of property within the said state of New Jersey, as aforesaid, was according to the several laws and statutes of the said state of New Jersey, and by

an inquisition and judgment thereon rendered, hereafter mentioned, on the several days therein mentioned, attainted [118] of adhering to the enemies of the said state of New Jersey; and thereby all his real and personal estates, within the said state of New Jersey, became and were forfeited, and vested in the said state of New Jersey for ever; to wit, One act, passed October 4th, 1776, intituled, 'An act to punish traitors and disaffected persons:' one other act, passed the 5th June 1777, intituled 'An act of free and general pardon, and for other purposes therein mentioned:' one other act, passed the 18th of April 1778, intituled, 'An act for taking charge of and leasing the real estates, and for forfeiting the personal estates of certain fugitives and offenders; and for enlarging and continuing the powers of commissioners appointed to seize and dispose of such personal estate, and for ascertaining and discharging the lawful debts and claims thereon:' one other act, passed on the 11th of December 1778, intituled, 'An act for forfeiting to and vesting in the said state of New Jersey, the real estates of certain fugitives and offenders, and for directing the mode of determining and satisfying the lawful debts and demands, which may be due from and made against such fugitives and offenders, and for other purposes therein mentioned.' And also by virtue of a certain inquisition, dated 8th day of June 1778, taken and made in the county of Essex, in the said state of New Jersey, by the oaths of jurors summoned for that purpose, thereby finding that the said David Ogden had, since the 4th October 1776, and before the 5th June 1777, to wit, on or about the 24th December 1776, gone into the enemy's lines, and aided and assisted the king of Great Britain's troops, against the form of his allegiance to the said state of New Jersey, and against the peace of the said state, the government and dignity of the same; and on which judgment was entered against the said David Ogden, in the inferior court of Common Pleas for the county of Essex, and state of New Jersey aforesaid, according to the directions and mode prescribed by the aforesaid act, passed on the 18th day of April, in the year of our Lord 1778. And the said David further says, that it was provided by the said laws and statutes, and also by one other act, passed by the legislature of said state of New Jersey on the 23d December 1783, intituled, 'An act for ascertaining the value of debts due from the forfeited estates of certain fugitives and offenders, and for directing the payment of the same;' that the said real and personal estates of the said David, so forfeited and vested in the said state of New Jersey as aforesaid, should be, and they accordingly were, by the said laws and statutes of the same state, made liable, in the first place, to the payment of all debts of and demands against the said David; such demands being made according to the terms prescribed by the said laws and statutes of the said state of New Jersey. And the said David further says, that in consequence of the said attainder of him the said David, and forfeiture of his estate as aforesaid, all the real and personal estate of him the said Da-[119]-vid within the state of New Jersey, were afterwards, to wit, between the 10th day of September 1777, and the 3d August 1779, seized and sold by the state of New Jersey; and the monies arising on such sale, and also on and for several debts due to said David, by persons residing within the said state of New Jersey, were received by the same state for the said uses and purposes mentioned in the said laws and statutes of the said state of New Jersey aforesaid; and that the real and personal estates of him the said David within said state of New Jersey, at the time of his attainder as aforesaid, and also at the time of the said seizure thereof by the said state of New Jersey, were of greater value than was sufficient to pay the said sum of £4000 current money of New York, mentioned in the said writing obligatory, to wit, at Westminster aforesaid. And the said David further says, that after the said attainder of him the said David as aforesaid, and the said seizure and sale of his said real and personal estates, the said George was at liberty, and might and ought, according to the laws and statutes of the said state of New Jersey, to have made demand of and from the said state of New Jersey, of the said sum of money due to him, by virtue of the said writing obligatory against the said real and personal estates of the said David, so forfeited and vested in the said state of New Jersey, as aforesaid; and might thereout have been paid his said debt, to wit, at Westminster aforesaid; and this the said David is ready to verify: wherefore he prays judgment, if the said George ought to have or maintain his said action against the said David, etc.

S. LE BLANC."

"And the said George, as to the said plea of the said David by him first above pleaded in bar, says, that he the said George, by reason of any thing in that plea above alledged, ought not to be barred from having and maintaining his aforesaid action thereof against the said David, because he says, that the said Lewis and Richard did not pay to the said George, the said principal sum of two thousand pounds current money of the province of New York, in the said condition mentioned, with all interest due for the same, in manner and form as the said David hath above in his said plea alledged; and this he the said George prays may be inquired of by the country, and so forth. And the said George, as to the said plea of the said David by him secondly above pleaded in bar, says, that he by reason of any thing in that plea alledged, ought not to be barred from having and maintaining his aforesaid action thereof against the said David; because, he says, that the said David did not pay to the said George the said principal sum of two thousand pounds current money of the said province of New York, in the said condition mentioned, with all interest due for the same, in manner and form as the said David hath above in his said last-mentioned plea alledged; and this the said George also prays may be inquired of by the country, and so forth. And [120] the said George, as to the said plea of the said David, by him thirdly above pleaded in bar, saith, that he, by reason of any thing in that plea alledged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because protesting that, before, and at the time of making the said writing obligatory, the said George, Lewis, Richard, and David, were not severally and respectively persons residing within the said United States of America, and that they did not continue so resident there, until, and upon, and after the said twenty-second day of October, in the year of our Lord one thousand seven hundred and seventy-nine, as in the said plea is alledged for replication in this behalf, the said George says, that at the time of making of the said supposed law of the said state of New York, in the said plea mentioned, the said state was not one of the United States of America, but was one of his majesty's colonies in America then in open rebellion against his said majesty, to wit, at Westminster aforesaid; and this he is ready to verify: wherefore he prays judgment, and his said debt, together with his damages, by reason of the detaining the same, to be adjudged to him, and so forth. And the said George, as to the said plea of the said David by him fourthly above pleaded in bar, saith, that the said plea in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law to bar the said George from having and maintaining his aforesaid action thereof against the said David, to which said plea in manner and form above pleaded the said George is not under any necessity, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify: wherefore, for want of a sufficient plea in this behalf, the said George prays judgment, and his said debt together with his damages by reason of the detaining the same, to be adjudged to him, and so forth. And the said George, as to the said plea of the said David by him fifthly above pleaded in bar, saith, that the said plea in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law to bar the said George from having and maintaining his aforesaid action thereof against the said David, to which said plea in manner and form above pleaded the said George is not under any necessity, nor is he bound by the law of the land in any manner to answer, and this he is ready to verify: wherefore, for want of a sufficient plea in this behalf, the said George prays judgment, and his said debt, together with his damages by reason of the detaining the same, to be adjudged to him, and so forth.

S. LAWRENCE."

"And the said David, as to the said plea of the said George by him above pleaded by way of reply to the said plea of the said David by him first above pleaded in bar, and whereof the said George puts himself upon the country, doth so likewise: and as to the said plea of the said George by him above pleaded by [121] way of reply to the said plea of the said David, by him secondly above pleaded in bar, and whereof the said George puts himself upon the country, the said David doth so likewise: and as to the said plea of the said George, by him above pleaded by way of reply to the said plea of the said David, by him thirdly above pleaded

in bar, the said David says, that the said George, by reason of any thing by him therein alledged, ought not to have or maintain his aforesaid action thereof against him the said David, because he says, that before the making of the said law of the said state of New York, in the said third plea of the said David above mentioned, to wit, on the fourth day of July, in the year of our Lord one thousand seven hundred and seventy-six, the several colonies of New Hampshire, Massachusetts Bay, Rhode Island, and Providence plantations; Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, in America, separated themselves from the government and crown of Great Britain, and united themselves together, and were by the people of the said respective colonies in congress declared and made free and independent states by the name and stile of the United States of America; and to have full power to do all acts and things which independent states may of right do, to wit, at Westminster in the county of Middlesex: and the said David further says, that afterwards, to wit, on the said third day of September, in the year of our Lord one thousand seven hundred and eighty-three, by the definitive treaty of peace and friendship made and signed at Paris on the same day and year last aforesaid, between our lord the now king and the said United States of America; our said lord the king acknowledged the said United States to be free, sovereign, and independent states, and he treated with them as such; and by the said treaty the several laws which had been made and passed by the legislatures of the said respective states, after the declaration of independency so made by them as aforesaid, for the confiscation of the property of persons within the said respective states, were recognized and admitted to be valid: and the said David further says, that before the making of the said law of the said state of New York, in the said third plea of the said David above mentioned, to wit, on the fourth day of July one thousand seven hundred and seventy-six, and from thence continually hitherto, the said United States became and were divided from his said majesty's dominion and government, and absolutely independent thereof; and that long before, and at the said time of making the said law of the state of New York, in the said third plea of the said David mentioned, and from thence hitherto, the people of the said state hath exercised and still doth exercise sovereignty, legislation, and government within the said state of New York, separate and distinct from the legislation and government of Great Britain, and the said law of the state of New York, in the said third plea of the said [122] David mentioned, from the said time of the making thereof, hitherto hath been and still is in full force and effect, not in any way repealed, annulled, or made void, to wit, at Westminster aforesaid; and this the said David is ready to verify; wherefore he prays judgment if the said George ought to have or maintain his said action against him: and the said David says, that the said plea by him fourthly above pleaded in bar, and the matters therein contained, are sufficient in law to bar the said George from having and maintaining his aforesaid action against the said David; which said plea, and the matters therein contained, the said David is ready to verify and prove, as the court shall award; wherefore, and so forth: and the said David says, that the said plea by him fifthly above pleaded in bar, and the matters therein contained, are sufficient in law to bar the said George from having and maintaining his said action against the said David; which said plea, and the matters therein contained, the said David is ready to verify as the court shall award; wherefore inasmuch as the said George hath not answered the said plea, nor in any manner denied the same, the said David prays judgment, and that the said George may be barred from having and maintaining his said action thereof against him, and so forth.

S. LE BLANC."

"And the said George, as to the plea of the said David above pleaded by way of rejoinder to the plea of the said George above pleaded by way of reply to the plea of the said David thirdly above pleaded in bar, says, that by reason of any thing therein contained he ought not to be barred from having and maintaining his aforesaid action thereof against him, because he says, that by the said treaty, the said several laws supposed to have been made and passed by the legislatures of the said respective states, after the declaration of independency so made by them as aforesaid, for the confiscation of the property of persons within the said respective

states, were not recognized and admitted to be valid ; and this he is ready to verify ; wherefore he prays judgment, and his debt aforesaid, together with his damages occasioned by reason of that debt, to be adjudged to him, and so forth.

S. LAWRENCE."

"And the said David, as to the plea of the said George, by him above pleaded by way of surrejoinder to the said plea of the said David, by him above pleaded by way of rejoinder to the plea of the said George, by him pleaded by way of reply to the plea of the said David, thirdly above pleaded in bar, says, that by reason of any thing in the said surrejoinder contained, he the said George ought not to have or maintain his said action against the said David ; because he says, that in and by the first article of the said treaty, his said Britannic majesty acknowledges the said United States to be free, sovereign, and independent states, and that he treats with them as such : [123] and that in and by the fifth article of the said treaty, it is agreed by and between his said Britannic majesty and the said United States of America, that the congress of the said United States should earnestly recommend it to the legislature of the respective states, to provide for the restitution of all estates, rights, and properties, which have been confiscated, belonging to real British subjects ; and also of the estates, rights, and properties of persons resident in districts in the possession of his majesty's arms, and who had not borne arms against the said United States ; and that persons of any other description should have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months unmolested in their endeavours to obtain the restitution of such of their estates, rights, and properties, as might have been confiscated ; and that congress should also earnestly recommend to the several states, a re-consideration and revision of acts and laws perfectly consistent not only with justice and equity, but with that spirit of conciliation, which on the return of the blessings of peace should universally prevail ; and that congress should also earnestly recommend to the several states, that the estates, rights, and properties of such last-mentioned persons, should be restored to them, they refunding to any person who might then, at the time of making the said treaty, be in possession, the *bona fide* price (where any had been given) which such person might have paid on purchasing any of the said lands, rights, or properties, since the confiscation : and it was also agreed by the said article last-mentioned, that all persons who then had any interest in confiscated lands, either by debts, marriage settlements, or otherwise, should meet with no lawful impediment in the prosecution of their just rights. And the said David further says, that the said George, at the time of the making the said law of the said state of New York, in the said third plea mentioned, and also at the time of the making and signing the said definitive treaty of peace between his Britannic majesty and the said United States, was resident in a district in the possession of his majesty's arms, within the said state of New York, and had not borne arms against the said United States. And the said David further says, that in and by the sixth article of the said treaty, it is agreed by and between his said Britannic majesty and the said United States of America, that there should be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they might have taken in the then present war ; and that no person should on that account suffer any future loss or damages, either in his person, liberty, or property ; and that those who might be in confinement on such charges, at the time of the ratification of the said treaty in America, should be immediately set at liberty, and the prosecutions so commenced be discontinued. And so, the said David says, that by the said treaty, the said several laws made [124] and passed by the legislators of the said respective states, after the declaration of independency, so made by them as aforesaid, for the confiscation of the property of persons within the said respective states, were recognized and admitted to be valid ; and this the said David is ready to verify ; wherefore he prays judgment if the said George ought to have or maintain his said action against him the said David, etc.

S. LE BLANC."

"And the said George, as to the plea of the said David, by him pleaded by way of rebutter to the plea of the said George above pleaded, saith, that the said plea in manner and form as the same is above pleaded, and the matter therein con-

tained, are not sufficient in law to bar the said George from having and maintaining his aforesaid action thereof against the said David: to which said plea, in manner and form above pleaded, the said George is not under any necessity, nor is he bound by the law of the land in any manner, to answer; and this he is ready to verify: wherefore, for want of a sufficient plea in this behalf, the said George prays judgment, and his said debt, together with his damages by reason of detaining the same, to be adjudged to him, etc.

S. LAWRENCE."

"And the said David says, that the plea of him the said David, pleaded by way of rebutter to the plea of the said George, above pleaded, and the matters therein contained, are sufficient in law to bar the said George from having and maintaining his aforesaid action against the said David; which said plea of him the said David, and the matters therein contained, the said David is ready to verify and prove as the court shall award: wherefore he prays judgment, if the said George ought to have or maintain his aforesaid action thereof against him, etc. and because the justices here will advise themselves of and upon the premises, wherefore the said George and David have prayed the judgment of the court; before they give their judgment thereof, a day is given to the said parties here, from the day of Easter in fifteen days, to hear their judgment, for that the said justices here are not yet advised thereof; and to try the issues aforesaid by the parties aforesaid above joined, and whereof they have put themselves upon the country, the sheriff is commanded that he cause to come here from the day of Easter in fifteen days, twelve free and lawful men of his county, by whom, etc. and who, etc. to recognise, etc. because as well, etc. the same day is given to the parties aforesaid; on which day come here the said George and David, by their attornies aforesaid; and because the said justices will further advise themselves of and upon the premises, whereof the said George and David have prayed the judgment of the court, before they give judgment thereupon, a day is further given to the parties aforesaid, to the morrow of the Holy Trinity, and to try the issues aforesaid, in form aforesaid joined; because the sheriff hath not returned the writ thereof: [125] therefore, as before, the sheriff is commanded that he cause to come here, on the morrow of the Holy Trinity, twelve free and lawful men of his county, by whom, etc. and who, etc. to recognise, etc. because as well, etc. the same day is given to the parties aforesaid, etc. on which day come here the said George and David, by their attornies aforesaid; and because the said justices will further advise themselves of and upon the premises, whereof the said George and David have prayed the judgment of the court, before they give judgment thereupon, a day is further given to the parties aforesaid, on the morrow of All-Souls, and to try the issues aforesaid, in form aforesaid joined; because the sheriff hath not returned the writ thereof; therefore, as before, the sheriff is commanded, that he cause to come here, on the morrow of All-Souls, twelve free and lawful men of his county, by whom, etc. and who, etc. to recognise, etc. because as well, etc. the same day is given to the parties aforesaid, etc. On which day come here the said George and David, by their attornies aforesaid; and because the said justices will further advise themselves of and upon the premises, whereof the said George and David have prayed the judgment of the court, before they give judgment thereupon, a day is further given to the parties aforesaid, in eight days of Saint Hilary, and to try the issues aforesaid, in form aforesaid joined; because the sheriff hath not returned the writ thereof; therefore, as before, the sheriff is commanded, that he cause to come here in eight days of Saint Hilary, twelve free and lawful men of his county, by whom, etc. and who, etc. to recognise, etc. because as well, etc. the same day is given to the parties, etc. On which day come here the said George and David, by their attornies aforesaid; and because the said justices will further advise themselves of and upon the premises, whereof the said George and David have prayed the judgment of the court, before they give judgment thereupon, a day is further given to the parties aforesaid, from the day of Easter in fifteen days, and to try the issues aforesaid, in form aforesaid joined; because the sheriff hath not returned the writ thereof; therefore, as before, the sheriff is commanded, that he cause to come here, from the day of Easter in fifteen days, twelve free and lawful men of his county, by whom, etc. and who, etc. to recognise, etc. because as well, etc. the same day is given to the parties afore-



said, etc. On which day come here the said George and David, by their attornies aforesaid; and because the said justices will further advise themselves of and upon the premises whereof the said George and David have prayed the judgment of the court, before they give judgment thereupon, a day is further given to the parties aforesaid, on the morrow of the Holy Trinity; and the jury between the parties aforesaid, in the plea aforesaid, was respited here until the morrow of the Holy Trinity, unless the Right Honourable Alexander Lord Loughborough, Chief Justice of his majesty's court of the Bench here, according to the form of the statute, on Tuesday the twenty-sixth day [126] of May last past, at Westminster, in the Great Hall of Pleas there, shall first come; and now here, at this day, that is to say, on the morrow of the Holy Trinity in this same term, come the said George and David, by their attornies aforesaid; and the said Alexander Lord Loughborough, the Chief Justice within named, hath sent here his record in these words: Afterwards, that is to say, on the day in the year, and at the place within mentioned, cometh the within-named George Folliott, by his attorney within-named, before Alexander Lord Loughborough, the Chief Justice within-named; and the within-named David Ogden, although solemnly called, cometh not again, but maketh default; therefore the jury within-named, is taken against him by default; whereupon certain of the jurors of the same jury, whereof mention is within made, summoned to be upon that jury, being impannelled and drawn by ballot, according to the form of the statute, etc. and called over, come, who to speak the truth of the matters within contained, being tried, and sworn on their oath, say, that the within-named Lewis Morris and Richard Morris did not pay to the said George, the within-mentioned principal sum of two thousand pounds current money of the province of New York, in the within condition mentioned, with all interest due for the same, as he the said George hath, by his replication in pleading, within alledged. And the said jurors, on their said oath, further say, that the said David did not pay to the said George the said principal sum of two thousand pounds current money of the province of New York, in the said condition mentioned, with all interest due for the same, as he the said George hath also by his said replication in pleading, within alledged: and they assess the damages of the said George, by reason of the detaining the within-mentioned debt from him, besides his costs and charges by him laid out and expended about his suit in this behalf, to one shilling; and for his said costs and charges, to forty shillings: whereupon the record and the matters aforesaid being seen and fully understood, and all and singular the premises being examined, and due deliberation thereupon had, for that it seems to the justices here that the several pleas of the said David, by him fourthly and fifthly above pleaded in bar, and the plea of the said David by him above pleaded, by way of rebutter to the plea of the said George above pleaded by way of surrejoinder to the plea of the said George, pleaded by way of rejoinder to the plea of the said George, pleaded by way of reply to the plea of the said David thirdly above pleaded in bar, and the matters therein contained, are not, nor is any or either of them sufficient in law to bar the said George from having or maintaining his aforesaid action thereof against the said David: therefore it is considered, that the said George recover against the said David his debt aforesaid, and damages by the jury in form aforesaid assessed; and also eighty-eight pounds and twelve shillings for his costs and charges, by the court of our said lord the king, now here adjudged of increase to the said George, by his assent; which da-[127]-mages, in the whole, amount to ninety pounds and thirteen shillings. And the said David, in mercy, etc. Afterwards, to wit, on Saturday next after fifteen days of Saint Hilary, in the same term, before our lord the king at Westminster, comes the said David Ogden, by George Pearson his attorney, and says, that in the record and proceedings, (and also in the rendering the judgment aforesaid, there is manifest error in this; to wit, that whereas by the record aforesaid it appears, that the judgment aforesaid, in form aforesaid rendered, was rendered for the said George Folliott against the said David Ogden; whereas, by the law of the land of this kingdom of England, that judgment ought to have been rendered for the said David Ogden against the said George Folliott. There is also error in this, that it appears by the said third plea of the said David, the truth of which is confessed by the demurrer, that the said writing obligatory, which was the cause of the said action of the said George Folliott

against the said David Ogden, before and at the time of the commencement of the said action of the said George against the said David, was lawfully forfeited to and vested in the state of New York; wherefore the said George could not maintain any action thereon; nevertheless, by the record aforesaid, it appears, that the judgment aforesaid was given, that the said George should recover the amount of the same against the said David; therefore in that there is manifest error. There is error also in this; that it appears by the said fourth and fifth pleas, which are confessed by the demurrer before the time of commencing the action of the said George against the said David, all the estate and effects of the said David, and which were more than sufficient to pay his debts, were forfeited to and vested in the state of New Jersey, and were liable to the payment of the debts of the said David, and appropriated for that purpose; and that the said George might, could, and ought to have been paid and satisfied his said debt out of the said estates, from the said state of New Jersey, if he had duly applied for the same; nevertheless, by the record aforesaid, it appears, that the judgment aforesaid was given, that the said George should recover against the said David: therefore in that there is manifest error. And the said David prays, that for those errors, and other errors in the record and proceedings aforesaid appearing, the judgment aforesaid may be reversed, annulled, and held as void; and that he the said David, to all things which by reason of that judgment he hath lost, may be restored; and that such judgment may be given in this court for the said David, as by the law of the land of this kingdom ought to have been given for the same David against the said George, in the said court of our lord the king of the bench; and that the said George to those errors may rejoice.

GEO. WOOD."

"And thereupon the said George comes here in court, and says, that there is no error either in the record and proceedings [128] aforesaid, or in giving the said judgment; and he prays that the court of our said lord the king may proceed to the examination as well of the record and proceedings aforesaid, as of the matter aforesaid, above assigned for error; and that the said judgment may be in all things affirmed.

S. LAWRENCE."

"But because the court of our lord the king now here, is not yet advised what judgment to give of, upon, and concerning the premises, a day is therefore given to the parties aforesaid, to come before the said lord the king, on Friday next after the octave of the Holy Trinity, to hear the judgment aforesaid; for that the court of the said lord the king now here is not yet advised thereof, and so forth; at which day, before our lord the king at Westminster, the said parties come by their attornies aforesaid; whereupon the said court having seen, and fully understood, all and singular the premises, and having diligently examined and inspected as well the record and process, and the judgment upon them given, as the said causes and matters above assigned for error, by the said David, it appears unto the said court, that there is not any error in the record and process aforesaid, or in giving the said judgment, and that the said record was not in any wise erroneous or defective; therefore it is considered that the said judgment be in all things affirmed, and stand in its full force and effect, the said causes and matters above assigned for error in any wise notwithstanding. And it is further considered by the said court, that the said George recover against the said David, thirty-six pounds, adjudged by the said court to the said George, according to the form of the statute in such case made and provided, for his costs, charges, and damages, which he has sustained by reason of the delay of execution of the said judgment, on pretence of prosecuting the said writ of error; and that the said George have execution thereof, etc."

In Trinity term 1790, the several demurrers came on to be argued (J. Scott, T. Erskine) in the court of King's Bench, and that court gave judgment for the defendant in error: upon this judgment the present writ of error was brought, and the counsel for the plaintiff in error, in the first place, observed, that with respect to the third plea, the courts of King's Bench and Common Pleas differed in opinion, in rendering their respective judgments on the principal point upon which the determination of the action turned.

The court of Common Pleas were of opinion, that the said confiscatory laws of the state of New York, passed during the war, were *certainly* of as full validity as the act of any independent state; and assigned as the principal ground for their judgment for the defendant in error, "that the subject matter of the action being a bond, it could only be sued for according to the laws of England relating to bonds; and that supposing, therefore, the right of the plaintiff (Folliott) to be gone, that fact could not be set up in bar to the action, which must be brought in the name of the plaintiff (Folliott), whoever might be in pos-[129]-session of the bond; since a chose in action is not assignable at law; and that the defendant could not plead that the obligee had assigned it."

The court of King's Bench expressed an opinion that if the acts of the state of New York were to be considered as binding, an action might have been brought in the name of the executive power of that state, to enforce the payment of the bond as confiscated property; but grounded their judgment principally upon this ground, that as the parties to this action came into this country before the treaty of peace, the prior acts of the state of New York were of none effect as to their property.—A part of the court also intimating an opinion, that in order to divest the property of the defendant in error, there should have been an actual seizure, by the state of New York, of this bond.—After these preliminary observations, the counsel for the plaintiff in error strongly urged,

First, That the act of attainder against the defendant in error, and the forfeiture of his estate, passed by the legislature of the state of New York, on the 22d of October 1779, is an act of investiture of the defendant in error's property in the people of that state, the same expressly declaring, "that all the estate both real and personal, *held or claimed* by the defendant in error (by name) whether in possession, reversion, or remainder, within that state, on the day of passing that act, shall be, and thereby is declared to be *forfeited* to and *vested* in the people of that state."

Second, It is also humbly submitted, that the defendant in error, and the several obligors in the bond, prosecuted in this suit, named, were before, at the time of, and after passing said confiscatory law, residents in the said state of New York, and the defendant in error had before, and at the time of passing said law, the said bond in his possession, within the jurisdiction of that state; and that it did not appear by the record or otherwise, but that the defendant in error had remained from the time of passing said law, and at the time of the appeal did remain a citizen of said state of New York; or that the defendant in error came into this country before the signing of the treaty of peace.

Third, That the possession of goods and chattels is by law vested in the sovereign, on attainders, outlawries, and forfeitures, without office found or actual seizing.

Fourth, That bonds, and the debts due thereon, are forfeitable on attainders, outlawries, etc. and are vested in the sovereign, in like manner as other goods and chattels are.

Fifth, That the plea of attainder and forfeiture is a good bar to an action brought by the obligee on a bond or other chose in action.

Sixth, That on forfeitures, the king or his assigns, in whom the property of the debt due on an obligation is vested, have sole right to support an action for the recovery thereof, and none [130] others; and therefore also that the state of New York hath the sole right to sue upon this bond.

Seventh, That the courts of justice here do regard the subsisting laws and adjudications of foreign states *in force* there, and determine according to those laws and adjudications, both in civil and criminal cases, when they relate to matters within the jurisdiction of the foreign state at the *time* of passing the same, without examining into their propriety or impropriety; but take and regard them as laws and adjudications passed agreeable to the constitution of the country where made, and determine conformably thereto. If, therefore, the courts of New York, governed in the constitution of their own laws of confiscation by the law of nations, would necessarily adjudge this property to belong to the people of that state—the courts in England ought also to hold the property to be vested in that people.

Eighth, It was urged that the people of the United States, having on the 4th

of July 1776, declared themselves separated from the sovereignty and government of Great Britain, and declared themselves free, sovereign, and independent states, distinct from all others; and treaties of peace having been afterwards made with them as such, humbly conceived, that the opinion of the court of Common Pleas was agreeable to the laws of nations, and that the judgment of the King's Bench is not so; and although before such treaties of peace, the act of confiscation by the state of New York, might have been held as an absolute nullity in this country, yet after those treaties had been entered into, it appears to be clearly conformable to the laws of nations, that the act should be considered as of force from its date, and the state that made it, as independent from the time it declared itself to be so; and therefore, that the defendant in error could not sue effectually upon this bond in the courts of this country, at the time he brought the action, though it should be admitted, that he might have sued with effect before this country acknowledged the independence of New York.

Ninth, That the definitive treaty of peace, of the 3d September 1783, made between his Britannic majesty and the United States of America, (who only had the right of fixing the terms inviolably to be observed by both states) did accordingly in its terms, manifestly admit and recognize the said United States, as *pre-existing*, sovereign, and independent states; and that they had before that time exercised, and then did exercise the powers of government: and therefore, that their prior acts of legislation, as well penal or confiscatory, as of any other nature, must have been considered as in force from the time of passing them, and to continue in force until repealed by the recommendation of congress, or the voluntary acts of the respective legislatures of the states.

Tenth, That the bond and debt being for those and other reasons to be judicially considered by the court, at the time at which [131] the suit was commenced, as having been at all times after the separation, *de facto*, of the countries, vested in the state of New York, no act of the defendant in error, or of any other person, but the act of the said state only, done after the separation, *de facto*, of the two countries, though such separation, *de facto*, was not originally acknowledged to be lawful, could be judicially held sufficient to bar the state of New York from claiming, *de jure*, the property in this bond. If, therefore, it had appeared upon the record, that the defendant in error had withdrawn himself from the state of New York, and had come into this country, yet, regard being had to the date of the commencement of this suit, judgment ought to have been given for the plaintiff in error; and the courts of law both of Great Britain and New York ought, at the time of the commencement of this suit, to regard this bond as the property of the state of New York at all times, from the date of the act of confiscation.

Eleventh, They concluded with asserting that a judgment given here for the defendant in error, and a recovery had of the debt from the plaintiff in error, would not be a bar to a suit brought by the state of New York in any of the United States, against the plaintiff in error, his executors or administrators, or against Lewis and Richard Morris, two of the obligors in said bond named, and now residents in the state of New York, and the payment of the debt would, contrary to common justice, be twice compelled; once to the defendant in error, and a second time to the state of New York. And that judgment here for the defendant in error, and the recovery of the debt from the plaintiff in error, would not be a sufficient ground for the plaintiff in error to recover, at least in the state of New York, against his co-obligors Lewis and Richard Morris, whose security he was; nor, as they apprehended, could the plaintiff in error, if he had been a principal in the bond, and not a surety, have protected himself by reason of the judgment here, against a demand of his co-obligors upon him for contribution, if they should be obliged to pay to the state of New York; whose property, according to the principles of the laws of nations applied to all the transactions between Great Britain and America, this bond, at the time of bringing the action, must be deemed to have been, from the date of the act of that state confiscating the defendant's property.

For many of the reasons before stated, the counsel for the plaintiff in error pressed that the judgment should be reversed also, with respect to the 4th and 5th pleas; which are alike in substance, and also, because the people of the United

States of America (whereof the defendant in error was one) on the 4th of July 1776, by the congress their representatives declared themselves to be free, sovereign, and independent states; and from that time, and hitherto have, *in fact*, exercised all the powers of government; and by their articles of confederation and perpetual union of all the said states agreed upon in congress, in 1778, soon afterwards confirmed by the several [132] acts of the legislatures of the states of New York and New Jersey, and also by all the other of said states, whereby it was expressly agreed, "the better to secure a perpetual mutual friendship and intercourse among the people of the different states, that the free inhabitants of each of the said states shall be entitled to all privileges and immunities of free citizen in the several states;" declared themselves one body; having one supreme legislature, representing all the people of the several states as one independent society; all equally privileged in the rights of all and every of the said states, and were citizens of all the states, and as citizens were *parties* to the laws of the several states, and amenable to the same: and because, granting that those proceedings and declarations were ineffectual before the time that his majesty, by treaties and otherwise, acknowledged the independence of the United States, and must have been so treated in the courts of this country before such acknowledgment was made; yet it did not appear to be inconsistent with that admission, though perhaps the defendant in error would not be entitled to the benefit of the principle upon which it is made, to insist that after such acknowledgment, those proceedings and declarations were effectual, *ab initio*; because the law of nations, and the interests of mankind, require that they should be held valid, *ab initio*, when such acknowledgment hath been made.

Because also all the estate of the plaintiff in error was, by the laws of the state of New Jersey, one of the said United States, forfeited to and vested in said state, and was, by the same laws, appropriated in the first place for the payment of the plaintiff in error's debts, and the money arising on said estate was directed to be lodged in the treasury of that state for that purpose, which was accordingly done, and was more than was sufficient to pay all the debts the plaintiff in error owed; and the defendant in error afterwards, and before the commencement of this suit, was *at liberty* to have applied to said treasury for payment of the debt, and *might, could, and ought* so to have done, and to have received payment agreeable to the allegations in their pleas, the truth of which is confessed by the demurrer: that the defendant in error did not receive satisfaction for his debt, is therefore altogether owing to his *own* acknowledged neglect. The debt ought then to be considered, as having by his own consent, which must be deemed to have been actually given by him to every law of the country to which he was a subject, been levied by the legislature for his benefit, and in satisfaction of his demand, and therefore as having been paid, because it has been received by those whom *he authorized* to receive it on his behalf.

On the other side, for the defendant in error, it was shortly contended (T. Lawrence, J. Wilson) that the judgment should be affirmed,

I. Because no assumed act of legislation by the colonies of North America, while in a state of rebellion against his majesty, can legally affect the rights of any subject of this realm. By the treaty of peace, those colonies acquired in future the power of [133] making laws obligatory in all cases, in which the laws of independent states are binding, in consequence of their becoming such by that treaty; but no effect was thereby given to the acts they had before passed to confiscate the property of those who had persevered in their loyalty and allegiance.

II. Because, were it to be admitted, that what is insisted on in the third plea as a law of the state of New York, is of as full force as the laws of a sovereign, independent state, yet as it was intended to operate as a penal law, and to inflict a forfeiture on the defendant in error for a supposed crime committed by him, it furnishes no defence to the action, inasmuch as the allowing such defence would be, in effect, carrying into execution the criminal laws of a foreign state.

III. Because there is not any thing stated by the plaintiff in error in his fourth and fifth pleas, from whence there can be inferred any legal obligation on the defendant in error to resort to any particular fund for the payment of his debt, in prejudice of the right which by law vested in him on the execution of the bond

in question, of proceeding for the recovery of the money secured thereby, either against the person or the general property of his debtor.

It was accordingly ORDERED and ADJUDGED, that the judgment given in the court of King's Bench, affirming a judgment of the court of Common Pleas, be affirmed. (MS. Journ. Sess. 1792, p. 139.)

## FORFEITURE OF OFFICE.

CASE 1.—GAVIN MASON,—*Plaintiff*; ATTORNEY GENERAL,—*Defendant* (in Error) [21st February 1710].

[The office of warden of the Fleet prison is an ancient office of inheritance, held by grant from the crown; and is liable to be forfeited, by the warden's permitting a prisoner to escape.]

**\*\*JUDGMENT of B. R. on a *Monstrans de droit*, that the plaintiff should take nothing thereby, AFFIRMED.\*\***

The office of warden of the *Fleet* is an ancient office of inheritance, held by several grants from the crown; and one Thomas Bromhall, an infant, being entitled to the equity of redemption of this office, subject to several mortgages for large sums of money; it was, by an act of parliament, 4th and 5th of William and Mary, vested in trustees to be sold; and John Tilly Esq. [134] purchased it, in the name of the plaintiff, for a valuable consideration, subject to the several incumbrances.

In February 1697, one Leighton, upon a suggestion in Chancery, that many abuses were committed in the execution of this office, obtained a commission to inquire into the same; and, upon such inquisition, it was found that Ford, the then acting warden, had permitted one Spencer and three other persons to escape, and had received twenty guineas for the escape of Spencer; and that by reason of such misconduct, the said office was forfeited to the crown.

Ford having traversed this inquisition, the matter was tried at the bar of the court of Queen's Bench on the 25th of November 1700; when he was acquitted of all the escapes except Spencer's; and also of taking any money for his escape. But the jury found him guilty of the escape itself, upon the single evidence of one Emerson, a bailiff's follower, who had not only been twice convicted of felony, but had joined with others in a bond of £6000 penalty, for Spencer's true imprisonment, and therefore swore to discharge his own bond. He was afterwards prosecuted, and found guilty of perjury, for what he had sworn upon this very trial: and it appeared likewise, that the plaintiff, at whose suit Spencer was imprisoned, had been fully satisfied his debt; and therefore had sustained no damage by the pretended escape. The jury, however, having found the fact, the court was of opinion, that the office was forfeited into the queen's hands, and gave judgment accordingly. And Leighton the prosecutor afterwards obtained a grant of it for his life.

In April following, the present plaintiff brought his *monstrans de droit*, in the *petty-bag*; and therein declared, that before one Anthony Church was warden of the *Fleet*, he the said Mason was seised of the said office, with its appurtenances, *ut de feodo et jure*; and, that on the 22d of May 1695, he granted the office to Church for life. That Church entered, having an estate for life, the reversion to Mason; and enjoyed the office till the 28th of September 1697. That under colour of some assignment from Church, who was then living, Ford on that day took upon him the execution of the said office, and remained therein till the taking of the inquisition; and then the plaintiff traversed, that Ford was seised in fee, as found by the inquisition; and therefore prayed, that the king's hands might be moved.

To this *monstrans de droit* the attorney-general demurred, and the plaintiff having joined in demurrer, the record of the *monstrans de droit* (but not the

inquisition) was sent into the court of Queen's Bench, to be there determined; and in Trinity term 1710, the judges of that court unanimously gave judgment against the plaintiff, that he should take nothing by his *monstrans de droit*, for that he had not shewn sufficient title in himself.

To reverse this judgment, the present writ of error was brought; and, on behalf of the plaintiff, it was said (J. Pratt, P. King) to be im-[135]-possible for him to set forth his title so largely as the court of Queen's Bench seemed to expect, because many of the deeds belonging to this title were destroyed, together with the prison-house, by the great fire in London, *anno* 1666, so that he could not set them forth particularly: and if he could, besides the length, prolixity and charge of it, it would have been only matter of inducement, and therefore unnecessary; for even then, the plea must have centered in the same fact, and concluded with the same traverse; viz. *That Ford was not seised in fee of the office, at the time of the pretended escape of Spencer*. That this point, if tried, would have put the plaintiff under the necessity of shewing his title, to the satisfaction of a jury; but this he was prevented from doing by the demurrer, and it would be very hard for a man to lose his inheritance, merely for a defect in the form of his plea. That this pretended forfeiture was to take away the inheritance from a fair purchaser, under an act of parliament, and also the right of several innocent mortgagees, for an offence supposed to be committed by Ford, who had only an estate for life in the office; and to give it to a third person, who had no right but what was created to him by the oath of Emerson, after begging a prosecution of a forfeiture for his own benefit, which was frequently the occasion of great oppression and vexation to the subject; and if encouraged by success in the present case, might endanger the inheritance of all offices and places, liable to forfeiture.

To this it was answered (E. Northey, R. Raymond), that as to the pretended difficulty of proving the plaintiff's title, because some of his deeds were burnt in the year 1666, it had no foundation in fact; for the plaintiff's title was under an act of parliament passed in the year 1692, whereby the office was vested in fee, in trustees to be sold, and his conveyance was from those trustees in 1693, and that conveyance inrolled; and the judges of the Queen's Bench several times said, *that to plead that act, and that conveyance, had been sufficient*. And, as to the other pretence, that the forfeiture took away the right of several innocent persons, who had mortgages upon the office; it was likewise false in fact, because every mortgage but one was paid and discharged; and that one was vested in Tilly, who, since the forfeiture, had received ten times more than would have discharged it. But, if the case was otherwise, the forfeiture could do the mortgagees no harm; since it is well known, that, in all cases of forfeiture, the crown, by law, takes only subject to preceding incumbrances.

Accordingly, after hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the court of Queen's Bench should be affirmed; and that the transcript of the record should be remitted to that court, to the end execution might be had thereupon, as if no such writ of error had been brought into the house. (Jour. vol. 19. p. 252.)

[136]

## FORFEITURE FOR TREASON.

CASE 1.—ATTORNEY GENERAL,—*Appellant*; ROGER CROFTS and others,—*Respondents* [24th January 1708].

[Mew's Dig. iv. 1136, ix. 1666. Forfeiture consequent on outlawry for treason is excepted from the abolition of forfeitures by the Forfeiture Act, 1870 (33 and 34 Vict. c. 23).]

[J. S. having made a mortgage of his estate, was afterwards indicted and outlawed for high treason; the attorney-general thereupon exhibited a bill in the court of Exchequer, to discover the consideration of the mortgage, and what

was due upon it, and that the crown might redeem, if any thing was due; the court directed several issues to be tried at their own bar relative to the consideration of this mortgage; and, upon the trial, verdicts were found in favour of the mortgagee: but these verdicts were so general, that application was made on behalf of the crown for a new trial: this was not only refused, but the court, on hearing the cause upon the equity reserved, ordered the information to stand dismissed. On an appeal this DECREE was REVERSED, and the attorney-general, on behalf of the crown, was admitted to redeem.]

**\*\*This case does not appear to be reported in any other book.\*\***

By deed dated the 12th of January 1674, Mary Braithwait and Sir Stafford Braithwait, in consideration of £1000 to them lent by Sir Henry Humlock Baronet, demised the manor and lands of Catterick, in the county of York, to John Jeffs, as a trustee for Sir Henry, for a term of 1000 years, subject to redemption on payment of £1060. And by indentures of lease and release, dated the 18th and 19th of October 1675, Sir Stafford Braithwait conveyed all his right and interest in this estate to the said Mary Braithwait, and her heirs; and the 1000 years term became afterwards vested in the Lord Viscount Fauconberg, as a security for £3000.

In February 1680, Mary Braithwait made her will; and thereby devised certain farms, part of this estate (being the premises in question) to Sir Roger Strickland, in tail male; with remainder to Robert Strickland, for life; remainder to his first, and other sons, in tail male; remainder to Sir Roger in fee; upon condition, that he should pay off the £3000 to Lord Fauconberg, and several other sums, amounting to £2000 more. And the testatrix devised the manor and other lands, residue of the mortgaged premises, to the respondent Roger Crofts, in fee.

By deed, dated the 24th of March 1681, Lord Fauconberg, in consideration of £2500 paid him by Sir Roger Strickland, and of £500 paid him by Richard Alibon Esq. assigned the mortgaged premises to Alibon, as a security for payment of the said £500 and interest; and by another deed, dated the 10th of March 1682, Richard Alibon, in consideration of £500 to him paid, and Sir Roger Strickland, in consideration of £3000 to him paid by [137] Edward and Thomas Ange, as trustees for Robert Strickland, assigned the said premises to them, for the residue of the said term; and they declared the trust thereof accordingly.

Afterwards, Edward and Thomas Ange, in consideration of £500 lent the said Robert Strickland by the respondent Job Alibon, and one John Smith, did, by indenture dated the 2d of June 1685, by the direction of Robert Strickland, assign the premises to William Gerard and Christopher Maddison, as trustees for Alibon and Smith; and on the 13th of the same month, Robert Strickland, in consideration of £500 more to him lent by them, confirmed the premises to Gerard and Maddison, as a security for both these sums and interest. And both Gerard and Maddison being dead, the widow and administratrix of Maddison (who was the survivor) assigned the mortgaged premises, to the respondents Crofts and Woodcock, in consideration of £1056.

In 1690, Sir Roger Strickland was indicted and outlawed for high treason; and by an inquisition taken thereon, he was found seised in fee of the lands in question, of the yearly value of £350.

One Dixwell Hungerford having obtained administration to Maddison the surviving trustee, a plea was in his name put in to the inquisition, and judgment given thereon for him; and which was afterwards affirmed upon a writ of error in the Exchequer.

But upon inspecting the deed of the 10th of March 1682, there appeared to have been a proviso for redemption inserted therein, and afterwards erased; but some parts of it still remained legible, and yet no memorandum was made thereof.

This circumstance raising some suspicion as to the fairness and validity of the deed, the attorney-general, in Hilary term 1707, exhibited a bill in the court of Exchequer, against Robert Strickland, the respondents, and others, for a discovery whether this assignment was absolute, or only a mortgage, or a trust for Sir Roger, and what consideration was paid for the same; and also for a discovery of the consideration of the mortgage to Gerard and Maddison, and whether they,



or any of the defendants, were trustees for Sir Roger, and that the crown might redeem if any thing was due.

The defendant Robert Strickland, long before the filing of this bill, went and resided in France, so that he never could be served with process to appear; but the other defendants put in their answers, stating their title, and denying any fraud or knowledge of any trust for Sir Roger.

Pending this suit, Dixwell Hungerford, by indenture dated the 17th of February 1704, in consideration of £900 assigned to the respondent Ridley a moiety of the mortgaged premises, and of the money due thereon, in trust for the respondent Alibon; and Hungerford afterwards dying, administration *de bonis non* of Maddison was granted to Ridley, who thereby became a trustee of the other moiety also for Alibon.

[138] On the 13th of November 1707, the cause was heard; when the court thought proper to direct four several issues to be tried at their own bar, by a Middlesex jury; viz. 1st, Whether the indenture of the 10th of March 1682, was duly executed, and whether the same was an absolute purchase or a mortgage only, and for what sum, and to whom and when payable; and whether the £500 and £3000 therein mentioned, or any and what part thereof, were really paid as the consideration thereof, and by whom, and to whom, and when; and whether the rasures therein were made before the execution thereof, by the parties thereto. 2d, Whether after, and notwithstanding the said indenture of the 10th of March 1682, there did remain any trust, or interest for Sir Roger Strickland, in the said term and lands, or any and what part thereof, and to what value, at or after his attainder. 3d, Whether Alibon and Smith, or Gerard and Maddison, or either and which of them, on the account of Alibon and Smith, or either of them, did at any time and when, really lend and pay to Robert Strickland, or any other, and who for his use, the two sums of £500 in the indentures of the 2d and 13th days of June 1685 mentioned, for and as the considerations for executing the said indentures, or either and which of them; and whether the said indentures were really made and executed by any, and which of the parties thereto, and when; and whether the interest and trust for Alibon and Smith, or either of them, was in being, and for what sum, at the time of exhibiting the bill in this cause, and putting in the answers thereto: and whether Alibon and Smith, or any other, and who for them, before the lending of their money, had any notice of any interest in the said premises in Catterick, for Sir Roger Strickland. 4th, Whether the indenture of the 17th of February 1704, was really executed, and by whom and when, and for what considerations paid; and whether any, and what trust or interest, and to what value, for Ridley, or any other and whom, did subsist at the time of putting in Ridley's answer.

On the 11th of May 1708, these issues were tried, when the jury found a verdict upon each of them to the following effect, viz. 1st, That the indenture of the 10th of March 1682, was duly executed by Richard Alibon to Edward and Thomas Ange, about the day of the date thereof, and that the £500 therein mentioned, was paid to him by them, or Robert Strickland; and that the same deed was executed some few days after by Sir Roger Strickland, and the £3000 paid to him by the said Robert Strickland, Edward and Thomas Ange, or some or one of them; and that the said deed was first designed for a mortgage, but that the rasure was made before the deed was executed by any of the parties thereto, and the deed altered to an absolute purchase for the residue of the term of 1000 years. 2d, That after the executing the same deed, no estate, trust, or interest remained for the said Sir Robert Strickland in the said term, or in the lands therein mentioned. 3d, That Job Alibon [139] and Smith, or one of them, did lend and pay to the said Robert Strickland £1000 about the date of the several deeds; and that the deeds of the 2d and 13th of June 1685, were executed by the parties about the dates thereof; and that the interest and trust for the said Smith and Alibon did remain in them at the time of exhibiting the bill or information in the Exchequer; and that they had not any notice of any trust in the premises remaining in the said Sir Roger Strickland. 4th, That the indenture of the 17th of February 1704, was made by Dixwell Hungerford to Ridley, about the time of the date thereof; but that the £900 therein mentioned was not paid.

The attorney-general, being dissatisfied with this verdict, moved for a new trial; but the court being satisfied with the proofs, and no new evidence being offered, they refused to grant a new trial; and on the 22d of November 1708, the cause being heard upon the equity reserved, the court ordered the bill to stand dismissed.

From this decree the attorney-general appealed; and on behalf of the crown it was insisted (J. Mountague, S. Dodd), that upon the face of the deed of the 10th of March 1682, there was fraud apparent; and therefore it ought to have been set aside without any trial. That there was no proof of any consideration paid, nor could the jury tell who paid it; but found it was paid by *them, some or one of them*. That this deed could at most be only a mortgage, and in that case the crown was entitled to redeem, upon payment of what was due; the proviso for redemption being still legible, and the value of the estate being at least four times more than the pretended consideration; besides, Sir Roger Strickland continued the possession, made leases, and exercised every other act of ownership, after the pretended sale to Robert Strickland. And that, at least, the court ought to have granted another trial, and not have concluded the crown for ever, in a case of this nature, by one trial only; and therefore it was hoped, that the decree of dismissal would be reversed, and the assignment of the 10th of March 1682, and the deeds to Gerard and Maddison, and also the deed to Ridley, set aside as fraudulent and void.

To this it was answered (J. Pratt, C. Phipps), that the rasure of the deed, which was the only badge of fraud that could be pretended therein, was fully proved both at the hearing, and upon the trial, to have been made before the deed was executed. That it was above 25 years since the execution of the deed, and the witnesses to the payment of the £3000 to Sir Roger Strickland were both dead; but receipts for the money were endorsed, and those receipts proved; and it was sufficient for the satisfaction of the court, if the money was found to be paid by Robert Strickland, or his trustees. That this deed, at the time of executing it, was certainly intended to be an absolute assignment, being recited as such in the mortgage of the 2d of June 1685, which was long before the attainder; and nothing could be more fully proved, than that the immediate possession was in Robert Strickland, who stayed near three weeks [140] among the tenants, viewed their farms, made alterations, and regulated differences amongst them, and the rents were all along received by his agents. That though leases were made in Sir Roger's name, yet they were so made at the request of the tenants; because Robert was a Roman catholic, and Sir Roger a protestant, to avoid distresses for recusancy, as had been in Mrs. Braithwait's time. And as to the consideration paid, that, with the money charged on the lands in question, was near the full value; for the manor and the residue of the lands were devised to and enjoyed by the respondent Crofts, and never were in Sir Roger's possession; besides, Sir Roger being a bachelor, and his brother Robert, who had six children, being entitled to the remainder after his death without issue male, £3500 was a valuable consideration for the purchase of Sir Roger's interest, which was not esteemed more than an estate for life. And as to a new trial, the parties before the court were only mortgagees under Robert Strickland, for £1000 and interest, which they had fully proved to the satisfaction of the court; and it would be too hard to oblige them, at their own expence, to try another title, in a cause where they had already expended near the amount of their debt, and that without any prospect of having their costs, as there was no relator named; and therefore it was hoped, that after so many years travel in law and equity, the respondents would quietly reap the benefit of their security.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of dismissal therein complained of, should be reversed; and that the attorney general should be admitted to redeem the premises in question, paying what was due to the respondents for the principal sum of £1000 and all interest due for the same; and that the respondents, the mortgagees, should account for the profits of the mortgaged estates received by themselves, or by Crofts or any other person whatsoever, other than the crown, or those claiming under or authorised by the crown, from the time of the first judgment of the *amoveas manus*, to the time of the account; (the respondents either having received, or wilfully and by collusion neglected to receive, the profits during such time;) and on such

account for the profits, the respondents were to have allowance of all monies already paid by order of the court, or otherwise, and all just allowances; and that the deputy remembrancer of the court of Exchequer should make a rest, and state if any thing, and what, was due to the respondents the mortgagees, at the time of the bill exhibited; and if it should appear that the said respondents were fully satisfied all principal and interest due on their mortgage at or before the time of the bill exhibited, then they were to have no costs; but if otherwise, then the said respondents, the mortgagees, were to have costs taxed, and allowed to them; and, upon the attorney general's paying, or causing to be paid, what should so remain due to the said respondents the mortgagees, for principal, interest, [141] and costs, they were to convey, or cause to be conveyed, to the attorney general, or such as he should appoint, all their estate, title, and interest in the premises in question; and to deliver possession thereof, and all deeds and writings in their custody and power, relating to the premises, to the attorney general, or such as he should appoint; and were thereby indemnified for so doing: but if it should appear, on taking the account above directed, that the respondents, the mortgagees, were over paid, then they were to refund and pay to the attorney general, or such persons as he should appoint, all such sums of money as it should appear they were so over paid, and were also to reconvey, deliver possession, and all deeds and writings as aforesaid; and the court of Exchequer were ordered to take care that the same should be done and performed accordingly. (Jour. vol. 18. p. 614.)

CASE 2.—ANN HORTON, Widow, and others,—*Appellants*; ANTHONY KIRTON and another,—*Respondents* [31st January 1709].

[Mew's Dig. iv. 1135. Forfeitures except on outlawry were abolished by the Forfeiture Act, 1870 (33 and 34 Vict. c. 23). See also 2 and 3 W. IV. c. 34.]

[A. seized of a freehold lease for lives, is indicted and found guilty of coining. Held, that the whole estate is forfeited to the crown, notwithstanding the proviso in the act 8 and 9 W. 3. c. 26. that no offence made treason or felony by that act, shall extend to make any corruption of blood.] \*\* For there are *other statutes which give the forfeiture to the crown in all treasons*; and when two acts seem to cross one another, such construction shall be made, that both shall stand together: besides, it is not like the case of felony; for there it is the corruption of blood *only* that prevents the descent and occasions the escheat. 13 Vin.

DECREE of the court of Exchequer AFFIRMED.\*\*

Viner, vol. 13. p. 437. ca. 8. vol. 19. p. 520. ca. 84. cited by the name of *Horton v. Hinton*. \*\* Fost. 233.\*\*

Roger Whitby Esq. on the 21st of October 1695, in consideration of a fine of £1200 and a yearly rent of £10 granted a tenement and lands in the township of Cotton Abbots, alias Cotton Hooke, in the county palatine of Chester, of the clear yearly value of £80 to one Joseph Horton, for the lives of himself, and the appellants Ann his wife, and Joshua Horton, senior, his brother; but Joseph not having money to pay this fine, on the 24th of the same month made a mortgage of the premises to Sir John Manwaring Bart. in trust for Mr. Whitby; redeemable on payment of the £1200 and interest.

Mr. Whitby afterwards calling in some part of his money, Joseph Horton borrowed several large sums at interest, and prevailed on his said brother Joshua and other persons, to become bound as his sureties for the same; and with the monies so borrowed, he discharged part of the £1200.

On the 8th of April 1701, Joseph was indicted before the justices of *oyer and terminer*, and gaol delivery for the county of the city of Chester, for having in his custody, without any lawful authority, or sufficient excuse for that purpose, one press

for coinage, two dies for coinage, etc. against the form of the statute [142] of the 8th and 9th William III. entitled, *an act for the preventing the counterfeiting the current coin of this kingdom*, whereby such offence is made *high treason*; and being thereof lawfully convicted, judgment was given against him accordingly.

In this statute is the following proviso, viz. "Provided always, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, or any attainder or attainders of any person or persons, for any offence or offences made treason or felony by this act, shall not in any wise extend or be judged, interpreted, or expounded, to make any corruption of blood to any the heir or heirs of any such offender or offenders; or to make the wife of any such offender to lose or forfeit her dower, of or in any lands, tenements, or hereditaments, or her title, action, or interest to the same."

Joseph Horton, soon after his conviction, made his escape out of prison, and died in the city of London; leaving the appellant Ann his widow, the appellant Joshua Horton, jun. his eldest son and heir, an infant, and three younger children.

An inquisition having been taken, and it being thereupon found that the convict was possessed of the lands in question, subject to Sir John Manwaring's mortgage, and several other incumbrances; the lands were seized into the hands of the crown, and some time afterwards granted to the respondents, subject to an annual rent, and under covenants on their part to discharge the incumbrances.

In Michaelmas term 1706, the respondents exhibited their bill in the court of Exchequer, against the appellants and other proper parties; to establish the right of the crown, and to redeem the premises, and for an account of the mesne profits thereof. To which bill the appellants put in an answer, and thereby insisted on the above proviso, as preventing the corruption of the blood of the heir.

On the 16th of May 1709, the cause was heard; when (contrary to the opinion of Mr. Baron Price) the court declared that the whole estate was forfeited to the crown; and therefore decreed, that the plaintiffs should be at liberty to redeem the premises, and should be let into possession, and have an account of the rents and profits, from the time that the offence was committed.

But from this decree, the defendants, the widow, brother, and eldest son of Joseph Horton, appealed; insisting (E. Northey, L. Lutwyche), that the above clause or proviso in the statute which made this offence treason, intended to make the punishment as personal to the offender as the guilt, and never meant that the innocent heir, who was no way *particeps criminis*, should be a sufferer; but that it fully, and in express words, saved and preserved the right of the heir to every thing which could descend or come to him from his ancestor, as fully as if the ancestor had committed no offence at all. For, that the saving against corruption of blood preserved the descent to the heir, in the same manner as a saving of the land to the heir [143] would have prevented corruption of blood; and although the act made a new offence treason, yet it restrained and limited the effects of that treason, and confined the forfeiture to the offender's life. That not only the heir, but the widow and the rest of the children, whose only support the remains of this estate was, would be starved and utterly undone; and the several fair and *bonâ fide* creditors of the said Joseph Horton, particularly those who had become bound for him in considerable sums, and divers workmen who had demands for building a large brick-house, which was standing on the premises, must fail of their debts, and be entirely ruined, unless they could be reimbursed out of the estate itself; and therefore it was prayed, that the decree might be reversed.

In support of the decree, it was contended (T. Parker, S. Dodd), that saving the blood, in an attainder for *felony*, might probably, by implication, save the inheritance also; because attainders in *felony* do not forfeit any lands to the crown, but only corrupt the blood, and thereby prevent a descent, and are the same in consequence of law, as if the offender had died without heir, unattainted; in either of which cases, there being no person who can make title to the inheritance under the offender, his tenure is determined; and therefore the land, by law, may return to the lord of the manor, not as a forfeiture, but as an escheat only for want of a tenant, and so become parcel of the demesnes again: but that the present case being an attainder for *high treason*, differed, *toto cælo*, from attainders for felony. For by the express words of the statutes 26 Hen. 8. cap. 13. 33 Hen. 8. cap. 2. & 5 & 6

Ed. 6. cap. 11. the lands of persons attainted for any manner of *high treason*, are forfeited to and actually vested in the crown, against the offender and his heirs, and also against the lord of whom they are holden, to all intents and purposes; saving the right of all persons, except the heirs of him attainted. That the estate in question was but a freehold, and no inheritance, nor the wife dowable thereof; and was before, and until the attainder, entirely in the convict, either to alien to any, or to forfeit to the reversioner, *a fortiori*, to the crown. That an attainder for *treason* does *alienum facere*, as much (and more) than the offender could have made or done, by any grant or means before attainder; it being a rule in law, that whatever a person has power to grant, he shall as fully forfeit by attainder for *high treason*. That therefore, to save the estate by any implication or construction, would be inconsistent with, and directly repugnant to the several statutes above-mentioned; which expressly give to, and actually vest in the crown, all the right, title, and interest, of the offender, in any lands, tenements, etc. with a saving of all persons, except the heirs of him attainted; and yet the heir, by such a supposed implication only, would totally defeat the crown; although it has been solemnly held, by all the judges of England, that no implication ought to be admitted for a subject, against the right and interest of the crown. Besides such a construction of this proviso [144] as the appellants contended for, was contrary to the general rule observed in the construction of statutes; for wherever two statutes seem to cross each other, such exposition and construction must, if possible, be made of both, as that both may stand in force; and in the present case it would be so, if by the attainder and the aforesaid statutes the lands were forfeited to the crown, and by the proviso, the blood not corrupted; for thereby the heir would continue inheritable to him, or any other ancestor, though attainted of felony, or any other crime, except *high treason*; and so this proviso and all the other statutes would be consistent, and have their full effect and operation, which otherwise could not be. And that it is regularly true, that all provisos and exceptions must be taken strictly: and here the blood only being expressly saved, no more shall be intended to be saved. *for expressum facit cessare tacitum.*

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed. (Jour. vol. 19. p. 53.)

## FRAUD.

CASE 1.—FRANCIS SCRIBBLEHILL,—*Appellant*; HENRY BRETT and another,—*Respondents* [29th January 1703].

[Mew's Dig. vii. 704. viii. 861.]

[Tenant in tail made a lease to A. in consideration of his *procuring a marriage* between the lessor and a lady of fortune. Held, that this consideration was fraudulent, and the lease accordingly set aside.]

\*\* DECREE of the court of Chancery, dismissing the bill for relief against the lease, REVERSED.

It does not appear that, on this appeal, the principles of law or equity on the subject of *marriage-brochage agreements* were at all disputed.—But it is probable the reversal of the decree might arise from a knowledge of facts in this instance, as it appears very remarkably to have been previously before the house in the case cited below from Shower. The following extract from the *Treatise of Equity*, (edit. 1793, with Mr. Fonblanque's notes,) will elucidate the rules both of law and equity on the general question. See *Treat. Eq.* pp. 249—254.

"Wherever a mother, or father, or guardian, insist upon a private gain, or security for it, and obtains it of the intended husband, it shall be set aside; for the power of a parent or guardian ought not to be made use of

to such purposes. And these contracts with the father, etc. seem to be of the same nature with brocage bonds, etc. but of more mischievous consequence, as that which would happen more frequently; and it is now a settled rule, that if the father, on the marriage of his son, takes a bond of the son to pay him so much, etc. it is void, being done by coercion while he is under the awe of his father. Nor will the Court only decree a marriage brocage bond to be delivered up, but a gratuity of 50 guineas actually [145] paid to be refunded (2 Vern. 392): for such bond is in no case to be countenanced.—And a bond to procure marriage, though between persons of equal rank and fortune, is void, as being of dangerous consequence.

“From the case of *Grisley v. Lother*, Hob. 10, it should seem that though the procuring of a marriage is not a consideration in equity, it is a sufficient consideration in law; and of that opinion Holt C. J. appears to have been in *Hale v. Potter*, 3 Lev. 411. (the case cited below); and the circumstance of the bond in that case having been ultimately cancelled by the decree of the House of Lords, does not affect the rule of law; as that decision was upon an appeal from the decree in equity which had held the bond to be good; as courts of equity do not in such cases interpose on account of the particular damage to the party, but from considerations of public policy. See *Law v. Law*, Forrest. 142. But query, whether the vice of such consideration could not now be pleaded at law? *Collins v. Blantern*, 2 Wils. 347.

“That Equity will relieve against bonds to strangers for the procuring of marriage, see *Arundel v. Trevilian*, 1 C. R. 47: *Glanville v. Jennings*, 3 C. R. 18: Toth. 27: *Drury v. Hook*, 2 C. C. 176: 1 Vern. 412: *Cole v. Gibson*, 1 Vez. 503: *Smith v. Aykwell*, 3 Atk. 566. And as these contracts are avoided on reasons of public inconvenience, the court of Exchequer, in *Shirley v. Martin*, Nov. 14, 1779, held, that they would not admit of subsequent confirmation by the party.”

See also *Booth v. Earl of Warrington*, post, ca. 6.\*\*

2 Vern. 445: Preced. in Chan. 165: 2 Eq. Ca. Ab. 585. ca. 1: Viner, vol. 10. p. 286. ca. 27: vol. 14. p. 160. ca. 4: vol. 15. p. 265. ca. 10.

† Thomas Thynne, of Longleat, Esq. being seised of the rectory of Thame in

† Mr. Vernon, and the other authors cited, as having reported this case, mention the event of it upon the appeal, but say, that the decree was reversed, and the lease set aside *without any regard to the two verdicts*; this seems to throw some imputation on the judgment; but upon examining the matter, there does not appear to be the least ground for any imputation. For by a memorandum on the appellant's printed case, reference is made to a cause of a *similar* nature, determined by the house some time before; and which case seems to have governed the house in the present determination: but, as no notice appears to have been taken of it in the court of Chancery, the reversal of that decree, *under this particular circumstance*, does not impeach the general principles on which it was founded. The case alluded to, is indeed *so similar*, as to vary in only one circumstance; viz. there was a *bond*, here was a *lease*; in every thing else it depended on the *same facts*. It is reported in 3 Lev. 411. and abridged by Viner, vol. 15. p. 265. ca. 8. but the best report of it is in a book known by the name of Shower's Parliament Cases, p. 76. and as both the case itself, and the arguments, throw great light upon and fully support the present determination, I hope to be excused inserting it as reported by the last-mentioned author.

“Hall, *et alia*, executors of Thomas Thynne,

“*versus*

“Jane Potter, administratrix of George Potter.

“Appeal, from a decree of dismissal in the court of Chancery: the case was thus, that Thomas Thynne Esq. having intentions to make his addresses to Lady Ogle, gave a bond of £1000 penalty to the respondent's husband, to pay £500 in ten days after his marriage with Lady Ogle: the respondent assisted in promoting the said marriage, which afterwards took effect. Soon after the said Mr. Thynne was barbarously murdered; and about six years after Mr. Potter brought an

Oxfordshire, granted a lease thereof to John Thynne, of Egham, Esq. for his life; and this had been usually done by their respective ancestors, for the better support of the Egham family, which was a branch of the other.

On the 28th of January 1681, the same Thomas Thynne granted a lease of this rectory, to Richard Brett Esq. the uncle of the respondents; to hold from the death of the above John Thynne for 99 years, if the respondents should so long live; under

action upon this bond against the appellants as executors of Mr. Thynne, and proving the marriage, recovered a verdict for £1000. Thereupon the appellants preferred their bill in Chancery to be relieved against this bond, as given upon an unlawful consideration; the defendants by their answer acknowledged their promotion of the marriage to be the reason of giving the bond.—Upon hearing the cause at the Rolls, the court decreed the bond to be delivered up, and satisfaction to be acknowledged upon the judgment. The respondent petitioned the Lord Keeper for a rehearing; and the same being reheard accordingly, his lordship was pleased to reverse the decree, and ordered the appellant to pay principal, interest, and costs, or else the bill to stand dismissed with costs.

“And it was argued on behalf of the appellants, that this bond ought in equity to be set aside; for that even at the common law, bonds founded upon unlawful considerations appearing in the condition were void; that in many instances, bonds and contracts which are good at law, and cannot be avoided there, are cancelled in equity; that such bonds, to match-makers and procurers of marriage, are of dangerous consequence, and tend to the betraying, and oftentimes to the ruin, of persons of quality and fortune; and if the use of such securities and contracts be allowed and countenanced, the same may prove the occasion of many unhappy marriages, to the prejudice and discomfort of the best of families; that the consideration of such bonds and securities have always been discountenanced, and relief by equity given against them, even so long since as the Lord Coventry's time, and long before; and particularly in the case of *Arundel* and *Trevilian*, between whom, the 4th February, 11 Charles I. was an order made in these or the like words:

“Upon the hearing and debating of the matter this present day, in the presence of the counsel learned on both sides, for and touching the bond or bill of £100 against which the plaintiff by his bill prayeth relief; it appeared that the said bill was originally entered into by the plaintiff unto the defendant for the payment of £100 formerly promised unto the said defendant by the plaintiff for effecting of a marriage between the plaintiff and Elizabeth his now wife, which the said defendant procured accordingly, as his counsel alledged. But this court utterly disliking the consideration whereupon the said bill was given, the same being of dangerous consequence in precedent; upon reading three several precedents, wherein this court had relieved others in like cases against bonds of that nature, thought not fit to give any countenance unto specialties entered into [on] such contracts: it is therefore ordered and decreed, that the said defendant shall bring the said bill into this court, to be delivered up to the plaintiff to be cancelled.”

“Then it was further urged, that the appellants had once a decree at the Rolls to be relieved against the bond in question; upon consideration of the said precedent, in time of the said Lord Coventry and others, and of the mischiefs and inconveniences likely to arise by such practices, which encrease in the present age more than in the times when relief was given against such bonds: and therefore it was prayed that the decree might be reversed.

“On the other side it was urged that the consideration of this bond was lawful; that the assisting and promoting a marriage at the party's request, was a consideration in law at all times to maintain a promise for payment of money; that this bond was voluntary, and the party who was obligor was of age and sound memory; that here was no fraud, no deceit, in procuring it; that Chancery was not to relieve against voluntary acts; that here was a great fortune to be acquired to the appellant's testator by the match; that here was assistance given; that the persons were both of great quality and estate, and no imposition or deceit on either side in the marriage; that it might be proper to relieve against such security where ill consequences did ensue, yet here being none, and the thing lawful, and

the yearly rent of £5 and for the *expressed* consideration of £3650. And on the 15th of June 1689, the said Richard Brett assigned this lease to the respondents.

[146] Thomas, the first Lord Weymouth, took a surrender of the lease to John Thynne; and granted another lease of the same premises to trustees during the lives of the said John Thynne, and of John [147] Thynne his son; but in trust for the benefit of John Thynne the father.

The said John Thynne the father afterwards mortgaged the rectory to the appellant's intestate, for securing £2000; and having several children, he, by his will, devised the same for the purpose of raising portions for them, and for the payment of his debts, and made his wife executrix; and in March 1698 died.

Soon after the death of John Thynne the father, the respondents brought an ejectment, and thereby recovered possession of this leasehold estate; but in June 1699 the appellant exhibited her bill in Chancery against them, praying to be relieved against the lease of 1681, under which they claimed; suggesting, that it was obtained by Richard Brett, the uncle, *for brokerage, in procuring a marriage between the said Thomas Thynne the lessor, and the Lady Ogle.*

On hearing this cause, 26th of February 1701, the Lord Keeper declined determining, upon the proofs and circumstances of the case; but was pleased to direct a trial at the bar of the court of Common Pleas, by a special jury of the county of Oxford, upon the two following issues: 1st, Whether the said £3650 was paid, as the consideration of the said lease or not? And, 2dly, Whether the consideration of the said lease was the procuring the said marriage, or on what other consideration the said lease was granted?

The trial was accordingly had, and a verdict for the plaintiff on the first issue, and for the defendants on the second: but three of the judges having certified, that, though they did not find cause to set the verdict aside, yet they were not so fully satisfied with it, as to think a new trial unreasonable, application was made to the court of Chancery for a new trial; and, on the 11th of July 1702, it was ordered, that there should be a new trial at the bar of the said court of Common Pleas, upon the same issues, and before another special jury of the same county.

A second trial was accordingly had, when the jury found the same verdict as on the first trial; and in consequence thereof, when the cause came to be heard on the equity reserved, 3d May 1703, the Lord Keeper, assisted \* by the Lord Chief Justice Holt, the Master of the Rolls, and the Lord Chief Justice Trevor, were unanimously of opinion, that the plaintiff ought [148] not to be relieved, and therefore ordered that the bill should stand dismissed.

From both these decrees, and the order directing a new trial, the plaintiff ap-  
the bond good at law, the same ought to stand; that here are no children, purchasers, or creditors, to be defeated; that there are assets sufficient to pay all; and consequently, there can be no injustice in allowing this bond to remain in force; that it was the expectation of the respondent, without which she would not have given her service in this matter; that it was the full meaning of the appellant's testator to pay this money in case the marriage took effect; that there was a vast difference between supporting and vacating a contract in Chancery; that though equity perhaps would not assist and help a security upon such consideration, if it were defective at law, yet as there was no cheat or imposition upon the party, but he meant (as he had undertaken) to pay this money, and was not deceived in his expectation as to the success of the respondent's endeavours, it would be hard in equity to damn such a security; and therefore it was prayed, that the decree should be affirmed.

"It was replied, that marriages ought to be procured and promoted by the mediation of friends and relations, and not of hirelings; that the not vacating such bond, when questioned in a court of equity, would be of evil example to executors, trustees, guardians, servants, and other people, having the care of children: and therefore it was prayed, that the decree might be reversed, and it was reversed accordingly."

By the Journals, [vol. 15. p. 638] this judgment appears to have been given on the 11th of January 1695.

\* The reason of this *solemnity* seems to have been, because the plaintiff had previously obtained an order, for hearing the cause *ab origine*.



pealed; and on her behalf it was contended, that the taking of bonds, or making bargains, as rewards for procuring marriages, though not voidable in strictness of law, had always been declared fraudulent, and set aside in courts of equity; because such transactions tended to corrupt executors, trustees, guardians, servants, and others, having intimacy with persons of quality and fortune, to betray them into unhappy or improvident marriages; and were therefore the very seeds of fraud, misrepresentation, and deceit. That the court of Chancery having an *original jurisdiction*, in all matters of fraud and evil practice, because they are frequently covered with such specious pretences as not to be avoidable by the strict forms of law, ought to have given judgment, and relieved against the lease in question, according to the facts and circumstances of the case; and not have sent the appellant to prove the same at law, where matters of fraud are not so properly inquirable by a jury. That the inserting in the lease so great a consideration as £3650 when, in truth, not one penny of it was paid, or agreed to be paid, was evidently an attempt to cover some fraud or other, and sufficient to shew that the lease was not *bona fide* made; and that the fraudulent practices of Brett, in obtaining the lease, were so apparent in the cause, that the setting it aside could be attended with no ill consequences; whereas, by denying the relief sought for against it, the appellant, and other creditors of John Thynne the father would be deprived of their security; the provision made for his family and children would be defeated; and a brocade for betraying persons of quality and fortune into unhappy marriages, might be encouraged; or at least a safe method of managing the reward for such transactions would be established.

On the other side it was insisted (P. Crawford), that the lease in question was not made until six months after the marriage between Lady Ogle and Mr. Thynne had taken effect, when he was under no kind of obligation to make it, and even declared so at the time of its being executed, as appeared upon both the trials. That there was nothing alledged to avoid the lease, but that it was made on a corrupt agreement, to procure the marriage; which being a matter of fact, was, according to the law of England, most properly triable by a jury, and was accordingly submitted, by the appellant, to be so tried; and that if she had conceived any ground of appeal from trying that fact at law, such appeal should have been brought immediately after making the decree which directed the issues, and not after the appellant had submitted to have the fact tried twice; which had been done in the fairest and most solemn manner, and the same verdict found by two special juries, of unquestionable character and reputation.

[149] After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree, and the several other orders complained of, should be reversed; and that the indenture of lease, made by Thomas Thynne Esq. deceased, to Richard Brett Esq. also deceased, bearing date the 28th of January 1681, should be vacated, annulled, and made void, to all intents and purposes whatsoever; and that the respondents should, forthwith, deliver up the same to the appellant, to be cancelled: and it was further ordered, that the said respondents should deliver possession of the leasehold premises; and that the several tenants of the said premises should pay the rents to the appellant. (Jour. vol. 17. p. 389.)

CASE 2.—DAVID EYTON,—*Appellant*; JOHN EYTON and others,—*Respondents*  
[14th February 1706].

[Mew's Dig. vii. 174.]

[The defendant suppresses a settlement, but upon proof that it came to his hands, the party entitled shall hold and enjoy the lands, according to the settlement.]

**\*\*DECREES and ORDERS of the Master of the Rolls and Lord Keeper, AFFIRMED.**

See the case of *Dalston v. Coatsworth*, 1 P. Wms. 731, and the case of *Hampden v. Hampden*, *ante*, vol. 3. p. 550, title Evidence; and *post*, *Kenrick v. Hudson*, ca. 16. of this title.—This case of *Eyton v. Eyton* is also cited

as having determined the following points by the affirmance in the House of Lords; though the ground of fraud seems to have been the main consideration. "Equity will never assist to avoid a *common recovery* upon pretence that there is no tenant to the *praecipe*, especially when suffered by an heir at common law to bar a voluntary settlement. 2 Eq. Ab. 692. c. 1: 18 Vin. 217. c. 3." See this work, title Fine, Recovery.

"A counterpart of a settlement was admitted as sufficient *evidence* that there was such a settlement, and a conveyance was decreed accordingly. Pre. Ch. 116: 13 Vin. 61. c. 5."—This point does not appear on the present report.\*\*

2 Vern. 380. 1 Eq. Ca. Ab. 169. B.c. 1: Viner, vol. 13. p. 61. ca. 5: 100. ca. 11: vol. 18. p. 217. ca. 3, 4: 2 Eq. Ca. Ab. 692. ca. 1. \*\*1 Eq. Ca. Ab. 228. c. 8: Pre. Ch. 116.\*\*

Thomas Eyton, the appellant's grandfather, by deed and fine, 16th October, 2 Car. I. settled several lands and tenements in Knolton, Overton, Villa, and Erbisstock, in the county of Flint, to the use of himself, for life; remainder to his eldest son Benjamin, and the heirs male of his body; remainder to his second son Randall, and the heirs male of his body; remainder to his third son David, the appellant's father, and the heirs male of his body; with other remainders over. But in this deed was contained a proviso, that if Benjamin should die without issue male, leaving issue female; that then and in such case, if the next in remainder to the lands so limited to him as aforesaid, should not, within one year after Benjamin's death, without issue male, pay or tender to the daughter or daughters of Benjamin, in manner therein expressed, the sum of £300 to be equally divided between them, that then the uses so limited of the said lands should cease, and [150] the same should be and enure to the use of the daughter or daughters of Benjamin, her or their heirs.

Thomas, the settlor, and two of his sons, Randall and David, all died in the lifetime of Benjamin; and Randall dying without issue, the appellant, as the eldest son of David his father, became entitled as next in remainder to this estate, expectant upon the determination of Benjamin's estate-tail; who had no sons, and only two daughters, namely, the respondents Jane and Ann.

Benjamin Eyton, being a lunatic, and the respondent John having married Jane, one of these daughters, he got the original settlement into his custody; whereupon the appellant, in 1690, filed his bill in the court of Chancery, against Benjamin and Ann his wife, and also against the respondent John and his wife, for a discovery of this settlement, and to have the same brought into court.

The defendant John by his answer confessed the settlement to be in his custody, and set forth the date and uses thereof, but insisted, that he could not part with it, without Benjamin's consent, who had levied a fine of part of the premises; and by a deed dated the 6th of September 1648, had declared the uses thereof to himself and his heirs. The defendant also insisted, that the bill was brought too soon; for that Benjamin being tenant for life, might bar the remainders, or at least, that so long as he lived, there was a possibility of his having issue male. The plaintiff therefore dropped all further proceedings in this suit, during the life of Benjamin.

In 1696 Benjamin died, without issue male; whereupon the plaintiff, as next in remainder, became entitled to the lands in question; and he accordingly amended his former bill, by making Ann, the other daughter and co-heir of Benjamin, a party; and praying a discovery of the settlement, and other deeds and writings which manifested his title, and an account of the rents and profits from Benjamin's death.

To this amended bill, the defendant John by his answer insisted, that *he could not set forth the purport of the settlement, because he had many years ago delivered it to Benjamin, and knew not what was become of it*; and the defendants Jane and Ann insisted, that they were seised of a good estate of inheritance in the said premises, under a fine and recovery levied and suffered by Benjamin, their late father.

The cause being at issue, and witnesses examined, it came on to be heard before the Master of the Rolls, on the 1st of December 1699; when his honour declared,

that there was manifest proof of the settlement of the 16th of October, 2 Car. I. and that the same was in the defendant John's custody, and suppressed by him; and that he had made a very wicked defence, in denying, by his second answer, what he had confessed by his first, and varying from the same; and therefore decreed, that the defendants should convey the premises in question to the plaintiff, and [151] that he should hold and enjoy the same, according to the settlement; and, as to the forfeiture, by reason of the plaintiff's not paying the £300 according to the said proviso, the court declared, that he ought to be relieved against the same, on payment of one moiety of the said £300 to the defendant John, and the other moiety to the defendant Ann, with interest from the time it ought to have been paid; and therefore referred it to a master to compute such interest, and also to take an account of the rents and profits of the premises, received by the defendants since Benjamin's death; and decreed, that what should appear to be due from them for such rents, more than the interest, should be paid to the plaintiff, with costs.

The defendants being dissatisfied with this decree, obtained a re-hearing of the cause, before the Lord Keeper Wright, on the 6th of January 1700; when his lordship declared, that he saw no cause to alter the decree, and therefore confirmed it.

In consequence of this decree, the plaintiff got possession of some part of the estate; but the defendants, being still dissatisfied, obtained another re-hearing before the Lord Keeper (afterwards Lord Chancellor) Cowper, on the 24th of July 1701; when it was ordered, that the defendants should proceed to a trial at law, for the premises in question; and after such trial, either party was to be at liberty to resort back to the court.

An ejectment was accordingly brought, on the trial whereof a verdict was found for the defendants, as to all the lands in Knolton, comprised in the fine and recovery of 1648; and the cause being afterwards heard on the equity reserved, on the 26th of November 1702, it was referred to a master, to compute what was due to the defendants, for their respective moieties of the £300 with interest, and to tax the defendant Ann her costs both at law and in equity; and it was decreed, that the defendants should distinctly account for the rents and profits of such of the lands in question, as they had not recovered by the verdict; and, on payment of what should appear due to the plaintiff on that account, after deducting such principal, interest, and costs, as aforesaid, the defendants were to convey to him the premises not included in the verdict; and as to such of the lands in Knolton as the defendants had recovered at law, the plaintiff was forthwith to deliver the possession thereof to them, and account for the rents and profits by him received.

But the plaintiff, apprehending that the defendants had, upon the trial at law, taken a verdict for more lands than were comprised in the fine and recovery, and the deed of September 1648, applied to the court of Chancery to be relieved in this respect; and on the 28th of January 1704, an order was made, that he should be at liberty to bring an ejectment for the recovery of such lands as were not comprised in the fine and recovery, which the defendants had taken possession of under colour of the ver-[152]-dict; unless the defendants, having notice of that order, should on the 1st day of February then next, shew cause to the contrary. And the defendants having, on that day, shewed cause against the said order; the court, by another order then made, thought fit to allow the cause shewn, and to discharge the former order.

From this order of the 1st of February 1704, and also from the two former decrees of the 24th of July 1701, and the 26th of November 1702, the plaintiff appealed; and on his behalf it was argued (N. Lechmere), that Thomas Eyton, the grandfather, who was tenant for life of the lands comprised in Benjamin's fine and recovery, was living at the time when such fine and recovery was levied and suffered, and yet did not join therein; nor was there any proof, at any of the hearings in the court of Chancery, or upon the trial at law, of any deed to make a tenant to the *praeceptum*, without which the fine and recovery could not operate, or any thing pass thereby; and without such proof, the court of Chancery ought not to have decreed the lands from the appellant to the respondents. That there were more lands in Knolton than what were comprised in Benjamin's fine and recovery, and yet the respondents, under colour of the verdict, had taken possession of all those lands; and, though by an order of assize, which was afterwards made a rule of court,

the respondents were ordered to take possession of no more lands than what were comprised in the deed of the 6th of September 1648, under which they made their title; yet, by the said order of the 1st of February 1704, the appellant was debarred from taking his legal remedy, for recovering these surplus lands. That if the intail created by Thomas was barred by the said fine and recovery, then the condition, expectant on that estate-tail, was thereby defeated; and the £300 secured by that condition for the benefit of the daughters, ought not to remain a charge upon such of the lands as were not comprised in the fine and recovery; or at least, such lands, of which the intail was not barred, ought only to bear an equal proportion of this charge; and that the appellant ought not to be charged with interest of the £300 or with costs in respect thereof; because he had duly tendered the same, according to the condition of the settlement.

On the other side it was contended (W. Banastre), that courts of equity never assisted to avoid a common recovery, on pretence of there not having been a good tenant to the *praecipe*; and especially, when it was suffered by an heir at law, to bar a voluntary settlement, and where the pretence was not set up, until near fourscore years afterwards. But however, there was all reasonable ground to presume that Thomas actually released or surrendered his estate for life to Benjamin; for it was proved, that Benjamin was for many years before, and till the death of his father, in possession of all the Knolton estate; and that Thomas agreed to quit and release to him, for a valuable consideration of above £200 which it was also proved that Benjamin had paid for the debts of Thomas; besides, the law did not, at that time, require that such a surrender [153] should be by deed, or even in writing. That as to the objection that the fine and recovery comprised only *two messuages*, and many acres in Knolton, and yet the respondents had taken possession of *four more little tenements and other lands there*; it was answered, that the deed of uses, and not the fine and recovery, was the measure which the jury went by; and though it was true, that this deed named but two messuages in particular, and several closes, lands, and inclosures by name; yet it had the general words of *all other the messuages, lands, tenements, and hereditaments* of the said Benjamin, and which then were in the possession of him or his assigns in Knolton. And whether those other little tenements now claimed were then standing, or erected afterwards, ought not, at the distance of sixty years, to be inquired into, especially as there was general proof in the cause, that Benjamin had possession of all in Knolton in his father's lifetime: and as to the appellant's insisting on a proportionable abatement out of the £300 because he could not have the lands in Knolton, it was urged without any foundation, for he thought the *residue* of the lands so well worth redeeming, on payment of the whole £300 that he brought his bill for that very purpose, and thereby stated, and also proved by witnesses, that he had made a tender of this money according to the terms of the proviso in the settlement. The appellant had it evidently in his choice, whether he would sue for his redemption or not; for the respondents did not ask for, nor could compel him to pay the £300 and would have been content with the remaining lands in lieu of it: and this suit being to preserve and be restored to his estate-tail on performing the condition annexed to it; viz. paying the £300; he was accordingly, by the decrees, restored to so much of the estate-tail as was not legally barred. No equity arose to the appellant for an apportionment on account of Benjamin's having barred his title to the Knolton lands; because the title of Benjamin was paramount that of the appellant, whose title being in its original creation subject to be barred by Benjamin, he did no more in barring it than what the settlement and the law gave him a power to do, consequently no wrong was done to the appellant, nor was the £300 payable to Benjamin, the pretended wrong-doer, but to the respondents, who were his heirs at law, and from whom these remaining lands were taken by the decree: and, as to interest and costs, it was the constant justice of the court of Chancery, in all cases of redemption, to allow both.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the several orders and decrees therein complained of, affirmed. (Jour. vol. 18. p. 237.)

[154] CASE 3.—LORD VISCOUNT KINGSLAND,—*Appellant*; NICHOLAS BARNEWALL and others,—*Respondents* [1st March 1706].

[Mew's Dig. vii. 225, 261.]

[A. being *standing counsel*, and manager for B. obtained leases for long terms, of different parts of his estate, and a release of the equity of redemption of other part; on a bill brought to set aside these transactions for fraud, it was proved, that A. had as great a power over B. as a parent has over a child, and could persuade him to do whatever he pleased; but it being proved on the other side, that the purchase money was nearly equal to the value of the land, and that A. had in many respects been exceedingly serviceable to B. the bill was dismissed.]

DECREE of the Court of Chancery in Ireland, *AFFIRMED*.

Robert Barnewall Esq. the respondents testator, and his ancestors, were for many years in the possession of a small farm in the county of Dublin, called Balhary, at the yearly rent of £18 18s. under several successive leases for 21 years, granted by the appellant and his ancestors; and in the year 1692, Barnewall obtained from the appellant a new lease of this farm for a like term of 21 years, at the old rent of £18 18s. per annum. The appellant being seised of another farm called the Grange of Ballybog Hill, made a lease thereof in April 1694, to one Christopher Horish for a term of 99 years, at an old rent of £50 per annum; whereupon Barnewall applied to the appellant for a like lease of his farm of Balhary; but both these farms being subject to a mortgage for £580 made in the year 1665, to one Martin Brice, in trust for Barnewall, and this mortgage being still subsisting for the whole of the said principal money, a proposal was made by the appellant to release the equity of redemption of these mortgaged premises to Barnewall, in consideration of his paying £50 down, and granting the appellant a rent-charge of £10 a year for his life.

This proposal being agreed to, was accordingly carried into execution; and Barnewall having paid the £50 and secured the payment of the rent-charge, the appellant, by deed, dated the 18th of October 1694, released the equity of redemption of both these farms to the said Robert Barnewall and his heirs.

In consequence of this purchase, Barnewall received the rents and profits of the premises until the time of his death, which happened in October 1700; and having made great improvements thereon, he, by his will devised the same to Robert Barnewall his nephew, (one of the respondents,) for life; with remainders over to several other nephews, also respondents; and appointed the respondent Nicholas, his brother, executor.

The appellant never attempted to impeach Barnewall's purchase in his lifetime, nor for some time after his death; but at length in 1702, he exhibited his bill in the court of Chancery in Ireland against the respondents, all of whom, except the respondent Nicholas, were then infants; suggesting, that both the re-[155]-newed leases in 1692, and the release of the equity of redemption in 1694, were obtained from him by fraud and circumvention; and therefore praying that they might be set aside.

The cause being at issue, several witnesses were examined on the part of the plaintiff, as well to prove the fraud and circumvention, as that the plaintiff was of so weak a capacity as not to be able to manage his own affairs; and that therefore the purchase was made by Barnewall at an under-value; but when the cause came on to be heard on the 11th of December 1705, before the Lord Chancellor, assisted by the Lord Chief Justice Doyne, the Lord Chief Baron Donnellan, Mr. Justice Dolbin, and Mr. Justice Coote, the court was unanimously of opinion, that both the lease and purchase were fairly obtained; and therefore the bill was ordered to stand dismissed.

From this decree the plaintiff appealed; insisting (S. Harcourt, H. Poley), that a great fraud and breach of trust had been committed upon him; for that it appeared by the proofs in the cause, that he put his whole confidence in Barnewall, and

was entirely guided and governed by him as being his standing counsel and manager; and that he had as great a power over the appellant as a parent had over a child, and could persuade him to do whatever he pleased.

On the other side it was contended (F. Page), that there was no proof in the cause of any fraud or corruption in obtaining the lease or purchase; but, on the contrary, Barnewall was proved to have been a man of great worth and credit. That if the appellant might be admitted to stultify himself, yet he had not proved any thing of that kind; and that purchases were not to be set aside either in courts of law or equity, upon pretence of a good or bad bargain; or if they might, yet the purchase-money, in this case, would, upon computation, appear to be nearly equal to the value of the land at the time it was purchased; and that Barnewall was at great trouble and pains in procuring the appellant to be included in the articles of Limerick; and was, in many other respects, exceedingly serviceable to him, and therefore deserved much more kindness from the appellant than either was or could be shewed in his said purchase.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 18. p. 264.)

[156] CASE 4.—RICHARD MAY,—*Appellant*; WENTWORTH HARMAN,—*Respondent* [19th January 1709].

[Mew's Dig. vi. 519; xi. 1304.]

[A. together with B. and C. as his sureties, executed a bond to D. for securing £300 and interest; the debt is paid by C. with the proper money of A.; but C. neglects delivering up the bond to A. to be cancelled. C. afterwards procures this bond to be assigned as a collateral security for a debt of his own. Held, that this assignment was a gross fraud in C. and a perpetual injunction was granted to restrain all further proceedings upon the bond.—*Particeps criminis*, in the case of fraud, is the most proper person to discover and prove it; especially, when what he so proves turns to his own prejudice.]

DECREE of the Lord Chancellor of Ireland granting injunction, AFFIRMED.

One Thomas Whitley borrowed of Mrs. Judith Lake £300 and for securing the re-payment thereof, with interest, he, together with Roger Whitley, Matthew Kent, and the respondent, as his sureties, executed a bond to Mrs. Lake, dated 19th September 1689, in the penalty of £600 conditioned for payment of the £300 and interest on the 9th of March following.

In the year 1695, Kent and one John Mantus, his partner, by the order and with the proper money of Thomas Whitley, paid Mrs. Lake the principal and interest due on this bond, which was thereupon delivered up to Mantus, who kept it in his custody a considerable time; and before Thomas Whitley saw either of them to demand a delivery of the bond, he died.

Kent and Mantus being indebted to Philip Howard Esq. in a large sum of money upon bond, in which one Thomas Shephard had become bound with them, and being insolvent in their circumstances; they prevailed with Mrs. Lake in November 1695, to assign the bond to Shephard, although she at the same time informed him, that she had long ago been paid all principal and interest due to her thereon; nor did Shephard pay her any money or other consideration for such assignment.

Kent, Mantus, and Shephard, being all bankrupts, Shephard, on the 6th of December following, with the privity of the other two, assigned the said bond to Mr. Howard, as a farther security for the debt which they then owed him; but Kent soon afterwards informed Mr. Howard, that there was nothing due on this bond, and told him in what manner the same had been satisfied by Thomas Whitley;

so that Mr. Howard, though he lived several years afterwards, never put the bond in suit against Roger Whitley, the only solvent obligor therein named.

In July 1701, Mrs. Lake died, and James Lake her executor was by some means prevailed upon to assign his interest in the [157] bond to Mr. Howard; but he at the same time assured him there was nothing due thereon.

Mr. Howard afterwards died, having made his will, and thereof appointed Robert Thornhill Esq. and the appellant executors in trust, for the payment of his debts; and Charles Earl of Carlisle residuary legatee.

The respondent living in Ireland, was a perfect stranger to the several transactions which had passed relative to this bond; but Mr. Howard's executors having sent it there, and put it in suit against him, he made some inquiry concerning it; and finding that the bond had in fact been satisfied by the original and real debtor, in the manner before stated, the respondent, in Hilary term 1704, exhibited his bill in the court of Chancery in that kingdom, against the executors of Mr. Howard, and also against the Earl of Carlisle and others, to be relieved against the bond, and to have the same delivered up and cancelled.

On the 22d of November 1707, the cause was heard before the Lord Chancellor of Ireland; when it appearing from the depositions of Kent and Mantus, who were privy to all these transactions, that the said debt of £300 and the interest thereof, was paid by Thomas Whitley in discharge of the bond; that the assignment from Mrs. Lake to Shephard was made by fraud and contrivance, without one farthing of money paid by Shephard; and that Mrs. Lake and her executor, at the time of their respective assignments, declared that nothing was due on the bond; his lordship decreed a perpetual injunction against any proceedings at law on the said bond, and that the same should be delivered to, and remain in the custody of the usher of the court.

From this decree the defendant May alone appealed; insisting (J. Jekyll, R. Turner), that Kent's deposition ought not to have been read, because he was examined to prove the payment of a debt, for which he himself was bound and liable to be sued, unless acquitted on his own testimony; and that the deposition ought not also to have been read, or if read, not credited; he thereby confessing himself a party to so great a fraud, as joining in the assignment of a bond, after it was satisfied. That Mr. Howard appeared to be a fair purchaser of the bond, without notice of the pretended fraud set up by the respondents bill, and which he himself ought to have prevented, by taking care to have had the bond cancelled, in case of payment; and such neglect, if the money was paid, ought not to turn to the prejudice of the appellant, who was an executor in trust to pay debts, great part of which would never be paid, unless he received the money due on this bond. And that the court refused to permit the assignment from Mrs. Lake to Shephard to be read, although there was an indorsement thereon of the payment to her of £411 as the consideration of such assignment.

[158] On the other side it was contended (S. Harcourt, S. Cowper), that Mr. Kent, who paid the debt to Mrs. Lake with Whitley's money, was the proper witness to prove such payment, and was under no legal disability; inasmuch as he remained debtor to Mr. Howard's executors, by his own and his partner's bond, notwithstanding his proving the bond to Mrs. Lake satisfied; and that this bond being assigned, as a collateral security only for his own debt, it was rather his interest to prove that it was not paid by Thomas Whitley, in order that, in that case, the appellant might have received a satisfaction out of the collateral security, in discharge of the principal debt. That *particeps criminis*, in the case of fraud, was the most proper person to discover and prove it, especially when, as in the present case, what he proved was to his own prejudice; for it was plain, Mantus remained debtor to the appellant, as executor to Mr. Howard, in all the money for which he and his partner and Shephard were bound to Howard; whereas, if the appellant had recovered against the respondent, the debt to Mr. Howard would have been *pro tanto* discharged. That by the concurring testimony of Kent and Mantus, the payment of the principal sum of £300 and interest to Mrs. Lake, with the proper money of Thomas Whitley, was fully and effectually proved; and as to the refusing the assignment from Mrs. Lake to Shephard to be read, there was no proof in the cause of any payment whatsoever being made to her, at the time of executing this

assignment; but, on the contrary, it appeared in evidence, that no money was paid in consideration thereof. And therefore as it clearly appeared that the debt to Mrs. Lake was discharged, for the payment whereof the respondent was bound; and as the bond, which ought then to have been cancelled, had been afterwards *fraudulently* assigned, it was hoped that the decree would be affirmed, with costs.

And accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree and injunction therein complained of, affirmed; and that the appellant should pay to the respondent the sum of £20 for his costs. (Jour. vol. 19. p. 40.)

[159] CASE 5.—THOMAS AMORY,—*Appellant*; HENRY LUTTRELL,—*Respondent*  
[5th April 1710].

[Mew's Dig. v. 1052.]

[Lands of £353 per ann. were devised in trust for the sole and separate use of K. during the joint lives of herself and her husband; the husband being afterwards outlawed for high treason, these lands became forfeited, and were granted by the crown to S. his brother, subject to all legal and just incumbrances. S. having withheld the rents of these lands from K. whereby she was reduced to great necessity, she was prevailed upon to release the same to S. in consideration of £100 paid down, (though the arrears amounted to £1200) and an annuity of £200 per ann. during the joint lives of herself and her husband. But this release was set aside as fraudulent, and S. decreed to account for the whole rents and profits.]

DECREE of the Court of Chancery in Ireland REVERSED.

On the marriage of Simon Luttrell Esq. with Katherine, the appellant's late wife. in August 1672, the town and lands of Diswellston, and several other lands in Ireland, of about £500 per ann. were settled on the said Katherine, for her jointure; and in 1675, the lands of Luttrell's-town, of about £250 per ann. were limited to Katherine for her life, as an addition to her former jointure, in case Simon should die without issue male by her.

On the 9th of May 1684, Simon Luttrell granted the rents and reversions of several houses in Dublin, and of several lands thereunto adjoining, to Colonel Richard Talbot, afterwards Earl of Tyrconnel, for a term of 61 years, if Simon and Katherine his wife should so long live, in trust for and for the sole and separate use of Katherine, during the joint lives of her and her husband Simon. In pursuance of this deed, the rents of these premises, amounting to £353 5s. per ann. were received for the separate use of Katherine, from May 1684 to May 1690. And on the 17th of June in that year, the earl assigned this lease to Sir Thomas Newcomen and Samuel Molyneux Esq. upon the same trusts.

In 1692, the Earl of Tyrconnel and Simon Luttrell were outlawed for high treason; and thereupon the rents of this Dublin estate, limited to Katherine for her separate maintenance, were stopped in the hands of the tenants; but upon complaint being thereof made to the Lord Lieutenant of Ireland, and on full examination of the matter before the commissioners of forfeitures, an order was made, that the rents of the premises so granted in trust for Katherine, should be paid to Sir Thomas Newcomen, her trustee, for her use.

By an inquisition taken on the 8th of May 1694, the forfeitures of Simon Luttrell were found, and therein express notice was taken of the above grant and assignment, in trust for Katherine; and on the 14th of June following, the respondent obtained a grant, by letters patent under the great seal, of the forfeited estates of the said Simon Luttrell, his brother; discharged of all rents reserved to the crown, but under a proviso, that the [160] premises so granted should nevertheless remain *subject to all legal and just incumbrances*.

But the respondent, under pretence that the said trust estate was part of his brother Simon's forfeitures, which he was entitled to under the letters patent, pre-



vailed upon the tenants to pay their rents to him instead of Katherine or her trustee, and thereby deprived her of the whole separate maintenance, and reduced her to great extremities; although he was likewise in possession of the residue of his brother's estates, to the amount of £1500 per ann.

Mrs. Luttrell, being thus circumstanced, and resident in France with her husband, wrote in the year 1695, to one Mrs. Sheldon in London, requesting her to apply to the respondent for the arrears of her said separate maintenance, which he so unjustly detained; and thereupon the respondent proposed to Mrs. Sheldon, that if Mrs. Luttrell would release the arrears of such separate maintenance, which then amounted to £1750, and also both her jointures, he would grant her an annuity of £200 per ann. for her life; and having got a deed prepared for this purpose, he prevailed with Mrs. Sheldon to transmit it to Mrs. Luttrell, in order to be executed. But she rejecting this proposal, as equally unreasonable and unjust, wrote several letters to Mrs. Sheldon, in the months of August and September 1695, complaining of the respondent's behaviour, and directing her to enter into no agreement with him, but what should be, in every point, conformable to a paper which Mrs. Luttrell had signed, and then sent to her.

Notwithstanding these instructions, Mrs. Sheldon, on the 17th of March 1695, and without any authority from Mrs. Luttrell, executed a deed to the respondent, whereby the said £353 5s. per ann. and all arrears thereof to that time, were assigned and released to him, in consideration of £100 then paid, and of £200 per ann. to be paid in Ireland to Mrs. Sheldon, for Mrs. Luttrell's use, during the joint lives of herself and her husband Simon, provided the respondent should so long enjoy the Dublin estate, out of which £353 5s. per ann. was to issue. And the only security given by the respondent for the payment of this annuity of £200 per ann. was a lease of the very same estate, charged with the payment of the £353 5s. per ann.; but without any covenant for the payment of the annuity, or of any other sum towards Mrs. Luttrell's support, in case the respondent should by any means be deprived of that particular estate.

In October 1698, Simon Luttrell died without issue; whereupon Katherine, his widow, became entitled to her jointure-lands; but the respondent, for about three years, withheld the possession thereof, under pretence that they were granted to him by the crown in 1696; however, in May 1702, she recovered the possession of these lands; but was not able to obtain any satisfaction for the rents and profits thereof, from the time of her husband's death.

[161] In May 1703 Mrs. Luttrell intermarried with the present appellant; and in Michaelmas term following, they filed their bill in the court of Exchequer in Ireland, against the respondent, in order to set aside the deed of the 17th of March 1695, and recover the arrears of the separate maintenance; and also, for an account and satisfaction of the rents and profits of the jointure-estate: the defendant, by his answer to this bill, admitted the receipt of the separate maintenance, from the 1st of May 1692, to the death of his brother Simon in 1698; and also, of the rents and profits of the jointure-lands, for three years after Simon's death; but he insisted upon the deed of 1695, and the payment of the annuity of £200 per ann. thereby granted, in bar to so much of the plaintiffs demands, as related to the arrears of the separate maintenance.

Pending this suit, the plaintiff Katherine died; and the other plaintiff her husband, having taken out letters of administration, and revived; the cause was heard on the 8th of February 1706, when the court thought proper to dismiss the bill, as to all the arrears of the separate maintenance; but decreed the defendant to account for the rents and profits of the jointure-lands, from the death of Simon Luttrell, to the death of Katherine.

This account being accordingly taken, the sum of £710 was found due from the defendant for these arrears; which, by another decree of the 6th of December 1708, he was ordered to pay to the plaintiff on the 25th of March 1709, but *without any interest or costs*; and upon such payment, the plaintiff was to deliver up both the deeds of jointure, and release the defendant from all further demands: and, as to some part of the arrears, which the defendant had not received, he was ordered to deliver the counterparts of the leases to the plaintiff, who was left to recover the same at law, from the tenants.

From these decrees both parties appealed; and in support of the *original* appeal it was insisted (T. Powys, S. Harcourt), that Mrs. Sheldon had no sufficient authority from Katherine Luttrell, to execute the assignment and release of the separate maintenance; and that this deed was obtained by the respondent without any valuable or equitable consideration, or any hazard run by him on that account: for the £200 per ann. to Mrs. Sheldon, in trust for Mrs. Luttrell, was made payable only out of the estate charged with the separate maintenance, and even that, no longer than while the respondent should enjoy the same; and no more than £100 was paid in hand, although the arrears of this separate maintenance, then due from the respondent, amounted to above £1200. That the appellant ought to have been allowed interest for the sum decreed, and also the costs of the suit; because that sum appeared by the report to have been detained for several years before filing of the bill. And that the appellant ought not to be obliged to deliver up the jointure-deeds, or release the respondent from all [162] demands; before he had brought in the counterparts of the leases, and the appellant had recovered the arrears of rent remaining due from the tenants, which he could not do without having the counterparts of those leases.

In answer to this, and in support of the *cross* appeal, it was said (S. Dodd, S. Cowper), that though the respondent obtained a grant from the crown of his brother's forfeited estates, yet the act of *resumption* vested all Irish forfeitures in trustees, from the 2d of November 1699; before which time, no grantee was, by a clause in the act, to be made accountable; and by another clause, the estates of *article-men* were saved to them; and therefore, Mrs. Luttrell claimed both her jointures before the trustees, and the same were decreed to her accordingly. That Mrs. Luttrell empowered Mrs. Sheldon, by letter of attorney, to execute the agreement, respecting the annuity of £200 for her; and in consequence thereof, that annuity had been punctually paid to Mrs. Sheldon, for her use, as it became due. That upon the respondent's applying to the parliament of England for his estate, Mrs. Luttrell petitioned to have a saving of her right; and a clause being thereupon offered, entitling her to the arrears from her husband's death, the respondent objected, that being a grantee, he was not accountable before November 1699; and this objection being corroborated, by the examination of the Irish trustees, who declared, that they had adjudged to Mrs. Luttrell her jointure and arrears, only from the 2d of November 1699, when the act of *resumption* commenced; the clause was rejected, and another inserted, to entitle her to her jointures, agreeable to the adjudication of the trustees. But, that in order to frustrate the effect of this latter clause, the appellant, who was register to the trustees, afterwards obtained from them a certificate, that they had adjudged to Katherine, her jointure and arrears, from the death of Simon; and therefore it was insisted, that under these circumstances, the respondent was only liable to account for the arrears of the jointures, from the 2d of November 1699; that the appellant's ingenuity in obtaining the certificate, after the act for the respondent's relief was passed, ought not to prevail; and that the decree, as to this point, ought to be reversed.

To this it was answered, on the part of the appellant, that the rents of the jointure-lands, which accrued after the death of Simon Luttrell, were no part of his forfeitures; but belonged to Katherine during her life, and had accordingly been adjudged to her by the trustees. That by a clause in the act for the sale of Irish forfeitures, it was enacted, that estates claimed, and allowed by the trustee, should not afterwards be called in question, by any person deriving under the crown; that their adjudication to Katherine was further confirmed by a clause in the same act, which restored the respondent to the forfeitures granted him by the crown; and that the clause which exempted grantees from being accountable, extended only to the rents and profits of the [163] *forfeited* lands, for which they would otherwise have been accountable to the trustees; but not to the rents of any lands which were claimed by, and adjudged to other persons.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that that part of the decree, by which the appellant's bill was dismissed, as to all arrears of the separate maintenance, should be reversed; and that the respondent should account to the appellant for all the arrears, and all the profits, received by him, or any other person by his order, or for his use, out of the lands and premises

contained in the deed of the 9th of May 1684, and thereby settled or conveyed in trust, for the sole and separate maintenance of Katherine Luttrell, the appellant's late wife, by Simon Luttrell her former husband; and that the said account was to be taken by the chief remembrancer of the court of Exchequer in Ireland, who, in taking the same, was to make the respondent all just allowances: and as to the other matters concerning interest, it was ordered, that the appeal should be dismissed, and the decree affirmed; but without prejudice to the interest which was or might be due upon the stated balance of £710 only; and that the said remembrancer should tax the appellant's costs in the court of Exchequer, to be paid by the respondent to him: and that the *cross* appeal should be dismissed; and the decree, so far as it was not now reversed or altered, was affirmed. (Jour. vol. 19. p. 142.)

CASE 6.—GEORGE BOOTH,—*Appellant*; GEORGE, EARL OF WARRINGTON,—*Respondent* [29th April 1714].

[Mew's Dig. vii. 704; ix. 124. Explained *Gibbs v. Guild*, 1881, 8 Q.B.D. 304. See *Betjemann v. Betjemann*, 1895, 64 L. J. Ch. 641.]

A. under a pretence that B. was instrumental in procuring a beneficial marriage for C. obtains a bond from C. to B. for 1000 guineas, as a reward for his services. The bond is paid when due; but in nine years afterwards C. discovers the whole to be a gross imposition in A. and that he received all the money. On a bill brought, A. was decreed to repay C. the whole money, with interest and costs.]

\*\* DECREES of the Court of Chancery AFFIRMED.

Where there is fraud, and such fraud is concealed, no length of time can bar. See *Cottrel v. Purchase*; Forrest. 61; and *post*, ca. 14. S.P.—and also *ante*, case 1 of this title, relative to marriage-brochage agreements.\*\*

Viner, vol. 13. p. 542, ca. 3.

In August 1701, Mr. John Oldbury, a merchant in London, died, leaving only two daughters; namely, Mary, who afterwards married the respondent, and Dorothy, who married Francis Herbert Esq. It being reported that Mr. Oldbury had died worth £100,000, the respondent, on the 6th of September 1701, wrote a letter from Dunham in Cheshire, to his uncle the appellant, who was then in London, desiring him to make some inquiry into the truth of this report; this the appellant accordingly did, and in answer informed the respondent, "that the [164] ladies fortunes were so very considerable, that nothing must be wanting to obtain them, that was honourable and just; that to obtain either of them in marriage, would be a matter attended with very great difficulties, but he would endeavour to get over them, and should be glad to be instrumental in serving his nephew in a matter of that great concern, to make the head of his family considerable; and that he would forthwith undertake and go about it."

The respondent, apprehending that the fortunes of these ladies were at least £40,000 each, and his estate being incumbered with the debts of his father to more than that amount; wrote another letter to the appellant, on the 10th of September 1701, saying, *that if the ladies fortunes were so considerable as was represented, he should think no trouble or expence ill employed to obtain one of them.* To this letter, the appellant, on the 7th of October following, returned an answer, and therein expressed himself as follows: "My Lord, I believe you will not be less surprised than I was, to find that the ladies will not be worth above £24,000 each.—Now, my lord, I must acquaint you, that *having had a meeting with a person, deputed by those that can bring this matter about*, they first insisted to have 2000 guineas deposited in a third hand, when the match should be concluded, to be paid in a month; but with much arguing, it was *concluded*, that 1000 guineas should be paid in a month after such marriage; and in lieu of depositing money, I have put into their hands, the security I have from my Lord Radnor, of my wife's portion:

I desire your lordship will send me your answer by the next post, what your thoughts are upon the whole matter, for there will not allow of any delay, there being so many offers made to them.—I will use no argument for or against.”

The respondent being able to make a settlement fully adequate to the fortune mentioned in this last letter, he considered the appellant's agreeing to give so large a gratuity, as rather rash and imprudent: believing him, however, to be just and sincere in what he had done, the respondent signified his approbation thereof, and promised to be punctual in paying the money, by two several letters of the 11th and 13th of the same month.

A treaty was soon afterwards opened by the appellant, on behalf of the respondent, with Doctor Castle, the uncle and guardian of the young ladies; in consequence of which, a match was agreed upon between the respondent and Mary, the eldest of them; and on the 9th of April 1702, the marriage was had, a suitable settlement having been previously made.

Soon after the marriage, the appellant informed the respondent, that the speedy payment of the 1000 guineas was much pressed for; but that to make the parties easy, he had entered into a bond to one James Isaackson, bearing date the 19th of May 1702, in the penalty of £2150, conditioned for the payment of £1075 on the 29th of September then next; and therefore pro-[165]-posed, that the appellant should give him a counter-bond of the same tenor and date, by way of indemnity, which was accordingly done.

On the 14th of January following, the respondent paid the appellant the sum of £1050 together with £15 more, which he said was required for interest; he also made a present of £200 to the appellant's son, as an acknowledgment of the favours supposed to be done by his father, who had refused any gratification, professing that what he did, was purely out of friendship, and not for reward.

About nine years after this transaction, the respondent discovered the whole of it to be a gross fallacy and imposition; that Doctor Castle was the only person with whom the appellant treated for the match; but that he had never received a single shilling of the money paid upon the bond. The respondent therefore, in Hilary term 1711, exhibited his bill in the court of Chancery against the appellant, in order to recover back the 1000 guineas and £15 with interest.

To this bill, the defendant pleaded the statute of limitations; and by his answer it appeared, that he had deposited the Earl of Radnor's security with one Samuel Jackson, had given his bond to James Isaackson, and had paid the money to one Towers; but as to who these people were, or where, or in what capacity they lived, no satisfactory account was given.

On the 6th of March 1712, the plea was argued: when the benefit of it was saved to the hearing. And the cause being at issue, the plaintiff proved by divers witnesses, that Doctor Castle was the uncle and sole guardian of the young ladies, and the person who had the sole disposal both of their persons and fortunes: that he was the only person with whom the defendant treated for the marriage, and to whom he had written many letters on that subject, which were produced and verified: that the ladies were never out of the company of the doctor and his wife, and two other gentlewomen, who were their constant companions both at home and abroad: that no person was ever deputed to treat with the defendant for the match, nor one penny ever asked or received as a gratuity for effectuating it: and that Isaackson, Jackson, or Towers, were never known, seen, or heard of.—The defendant entered into no evidence to support the case made by his answer.

On the 22d of June 1713, the cause was heard before the Lord Chancellor Harcourt; who declared, “that he was far from being satisfied, that there ever was any such agreement as in the answer, touching the payment of the 1000 guineas; or that there were any such persons as Isaackson, Jackson, or Towers, or that they had any power to influence the match, or were ever represented to have such power, or that any money was paid by the defendant on the bond pretended to have been entered into by him; but that the same appeared to have been set up on a fraudulent account, and upon a misrepresentation [166] of the defendant, and was not really executed by him; and that therefore, the plea of the statute of limitations ought not to avail him any thing.” But in regard to the length of time since the bond was pretended to be entered into, it was referred to a master to see whether any such

bond was executed, and to whom the same was delivered after the execution thereof; and whether there were then any such persons as Isaackson and Towers, and where they then lived, or were yet living; and whether any and what money was really and *bonâ fide* paid, and when, where, to whom, and in whose presence, upon the said bond: and after the master's report, such further order should be made, as should be just.

The defendant examined one Philip Oddy, before the master, to prove the execution of the bond; who confessed, that he wrote his name as a witness, and believed that it was executed; but said he was an utter stranger to all the parties, and being accidentally present, was desired to be a witness.

The master, by his report of the 5th of February 1713, after stating this evidence, certified, that it did not appear to him, to whom the bond was delivered, or by whom it was taken away after the execution thereof; or that there were any such persons as Isaackson and Towers at the time of entering into the bond, or whether they were then living, or where they lived; or that any money was really and *bonâ fide* paid to any person whatsoever, upon the said bond.

On the 16th of March following, the cause was heard upon this report; when the court declared, that it fully appeared by the master's report, that there never was any real transaction between the defendant and Isaackson and Towers; and that the payment of the 1000 guineas and £15 was a mere fiction and fraud in the defendant; and therefore decreed, that he should pay to the plaintiff the said 1000 guineas and £15 with interest from the time of filing the plaintiff's bill, and the costs of the suit.

From both these decrees, and also from the order of the 6th of March 1712, the defendant appealed; and on his behalf it was insisted (E. Northey, S. Mead), that the statute of limitations extends as well to proceedings in equity as at law, and that the respondent's bill, being in the nature of an action upon the case, for monies supposed to have been had and received to the respondent's use, above nine years before the bill exhibited, without so much as a pretence of any claim or demand in all that time, nor any thing surmised in excuse of this neglect; there was no just reason for over-ruling the appellant's plea, or depriving him of the benefit of the statute. That upon the circumstances of the case, it was neither just or reasonable, after so long an acquiescence, and at such a distance of time, to require of the appellant any other evidence or proof of payment, than his own oath, and the delivering up the bond. And the rather, because the transaction was of a secret nature, and requisite to be kept [167] so, for the honour of the respondent's family; for which reason, the appellant kept no notes or memorandums of it, and it was by meer accident that he found, amongst loose and disregarded papers, some few of the respondent's letters, which were proved in the cause.

On the other side it was only said (J. Jekyll, T. Lutwyche), that the order and decrees appealed from were just, and grounded upon the rules of equity and good conscience; and that therefore the appeal ought to be dismissed with costs.

After hearing counsel on this appeal, on the 28th of April 1714, it was ORDERED, that on the morrow at 12 o'clock, the house would hear one counsel of a side, to the following points: "*First*, Whether, supposing such a fraud to have been committed, as charged by the plaintiff's bill, an action at law might have been maintained, and the plaintiff thereby repaired in damages, for what he had suffered by reason of the fraud? *Secondly*, Supposing such an action might have been maintained at law, at what time the cause of action accrued? *Thirdly*, Supposing the fraud not to have been discovered, till six years after the cause of action accrued, whether a court of equity be barred from giving relief in such case, on a bill to be commenced after the six years?" And it was further ordered, that all the judges should attend the house, on the morrow at 12 o'clock. (Jour. vol. 19. p. 669.)

Accordingly, on the next day, after hearing one counsel of a side, as to the above points, and also the judges, and upon due consideration of what was offered, it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the order and decrees therein complained of, affirmed. (Jour. vol. 19. p. 670.)

CASE 7.—JEREMIAH BROWNE,—*Appellant* ; THOMAS MITTON,—*Respondent*  
[23d June 1714].

[Mew's Dig. vii. 20.]

[J. S. and W. his eldest son, join in a mortgage for £100 and interest, and after payment it was declared, that the premises should be to the use of J. S. for life; remainder to W. and the heirs of his body; remainder over. B. takes an assignment of this mortgage, and afterwards prevails on J. S. to sell him part of the premises, and levy a fine. This sale is a fraud upon W. and was accordingly set aside.]

DECREES of the Court of Chancery AFFIRMED.

John Mitton was seised in fee of a messuage, tan-house, and lands, in Clunton in the county of Salop; and, by articles dated the 14th of April 1687, previous to the marriage of his son William, with Alice Bolton, in consideration of the intended marriage, and of £170 the portion of Alice, he covenanted to settle the said premises to the following uses; viz. one moiety to the use of William and Alice, for their lives, and the life of the survivor [168] of them; and after the death of the survivor, to the use of the heirs of their two bodies; and the other moiety, to the use of the said William, for life; with remainder to the use of the heirs of the bodies of William and Alice.

By indentures of lease and release, dated the 15th and 16th of the same month, John Mitton conveyed the premises to the uses of the articles; save only, that by some mistake in the wording of this settlement, Alice was made only a bare tenant for life, in the moiety limited to her, instead of being a joint-tenant in tail of such moiety, as by the articles was stipulated.

By other indentures of lease and release, dated the 7th and 8th of November 1695, John Mitton and William his son, mortgaged the lands so settled to one Jeremiah Bright, for securing the payment of £100 and interest; but after payment thereof, it was declared, that the said mortgaged premises should be to the use of the said William Mitton, for his life; remainder to John, his eldest son, and the heirs of his body; remainder to Thomas, his second son (the respondent), and the heirs of his body, with other remainders over.

Alice, the wife of William Mitton, never joined in this mortgage; and in November 1698, Bright, the mortgagee, assigned all his estate and interest to one Evans, in trust for one Thomas Browne; which assignment recited the mortgage, and was drawn and prepared by the appellant.

William Mitton becoming soon afterwards distressed in his circumstances, was prevailed upon by the appellant, in consideration of £100 to sell him several parcels of the settled lands, of about £11 per ann. which lay contiguous to his own estate; and in October 1699, the same were conveyed to him accordingly: but, as these lands were part of the premises comprised in Bright's mortgage, the appellant, in order to fortify his title, took an assignment of that mortgage from Evans and Browne, by indentures of lease and release, dated the 1st and 2d of November following, in consideration of £123.

At the time of executing the mortgage to Bright, William Mitton levied a fine of the premises; and he was afterwards prevailed on to levy another fine thereof, to corroborate the appellant's purchase; but Alice, the wife, was no party to either of these fines.

In 1708, William Mitton died, leaving Alice his widow, with five sons and two daughters; and soon afterwards the widow, together with John, her eldest son, exhibited their bill in Chancery against the appellant, in order to set aside the said conveyance of October 1699, as having been fraudulently obtained; and, that they might enjoy the estate according to the marriage-articles.

The appellant thereupon exhibited his cross bill, to foreclose the equity of redemption of the mortgaged premises; to have his purchase of part thereof confirmed; and to compel the widow to [169] come to a division of the lands, in respect of the moiety which she was entitled to for her life.

On the 13th of November 1711, these causes were heard at the Rolls; when his honour declared, that the settlement or limitation of the equity of redemption of the lands in Bright's mortgage, was not voluntary, but founded on the marriage articles; and that the plaintiff John ought to be admitted to a redemption of the lands contained in that mortgage, on payment of what the defendant had really and *bonâ fide* paid on taking the assignment thereof, with interest for the same, after discounting the profits of the lands; and therefore it was decreed, that the defendant should account for what profits he had received out of the lands in the said mortgage; and, upon the plaintiff John's paying what the master should state to be due to the defendant on account of the said mortgage, he should re-convey the mortgaged premises to the plaintiff John; and the master was directed to inspect the defendant's purchase deeds, and to examine and certify what lands were comprised therein; and also what money the defendant really paid or advanced to or for the said William Mitton, the plaintiff's father; and upon the master's report, such further order should be made touching the defendant's said purchase, as should be just.

The defendant, being dissatisfied with this decree, applied for, and obtained a re-hearing before the Lord Keeper Harcourt, on the 18th of May 1712; when it being admitted, that the whole estate was comprised in the mortgage made to Bright, it was ordered, that only so much as the defendant paid on taking the assignment of Bright's mortgage, was to be re-paid with interest; and that so much of the decree as directed the master to look into the defendant's purchase deeds, and to certify what lands were comprised therein, and whether all or any, and what part of the lands contained in Bright's mortgage, were comprised in the defendant's purchase deeds, and also to examine and certify, what money the defendant paid to, or advanced for the plaintiff's father, should be discharged: and that the defendant's cross bill, touching those matters, should be dismissed; but his lordship did not think fit to give costs to either party, in either of the causes.

Before this decree was drawn up, the plaintiff John Mitton died; whereupon the present respondent Thomas became entitled to the mortgaged premises; and having accordingly revived the suit, was proceeding to carry the decree into execution.

But the defendant thought proper to appeal from both decrees; insisting (J. Pratt, N. Lechmere), that the limitation in Bright's mortgage, on which they were founded, and to which Alice the wife was no party, was voluntary; it being entirely in the power of William Mitton to create such limitation or not, and no consideration was mentioned in that deed, to raise such uses or limitation. That by the decrees, the limitation was declared to be founded on the marriage-[170]-articles; whereas the settlement itself was executed before the marriage, in pursuance of, and by all the parties to the articles; and the fines afterwards levied by William Mitton, barred the intail, as well in the settlement as in the articles. And that the appellant being in possession by virtue of his purchase, the mortgage being only assigned to protect the purchase, ought not to have been decreed to account for the profits of the purchased lands, received in William Mitton's lifetime; for he being, by the limitation in Bright's mortgage, tenant for life, had power to dispose of the profits as he pleased, during the continuance of that estate.

On the other side it was contended (J. Jekyll, S. Mead), that the limitations of the equity of redemption in Bright's mortgage, being founded upon, and consonant to the marriage-articles, were not voluntary; and that the appellant having notice of those articles, by taking an assignment of that mortgage, and a full knowledge of the settlement, the lands therein comprised ought not to be subject to any other of his claims, but the mortgage. That his pretended purchase, being founded in fraud, ought not to subsist; and that having got into possession of the estate in a very unfair manner, he ought not to avail himself thereof to the respondent's prejudice, who was a purchaser for a valuable consideration.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree and confirmation thereof, therein complained of, affirmed. (Jour. vol. 19. p. 724.)

CASE 8.—MICHAEL WEBBER,—*Appellant*; RICHARD FARMER,—*Respondent*  
[21st January 1718].

[Mew's Dig. vii. 705; xiv. 1747.]

[A. made an absolute conveyance of lands to B. and his heirs, in consideration of £1500 which was at that time the full value; but on the next day B. executed a defeazance, declaring, that if A. or his heirs, should within 16 years pay B. the £1500 the conveyance should be void. B. entered and enjoyed the lands; and about three years afterwards made a settlement thereof upon his marriage; and to which settlement A. was privy, but took no notice of the defeazance, or ever attempted to refute the general opinion that B. was the sole and absolute owner of the lands. After B.'s death, A. set up by the defeazance, and filed a bill to redeem; to which the son and heir of B. pleaded the purchase deeds and marriage settlement of his father. Held, that the intent of the conveyance being to enable B. to obtain a marriage, and a considerable portion, such intention was fraudulent; and therefore a perpetual injunction was awarded against A. to stop all further proceedings under the defeazance.]

\*\* DECREE of the Court of Chancery in Ireland, for a perpetual injunction, AFFIRMED: eight Lords against seven. Cowper and Harcourt against the decree; Parker for it. 13 Vin. 525. H. c. 3.

From the statement in 13 Vin.: 2 Eq. Ca. Ab. and Treatise of Equity, the point determined seems more accurately as follows:

"If A. make an absolute conveyance to B. for £1500 and B. executes a defeazance upon payment of the £1500 within 16 years; and B. on his marriage settles this as an absolute estate on his wife, and the issue of that marriage; there being proof that A. made the conveyance to enable B. to get a fortune, though another lady, and not the wife he really married; yet A. shall be bound, as *particeps criminis*, notwithstanding that the wife's father had notice of the defeazance before the settlement made."

To the principle of this case may be referred the several cases in which Courts of Equity have held the party, colluding in a misrepresentation, barred from disturbing the claims of such persons as the law considers purchasers for valuable consideration.

If a man, by the suppression of the truth, or by the suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, it is agreeable to the dictates of good conscience that his claim should be postponed to that of the person whose confidence was induced by his representation: but where the party to whom the fraud is imputed, was not consensant of the treaty in which the fraud was practised, nor in any manner, nor for any fraudulent purpose, confederating with the party practising the fraud, the rule does not apply.—See Treat. of Eq. c. 3. § 4; and c. 4. § 11.

So, at law, a false affirmation made by A. to defraud B. whereby B. receives damage, is the ground of an action on the case in the nature of deceit. And in such action it is not necessary that A. should be benefited by the deceit, or that he should collude with the person who is. *Pauley v. Freeman*, 3 Term Rep. 51; where the question is fully and ably investigated. See also post, ca. 15.\*\*

Viner, vol. 13. p. 525. ca. 3: 2 Eq. Ca. Ab. 481. ca. 15.

The appellant being seised in fee of the lands of Curraghconway, in the liberties of the city of Cork, in Ireland, by indentures of lease and release, dated the 31st of October, and 1st of November 1698, conveyed the same absolutely to Jasper Farmer, the respondent's father, and his heirs, in consideration of £1500 which was at that time the full value thereof; and by the release, the appellant entered into all the covenants which are usual upon the absolute sale of lands.

But by a deed of defeazance, dated the 2d of the said month of November,



and executed by the said Jasper Farmer, it was declared, that if the appellant, or his heirs, should within sixteen years, from the 1st of May 1699, pay unto the said Jasper Farmer, his heirs, executors, or administrators, the said sum of £1500 the said conveyance should be void. And it was thereby agreed, that the said Jasper was to hold the said lands, without giving any account for the profits; but that for every sum which the appellant should pay him within the said sixteen years, (no one sum being less than £200) the appellant should have interest for the same, at the rate of £7 per cent per ann. in regard the said Jasper had the profits of the lands.

Jasper Farmer, being in the actual possession and the reputed owner of this estate, entered into a treaty of marriage with Elizabeth, the daughter of George Rogers Esq. and, by indentures of lease and release, dated the 8th and 9th of July 1701, in consideration of the intended marriage, and of £1000 marriage-portion, the said lands of Curraghconway were (among others) settled to the use of the said Jasper for life, remainder to the first and other sons of the marriage, successively in tail male; subject to a rent-charge of £200 per ann. to the said Elizabeth for life for her jointure, with other remainders over. And by this settlement, the said Jasper covenanted, that he was seised of an absolute estate in [172] the premises in fee-simple, without any condition or power of revocation whatsoever; and that he had good right and full power to convey the same, to the uses of the said settlement.

The marriage was soon afterwards had, and the appellant, who lived near the said city of Cork, and was uncle to the said Jasper Farmer, was privy to it; but it does not appear, that he took the least notice of the above deed of defeazance, or ever attempted to refute the general opinion, that Jasper was the sole and absolute owner of the said lands, so long as he afterwards lived.

In 1707, the said Jasper Farmer, having survived the said Elizabeth his wife, died; leaving the respondent his eldest son and heir, an infant of about nine years old; who thereupon became entitled to the lands in question, under the said settlement; and accordingly, by his guardians, continued in the quiet enjoyment thereof for several years afterwards.

But at length, under colour of the said defeazance, the appellant, in the year 1713, exhibited his bill in the court of Chancery in Ireland against the respondent; praying a redemption of the lands, and an account of the profits, from the date of the pretended mortgage.

To this bill, the respondent pleaded his father's purchase-deeds and marriage-settlement, in bar; and this plea, on argument, being allowed with costs, the appellant did not think proper to proceed any farther in that suit.

But the appellant having in Hilary term 1714, brought an ejectment for these lands; the respondent thereupon filed his bill in the said court of Chancery against the appellant, for a discovery of this pretended defeazance.

In Easter term 1715, the ejectment was tried, and the appellant non-suited; whereupon he immediately brought another ejectment, which occasioned the respondent to exhibit a second bill for relief; but, before this cause could be brought to a hearing, the appellant proceeded to trial in his said second ejectment, and obtained a verdict.

This, and the discovery of new matter, produced a supplemental bill on the part of the respondent; charging, that if such a defeazance was perfected by the said Jasper Farmer, yet the conveyance made to him by the appellant was intended to enable him to make a settlement on his marriage with the respondent's mother, or some other woman; and that therefore such intention was fraudulent.

On the 16th of February 1716, this cause was heard; when the court was pleaded to decree a perpetual injunction against the appellant, to stop all further proceedings at law against the respondent, or any deriving under him, for or concerning the said lands of Curraghconway; and that the respondent might make up and inrol the said decree with costs.

From this decree the present appeal was brought; and on behalf of the appellant, it was said (C. Phipps, R. Raymond) to be fully proved in the cause, [173] that George Rogers, the respondent's grandfather, had notice of the defeazance about the time it was executed, and long before his daughter's marriage with

the said Jasper Farmer; and whatever design the said Jasper might have, in case he had married any other woman (which the appellant was not privy to), yet no deceit, even by Jasper, was imposed upon the respondent's mother, or her friends; because the said defeazance was not concealed from them, but they knew, before the marriage, that Jasper's interest in the lands, was only that of a mortgagee. That it was of the last consequence, if mens inheritances should be endangered by pretended discourses, casually happening at a tavern, as in the present case; which were easily mistaken, and more easily misrepresented; and, if such sort of proof should be admitted, the statute to prevent frauds and perjuries would be of little use. And therefore it was hoped, that the decree would be reversed, or the appellant otherwise relieved.

On the other side it was said (T. Lutwyche, S. Cowper), that upon hearing of the cause, it appeared to the court, as well from a sight of the deeds, as by the proofs, that the deeds so made by the appellant to the said Jasper Farmer, were, and imported to be, an absolute sale or conveyance of the lands, with such covenants as are usual between buyer and seller; and that the consideration given, was then the full value of the lands to be sold: that the said Jasper, immediately after the perfection of the deeds, entered upon the said lands, and all along enjoyed the same during his life, as the absolute owner thereof, without any claim or mention made of any right of redemption in the appellant: that these lands were settled by Jasper, on his said marriage, for valuable consideration; and, that after his death, the same were enjoyed as the absolute estate of the respondent, during the life of his said grandfather George Rogers. That it also appeared to the court, that the appellant had sworn in his answer, that the said pretended defeazance was dated the 2d day of the said month of November 1698, which was the day after the date of the said deed of purchase; and that the appellant, some time after he first claimed the benefit of this defeazance, had confessed, in the presence of several credible persons, that his intent in making the said deed of release absolute, leaving out the condition of redemption in the same, was to enable the said Jasper to obtain a marriage and a considerable portion, on a settlement to be made by him of the said lands; and, that when the said deed of release should happen to be shewn or produced, it might thereby appear, that the said Jasper Farmer had an absolute estate in the premises, and might settle the same on such his marriage. That it likewise appeared to the court, but was never observed till the hearing, that one of the witnesses to this pretended deed of defeazance (long since dead) was a marksman; whereas, the name of the same witness to the purchase-deed, was written very legibly and at length, without any mark. But the court declared, that supposing such defeazance had been really executed, yet the contriving the deeds of lease and release [174] in manner aforesaid, was done with an intent to defraud and inveigle some honest purchaser; and that therefore, the said deed of defeazance was void. And that the appellant in court, contradicting what one of his own witnesses had sworn touching the said deed, the court offered him an issue at law, to try whether the same was put into a separate deed, to defraud any person, or not; but the appellant not consenting thereto, the court made their decree; which, upon all the circumstances of the case, the respondent hoped was well founded; and would therefore be affirmed, and the appeal dismissed with costs.

After hearing counsel on this appeal, the question was put, "Whether the decree should be reversed?" Which being resolved in the negative; it was ORDERED and ADJUDGED, that the appeal should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 21. p. 52.)

CASE 9.—THEOBALD BUTLER,—*Appellant*; SIR THOMAS PRENDERGAST and others,—*Respondents* [13th May 1720].

[*Mew's Dig.* vii. 382.]

[A. agreed with B. for the purchase of timber, and together with C. entered into a bond, that A. his executors and administrators, should not cut any timber under a particular size; but A.'s name was only made use of in this agreement for C. C. cuts down timber under the size stipulated; but as there could be no remedy against C. upon the bond, it was held to be a fraud upon B. the seller, and therefore relievable in equity.]

**\*\*DECREE** of the Court of Chancery in Ireland, **VARIED**.

See the observations on the preceding Case 8.

The following is given as one point determined in this case:

A nominal person only that has no interest is no necessary party, and a suit may go on without him. 16 Vin. 248. c. 5: 2 Eq. Ab. 632. c. 6. and which appears to have been insisted on by the counsel in argument on both sides.\*\*]

Viner, vol. 13. p. 546. ca. 13: vol. 16. p. 248. ca. 5: 2 Eq. Ca. Ab. 481. ca. 16. 632. ca. 6. \*\*2 Eq. Ca. Ab. 185. c. 6.\*\*

Thomas Prendergast Esq. afterwards Sir Thomas Prendergast Bart. deceased, the respondent Sir Thomas Prendergast's father, being seised in fee of several lands in the county of Galway, formerly the estate of Roger O'Shagnessy; the appellant employed one Anderson Saunders Esq. to take a lease thereof, in trust for him; and Sir Thomas not knowing that such lease was to be in trust for the appellant, by indenture dated the 30th of October 1697, demised to the said Anderson Saunders, his executors, administrators, and assigns, the several lands therein particularly named, and, *inter alia*, the lands of Gortocarnane and Killofane, whereon woods of great value were then growing, for 21 years, from the 25th of March then next ensuing, under the yearly rents thereby payable. In which lease, all timber and timber trees and saplings, then lying, standing, or growing, on the said demised premises, were excepted and reserved to the said Sir Thomas Prendergast, his heirs and assigns; with liberty to cut and carry [175] the same away, at all times during the said term, in such manner as he or they should think fit; with the freedom also of a house and garden, and the grazing of six collups in the woods on the said lands, and liberty for a servant, to be appointed by Sir Thomas, his heirs and assigns, to preserve and keep the said woods.

The appellant having thus, under the name of Saunders, obtained a lease of the lands whereon the woods were growing, afterwards prevailed on Sir Thomas to demise the said woods to one Cornelius Ryan, who was the appellant's servant; and accordingly, the said Sir Thomas Prendergast, by indenture dated the 20th of December 1698, in consideration of £2500 to him partly in hand paid, and the rest secured, did bargain, sell, demise, and set unto the said Cornelius Ryan, all the woods, timber, and timber trees, and all saplings like to be or grow into timber or timber trees, standing or growing upon the said lands; "saving and excepting out of the said sale and demise to the said Sir Thomas Prendergast, his heirs and assigns, all saplings of oak, ash, or elm, then standing or growing, or that then-after should grow on the said premises, that were of eighteen inches girt, or under; the same to be measured two feet above, and from the ground." And likewise house-boot and plough-boot, for all the tenants of the said lands, during the said Saunders's lease, according to a covenant in the said lease for that purpose contained; to hold the said premises (except as before excepted) to him the said Cornelius Ryan, his executors, administrators, and assigns, for 21 years, from the 25th of March then last past: and by this indenture, Ryan covenanted that he would, before the 25th of March then next, join one or more person or persons, with one or more person or persons whom the said Sir Thomas Prendergast, or any on his behalf should appoint, to girt and number the said saplings; and that he the said Ryan, his executors, administrators, or assigns, or any by him or them employed,

should not cut down or destroy, or willingly permit, suffer, order, or direct to be cut down or destroyed, any of the said saplings, during the said term, or at any time after, without the special leave or licence of the said Sir Thomas Prendergast, his heirs or assigns, in that behalf first had or obtained, upon the penalty of forfeiting 10s. for every sapling that should be so cut or destroyed.

In order to induce Sir Thomas Prendergast to execute this deed of sale of the woods, the appellant, jointly with the said Ryan, became bound to Sir Thomas in a bond of £5000 penalty, conditioned for the performance of the covenants in that deed contained. But by the condition of this bond, the appellant was only bound so far, as the breach of any covenant might extend against the said Ryan, his heirs, executors, or administrators, and not against his assigns; and that for such parts only as Ryan himself was obliged to perform.

[176] The appellant having, under the said lease made to Saunders, and deed of sale made to Ryan, possessed himself of the said several lands and woods, proceeded to cut down the said woods; at which time, as appears by the proofs in the cause, there were upwards of 26,000 saplings of oak and ash, which were girt and marked between fourteen and eighteen inches in their girt, two feet above the ground; and there were many more of a less girt, which were not marked: so that in the year 1710, there only remained of those which were so marked 2500, and about 1500 of those which were not marked; and the appellant having prevailed upon Sir Thomas Prendergast to turn off one Kelly, who was his serjeant and took care of the said woods, and having appointed a serjeant of his own, he and his agents cut down and destroyed all the saplings excepted by the said deed of sale, but the said remaining few, and thereby did irreparable damage to the respondent Sir Thomas Prendergast's estate.

Whereupon in Michaelmas term 1712, the respondents exhibited their bill in the court of Chancery in Ireland against the appellant and the said Ryan, stating the said lease and deed of sale, and that the appellant had obtained the same in the name of the said Saunders and Ryan in trust for himself, with intent to destroy and cut down the young saplings; and had accordingly destroyed and cut down, and converted to his use, saplings, which were excepted, to the value of £20,000; and therefore the bill prayed a specific performance of the covenants contained in the said deed of the 20th of December 1698; and that the appellant might be compelled to pay the said penalty of 10s. per sapling to the respondents the executors; and consequential damages to the respondent Sir Thomas the heir, for the prejudice done to his estate.

To this bill, the appellant put in his answer; and thereby confessed, that the said lease made to Saunders was taken in trust for him; and that the deed of sale of the said woods made to Ryan, was also in trust for him; that the said Ryan was his servant, and that he possessed himself of the wood, timber, and timber trees, and disposed of the same; but that Ryan did not intermeddle therein, otherwise than in permitting his name to be made use of, nor was he any ways employed in the management or disposal of the woods: but he denied having cut down any of the excepted saplings; and said, that an action at law had been brought against him in the court of Exchequer, by the executors, upon the said bond for £5000 which action was still depending.

On the 12th of September 1713, the appellant exhibited his cross bill in the said court against the respondents; praying the court to decree, that the said lease was duly obtained, and ought to be confirmed during the term; and that the sale of the said woods was also duly made and obtained, and the purchase-[177]-money fully paid; and that the appellant might have relief as to the lands of Killofane, which were detained from him by one Walter Taylor.

The respondents having severally answered the cross bill, and both the causes being at issue, several witnesses were examined on both sides, and on the 21st and 22d of February 1717, the causes were heard before William Whitshed Esq. Lord Chief Justice of the King's Bench, and Mr. Justice Cawfield, and others, Commissioners for hearing and determining causes in Chancery; when the Court ordered, that in regard the said Cornelius Ryan had not answered the original bill, the causes should be adjourned over to the then next term; and that in the mean time, the plaintiffs in the original cause should serve Ryan with process, so as to bring him before the Court.

Accordingly process was issued against Ryan, to a commission of rebellion; but he still neglecting to appear, the respondents applied by petition, that the causes might be heard without him, as being an unnecessary party; and on the 17th of June 1718, they were accordingly heard before the Lord Chancellor, when his Lordship declared, that all the matters in the original bill, except what related to the agreement for sale of the woods, were unnecessarily suggested and groundless; the whole question being, whether the said agreement was performed by the appellant, or not? And whether he had cut any saplings, contrary to the said articles? And therefore it was ordered, that the parties should go to a trial, upon the following issue, viz. "Whether the appellant, or James Butler his brother, Richard Butler, and Patrick Hore, or any of them, or any person or persons employed by them, or any or either of them, in felling the woods of Gortocarnane, cut down or destroyed any oak or ash saplings in the said woods, excepted out of the sale or grant of the said woods of Gortocarnane, made by Thomas Prendergast, Esq. to Cornelius Ryan, by deed dated the 20th of December, 1698, and what value the same amounted unto, at the time they were so cut?"

But, instead of proceeding to try this issue, the respondents petitioned for a re-hearing; setting forth, that they were advised that the period of time to ascertain the value of the saplings cut and destroyed, ought rather to be at the time of the expiration of the appellant's lease, than at the time that they were cut; for that the value thereof, at the respective times of their being cut, could be but very small, to what the value might have been at the end of the lease; and that therefore it would be to no purpose for them to go to trial on the said issue, as the same was worded.

Accordingly, on the 15th of May 1719, the causes were re-heard before the Lord Chancellor, assisted by the Lord Chief Justice Whitshed and Mr. Justice Dolbin; when the Judges declared their opinion, that the issue ought to be amended, and the Lord Chancellor took time to consider thereof; but the ap-[178]-pellant being then in Court, and apprehending the said issue would be changed, did then declare that he acquiesced under the said first issue.

On the 5th of June following, the Lord Chancellor declared in Court, that he had advised with all the Lords the Judges upon this case, and gave his opinion, that the respondent Sir Thomas Prendergast, as heir to his father, was properly relievable against the appellant in a Court of Equity, for that he could not recover at law; and that the appellant ought to be answerable for what damages the said respondent had suffered by Richard Butler, James Butler, and Patrick Hore's cutting down and destroying any of the saplings, excepted out of the deed of the 20th of December 1698; and, to ascertain the same, his Lordship was pleased to order and decree, That the respondents should, as of the then Trinity term, commence a feigned action against the appellant in the Court of Common Pleas, and that the appellant should appear *gratis*, and plead the general issue, so as a trial might be had at the bar of the said Court, some time in the next Michaelmas term, upon the following issue, viz. "How much the respondent Sir Thomas Prendergast was damnified on the 25th of March 1718, by the appellant Theobald Butler, and by James Butler, Richard Butler, and Patrick Hore, or any of them, or by any other person or persons by them, or any of them, employed in cutting the woods sold by Thomas Prendergast, Esq. deceased, to Cornelius Ryan, by deed dated the 20th day of December 1698, cutting any oak, elm, or ash saplings, excepted out of the sale or grant made by the said Prendergast to Cornelius Ryan?" And it was ordered, that each party should be at liberty to make use of the depositions, as usual; and that the sale to Ryan, the lease to Saunders, and the assignment thereof, should be produced by the appellant on the said trial, and be admitted as evidence, and read as they were on the hearing: And the parties were to agree on an indifferent county, and if they could not, the Court would order a county.

The appellant refusing to agree to an indifferent county for the said trial; upon motion of the respondents, on an affidavit that they did not expect indifferency in the county of Galway, in regard the appellant had many relations there; and also in consideration of the value of the respondents demands; the Lord Chancellor, on the 25th of the said month of June, was pleased to order, That the said issue should be tried at the bar of the Court of Common Pleas, some time in the next Michaelmas term, by a jury of the Queen's county; to which end, the Sheriff of the said county

was to attend one of the Masters of the said Court, with the grand pannel of freeholders, and he was therout to name forty-eight, and each party to strike out twelve, and the remaining twenty-four were to be the jury for trial of the said issue, unless on the next motion-day good cause should be shewn to the contrary, without further motion. And accordingly, the appellant and respondents did proceed to strike a jury; but the [179] appellant neglecting to appear at law, it was on the 3d of November following, ordered, that the appellant should, by the first day of the then next Michaelmas term, appear at law, as by the said order of the 5th of June last was directed.

The appellant still neglecting to appear, pursuant to this last order, the respondents, on the 12th of the same month, moved the Court, that the said issue might be taken as found against him, as to 10s. per tree, according to the number of saplings proved by the respondents witnesses to be cut and destroyed; or, that an attachment might issue against the appellant: Whereupon it was ordered, that unless the appellant appeared that day, an attachment should be awarded against him, without farther motion.

But the appellant, instead of appearing, appealed from the decree of the 17th of June 1718, and the several subsequent orders; and on his behalf it was insisted (T. Lutwyche, C. Phipps), that the respondents having made Cornelius Ryan a defendant to their bill, and taken out process against him, and it being proper and necessary to bring him before the Court; that cause could not regularly be heard, till Ryan had appeared and answered, or until the utmost process of contempt had been issued against him. That on the hearing of the cause, the respondents waived all the demands and pretensions of their bill, except what related to the saplings; and the Lord Chancellor declared, that all the suggestions of that bill, except what related to the performance of the agreement, touching the sale of the wood, were unnecessary and groundless. That as it did not appear in the cause, that any of the excepted saplings had been cut or destroyed by the direction, or with the privity or consent of the appellant, or had been converted to his use; the original bill ought to have been dismissed, not only as to what related to the pretended fraud therein suggested, but as to the whole; because the case was reduced to the single point of cutting the excepted trees, for which, if there had been any trespass or breach of covenant, there was a proper remedy at law; and accordingly an action had been brought against the appellant, upon the bond entered into by him and Ryan, which was still depending. That it was not pretended, that any of the excepted saplings were cut since the death of Sir Thomas Prendergast the father, nor could it be pretended, that Sir Thomas the respondent had any right, either in law or equity, to recover damages for any trespass committed in his father's lifetime; and yet, as the last issue was directed, the jury were to ascertain damages for him, on account of trespasses supposed to be committed before he was born, and to try what he was thereby damnified on the 25th of March 1718, several years after the commencement of the suit. That it appeared by the original bill, and also by the deed of the 20th of December 1698, that in case any saplings were cut, contrary to that deed, the penalty for so doing was settled at 10s. each; and this being a stated damage, fixed by the deed itself, no issue or enquiry ought to have been [180] directed as to those matters. That the last issue was worded in such a manner, as left the jury no certain rule or measure to go by, in trying it; and if any such issue was triable, yet, being in its nature local, and a view being necessary, it ought not to have been tried in a foreign county, without such reasons; and, in the present case, none such were offered: It was therefore insisted, that the said decree and orders being erroneous, and not agreeable to the rules of equity, the same ought to be reversed.

On the other side it was contended (R. Raymond, S. Mead), that the appellant had no just foundation to complain of the said several orders, he being the only person who had the benefit of the leases. That the appellant, by purchasing the woods in the name of Ryan, in trust for himself, was not properly the assignee of Ryan; and as the covenant extended only to Ryan, his executors, administrators, and assigns, the respondents had no action at law against the appellant, upon the deed of sale. That by the bond which the appellant and Ryan executed, for the performance of covenants, the appellant stood only bound for the breach of such

parts of the covenants, as Ryan was guilty of; and as it appeared by the appellant's answer that Ryan never intermeddled, he was not therefore strictly guilty of any breach of covenant within the words of the condition; so that the respondents could not properly bring an action at law against the appellant upon that bond. That the appellant having taken the lease in the name of Saunders, and purchased the wood in the name of Ryan, that he might not be accountable in law for such damage as he should commit in cutting down and destroying the saplings; and having procured Kelly to be discharged, and appointed a Serjeant of his own to look after the woods, seemed to amount to a proof, that the appellant was guilty of a fraud. That the bond executed by the appellant and Ryan being only for £5000 would not, if recoverable at law, be an adequate satisfaction for the damage done: And the respondents being at liberty, to take their remedy on the covenants in the deed of demise to Ryan, the proper method to ascertain the damages was, by directing an issue at law; especially, as by the agreement, 10s. was to be paid for every tree which should be destroyed, contrary to the terms of that deed, and as the appellant, by his cross bill, had submitted the whole matter to the Court.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree and orders therein complained of, should be affirmed; with this variation, "That instead of the issue, by the order of the 5th of June last, directed to be tried in this cause, a feigned action be brought against the appellant by the respondents, the executors of the late Sir Thomas Prendergast, and the now respondent Sir Thomas Prendergast, to try of how much better value the estate of Sir Thomas Prendergast would have been at the time of the expiration of the grant made to Cornelius Ryan of the woods in question, in case none of the saplings, excepted in the said grant, had been [181] cut or destroyed, or wilfully permitted to be cut or destroyed by the appellant or his agents, or by any employed by him, them, or any of them; and that such issue be tried by a jury of Queen's county:" And it was further ORDERED, that if the appellant should not appear and join issue, and proceed to trial, at such time as the Court of Chancery in Ireland should direct; that the respondents should, on such his default, enter an appearance for the appellant, and put in a plea for him, to be approved by a Master of the said Court, and might proceed to try the said issue *ex parte*: And it was ORDERED, that the said Court of Chancery should give the necessary directions for the proceeding to try the said issue with all convenient speed; and after the said trial had, the said Court was to proceed further in the cause, as should be just. (Jour. vol. 21. p. 327.)

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CASE 10.—ANN WHITE, Widow, and others,—*Appellants*; STAFFORD LIGHTBURNE and others,—*Respondents* [5th February 1722].

[Mew's Dig. vii. 415.]

[Where articles and a conveyance are not obtained with the strictest fairness, a Court of Equity will set them aside, and order the conveyance to stand as a security only for the consideration money.]

ORDERS of the Court of Chancery in Ireland, REVERSED.

Viner, vol. 13. p. 555. ca. 7: vol. 21. p. 541. ca. 5: 2 Eq. Ca.

Ab. 482. ca. 20: 687. ca. 2.

John Pue, Esq. deceased, being seised in fee of the lands of Aghavana, with the appurtenances, in the county of Wicklow, of the yearly value of about £25 per ann. borrowed £200 of Thady Byrne; and for securing the re-payment thereof, did, by deeds of lease and release, dated the 9th and 10th of May 1688, convey the same to the said Thady Byrne and his heirs, subject to redemption on payment of £200 with interest: Whereupon Thady Byrne was immediately put into possession of the mortgaged premises, and received the rents and profits thereof for some years: but this mortgage being afterwards, for a valuable consideration, assigned to

Arthur Emerson, Esq. he was let into the possession of the lands, and received the rents and profits thereof, till the year 1706.

The said lands were liable to great arrears of a yearly quit-rent of £204 1s. charged thereon by act of Parliament; and though application had been made by Sir Laurence Esmond, the former proprietor, to the Commissioners appointed for reducing the quit-rents of coarse and barren lands, and an order was made for reducing this quit-rent from £204 1s. to £10 per ann.; yet, as the Commissioners had not granted a certificate thereof, before their commission expired, the said quit-rent still remained a charge on the premises in the Exchequer: The said lands were also subject to a chief rent of 40s. a year, payable to Sir Laurence Esmond, and to several judgments and other incumbrances; particularly, a judgment obtained against the said John Pue, by Alice [182] Smith, widow, for £180, and two other judgments for £440 and £200 recovered against him by William Langton.

From the year 1688, to May 1695, the clear yearly rents of the mortgaged premises, did not amount to the annual interest of the mortgage-money; and the legal rate of interest being then £10 per cent. and the common value of lands in Ireland, not more than ten years purchase; the said John Pue, in 1697, proposed to sell the equity of redemption of the premises, to Sir William Fownes Knt. for £100, but he refused to give so much, though the lands lay contiguous to his estate, and though Pue was then indebted to him in upwards of £82, which was to be part of the £100; and Sir William being pressing for his money, Pue offered to sell the said equity of redemption to Abraham White and the appellant Thomas Burrowes; and, after some treaty, articles of agreement were, on the 7th of May 1697, made between them, whereby, in consideration of £5 paid by the appellant Burrowes and the said Abraham White, to the said John Pue, and of the further sum of £95 sterling, agreed to be paid to him, or his order, on the execution of the conveyances; it was agreed, that the said John Pue, his heirs and assigns, should, on the request and at the proper costs and charges of the appellant Burrowes and the said Abraham White, make and perfect conveyances and assurances, for the absolute conveying, assuring, and making over, unto the appellant Burrowes and the said Abraham White, their heirs and assigns, all his the said John Pue's right, title, interest, and equity, power and right of redemption, of, in, and to the said lands of Aghavana, with all its sub-denominations, free from all incumbrances, except the mortgage made to the said Thady Byrne; and the said John Pue did thereby covenant, to procure his then wife and the said William Langton, to join with him in the said conveyances, and in fines to be executed and levied of the premises.

Soon afterwards, Burrowes and White paid Sir William Fownes £82 17s. 10d. in full of the debt due to him from Pue; and thereupon by deed, dated the 22d of June 1697, Sir William assigned his security to them.

By indenture, dated the 21st of October following, reciting the mortgage made to Thady Byrne, and the said articles of agreement, the said John Pue, in performance of such agreement, and as well in consideration of the £5 to him paid on the execution of the articles, as of the said further sum of £95 paid to and for his use, according to the said articles; did grant, bargain, sell, assign, make over, and confirm, unto the said Abraham White and the appellant Burrowes and their heirs, the aforesaid condition, power, and equity of redemption of the said premises, and all the benefit thereof; and all his estate, right, title, interest, claim, and demand, of, in, and to the said premises, by force or virtue of the said proviso or condition of redemption, and all deeds and writings relating thereto: And he covenanted, to make further assurances of the said lands, to the appellant Burrowes and the said Abraham White, their heirs and assigns, freed and discharged from [183] all charges and incumbrances, except the said mortgage to the said Thady Byrne.—And by articles, dated the 26th of November 1697, the said Abraham White and the appellant Burrowes agreed to sever the joint-tenancy, and to bar the right of survivorship.

Although the said John Pue had covenanted, that the appellant Burrowes and the said Abraham White, should enjoy the said lands, freed and discharged from all incumbrances, except the said mortgage to Byrne; yet the judgments recovered against him by William Langton and Alice Smith were still unsatisfied: and Langton having sued out *elegits* on his judgments, the appellant Burrowes and the



said Abraham White were necessitated to satisfy the money due thereon; and accordingly, Langton by deed, dated the 3d of June 1698, assigned the benefit of the said two several judgments to Robert Anyon, in trust for the appellant Burrowes and the said Abraham White: And the said Alice Smith did also by deed, dated the 4th of March 1698, for a valuable consideration, assign the benefit of her judgment to Jacob Peppard, in trust for the said Abraham White.

In 1699, John Pue died, leaving issue Constance, the wife of Richard Ashmore, and the respondents Catherine, Jane, Alice, Elizabeth, Mary, and Sarah.

In the year 1706, the said Abraham White and the appellant Burrowes recovered possession of the said lands of Aghavana, after a tedious and expensive suit, which they were obliged to prosecute against Arthur Emerson, the assignee of the mortgage originally made to the said Thady Byrne.

Soon afterwards, the Commissioners of the revenue in Ireland ordered a distress to be made upon these lands, for the arrears of the said quit-rent of £204 10s. whereupon application was made by White to the Court of Exchequer in Ireland, to have these arrears discharged; and the matter being referred to the then Attorney-General of that kingdom, he reported the application made by Sir Laurence Esmond, and the proceedings thereon, as before stated; and upon reading this report, the Court, on the 7th of June 1708, allowed White time, till the last day of then next Michaelmas term, to procure a patent, confirming the order which had been made for reducing the said quit-rent: but before this could be effected, White died, so that the premises still remained charged with arrears of quit-rent, far exceeding the value of the inheritance.

The said Abraham White by his will, dated the 11th of June 1717, devised, *inter alia*, the said lands of Aghavana to the appellants Anne White and Paul Howell, and to John Usher, Esq. to be sold by them for the payment of his debts, and raising portions for his daughters: and at his death left issue, Thomas White, his only son and heir, and several daughters.

In Hilary term, 1719, the respondents exhibited their bill in the Court of Chancery in Ireland, against the appellants and others; suggesting, that the conveyance made by John Pue to the said Abraham White and the appellant Burrowes, was not made [184] for a valuable consideration, but was fraudulently obtained; and that the said John Pue, for some time before his death, became uneasy in his thoughts, and at last so stupid and weak in his senses, that he was incapable of managing his own affairs, and therefore prayed general relief: but the respondents did not make the said Thomas White, the son and heir of Abraham, or any of his daughters, parties to this bill.

The appellants put in several pleas and answers to the bill, and by their answers said, that the said John Pue had the perfect use of his reason and understanding at the time of executing the said articles and conveyance; and that a full and valuable consideration had been paid for the said purchase, and denied all fraud and imposition whatsoever: and they pleaded the said purchase for a valuable consideration, and the said several deeds executed by John Pue, in bar of the relief prayed by the bill. And these pleas coming afterwards to be argued, it was ordered, that the benefit of them should be reserved to the hearing of the cause.

On the 3d and 4th of July 1721, the cause was heard before the Lord Chancellor of Ireland, when it plainly appeared, by the depositions of several unquestionable witnesses, and particularly of Sir William Fownes, George Lynden, Esq. and the said Constance Ashmore, the said Pue's eldest daughter, that the said John Pue had the perfect use of his reason and understanding at the time of executing the said deeds; and that a valuable consideration was paid him for the purchase, by the said Abraham White, and the appellant Burrowes; but notwithstanding this proof, his Lordship, on the 5th of the said month of July, ORDERED AND DECREED, that the appellants should appear to an ejectment, to be brought by the respondents for the said lands, and that the appellants should not insist on the mortgage made to Byrne or Fownes, or set up any temporary bars; but insist on their mere right under the articles and deed of sale, made by the said John Pue to Abraham White and the appellant Burrowes. And it was further ordered, that each party, plaintiffs and defendants, should be at liberty on the said trial, to give in evidence the depositions of such witnesses already taken in the cause, as by reason of their death, or any other lawful cause, could not be present at the said trial.

The appellants being dissatisfied with this order, petitioned for a re-hearing: and the cause being accordingly re-heard on the 13th of November following, the Lord Chancellor was pleased to affirm the former order.

From these orders both sides appealed; and in support of the *original* appeal it was argued (R. Raymond, W. Peere Williams), that the appellants were fair purchasers, for a full and valuable consideration, without the least colour of fraud, circumvention, or surprise; that it appeared, the premises had every way cost them considerably more than they could be sold for, even in case they had been exonerated from the load of quit-rent wherewith they still remained charged; and therefore the bill ought to have been dismissed. That after so long a possession, a Court of Equity ought not to have interposed so far, [185] as to direct any trial at law, to impeach the title of fair purchasers: especially when it appeared by the testimony of Pue's own daughter, and several reputable persons, intimately acquainted with him, that he was of sound understanding when he executed both the articles, and the assignment of his equity of redemption. That if it were at all proper at this distance of time, to examine or enquire into the sanity or insanity of the said John Pue, yet the trial in ejectment was apprehended to be an improper method; for no legal estate did, or could possibly pass, or be conveyed by the articles or assignment; and yet, by the said orders, the appellants were to insist on their mere right, under the said articles and assignment, which only conveyed a bare equity of redemption; so that the appellants could not have thereby made any defence in ejectment, though it had been fully proved that Pue was of sound mind and understanding, at the time of executing the same; and this being a trial in ejectment, and no issue directed out of the Court of Chancery, the Judges must govern themselves according to the rules of law, and the plaintiffs upon proving a title in them, as heirs at law, must certainly recover a verdict.

To this it was answered (T. Lutwyche, S. Mead), on the part of the respondents, that White and Burrowes appeared to have been guilty of a gross fraud and manifest imposition upon John Pue, in obtaining the said articles and conveyance; and that this was so manifest from the facts of the case, that the whole transaction might be esteemed a fraud *apparent*. As to the objection arising from the length of time and acquiescence, ever since 1699, when Pue died; it was said to be but 18 years ago since John Pue died, and left his seven daughters in so poor and miserable a condition, that they were dispersed to get their livelihood, and unable, by reason of their poverty, to prosecute their right. That in 1701, they preferred their bill in the Exchequer, against White and Burrowes, but were so poor, they could not proceed; but in 1718, after Catherine, one of the daughters, had married the respondent Lightburne, a gentleman of estate and substance, they, and the other respondents, preferred their bill, and thereupon obtained the decree now complained of; and therefore it was hoped, that 18 years was not such a length of time, as to bar the respondents of their plain and manifest right; and especially when their not proceeding sooner, was so fully accounted for: that the decree in this case, being no more than to put the respondents in a condition of trying the merits of the cause, as to the insanity, by ordering that the mortgage should not be made use of, to hinder those merits from coming in question on a trial; the respondents were advised, that it was but the ordinary justice of a Court of Equity, and that there was not the least colour for appealing from such a decree.

In support of the *cross* appeal, it was insisted, that it appeared from the proofs in the cause, that White and Burrowes obtained from Pue, the articles and deed under which they claimed the equity of redemption, when he was under imprisonment: and that they being attorneys, were the more capable of imposing on [186] him in that situation. That the estate was above £80 per ann. and might be considerably improved, subject only to two mortgages; one to Thady Byrne for £200 which was overpaid by the perception of the profits; and the other to Sir William Fownes for £82 17s. 10d. That the pretended consideration of £100 bore no proportion to the value of the equity of redemption, neither was there any proof that even this inconsiderable sum was ever paid; and that the whole of this transaction was so manifestly fraudulent, that it was conceived a Court of Equity ought to have relieved against it, without the expence of sending the parties to a trial at law.

But to this it was answered (R. Raymond, P. Yorke), that there was no proof in

the cause of any fraud, imposition, or unfair practice, in obtaining the said purchase; but on the contrary it appeared, that during the treaty, which was fairly carried on, and at the time of executing the articles and assignment, John Pue had the perfect use of his reason, and very well understood what he was doing: that purchases were not to be set aside in Courts of Equity, upon pretence of a good or bad bargain; and a precedent of that kind might be attended with many inconveniences in Ireland, where the value of lands had for several years past been subject to great fluctuation. That it was in proof in the cause, that at the time of making the said purchase, the lands in question were let for a term of 21 years, at the yearly rent of £25, out of which a quit-rent of £10 per ann. at least was paid to the Crown, and a chief-rent of 40s. a year, to Sir Laurence Esmond, which reduced the clear yearly rent to £13. That there was then due on the mortgage to Byrne, £155, which, with the £100 paid to John Pue, and for his use, amounted to near 20 years purchase, and which, according to the then rate of interest in Ireland, was equal to 40 years purchase in England; so that, considering the then value of lands, which ought to be the measure in this case, more than a sufficient consideration was given for the purchase; besides £300 expended by White in obtaining a reduction of the high quit-rent, and the other sums laid out by him, after the purchase, in buying in judgments, that affected the premises, and which he was forced to do in order to have quiet enjoyment of his purchase: that though Pue was imprisoned at the time of executing the articles and assignment, yet he was not in prison at the suit either of White or Burrowes, or by their procurement, management, or consent; and it appeared, by the testimony of several witnesses of undeniable credit, that he was in his perfect senses when he executed the deeds: and should it be objected, that by a report made in a cause between White and Emerson, the assignee of the mortgage, it appeared, that in 1706, when White got possession of the mortgaged premises, he was overpaid £262, it was answered, that this was occasioned by the unforeseen and unexpected rise in the value of lands in Ireland, after making the bargain, and ought not to be of any weight or influence in this case.

[187] After hearing counsel on these appeals, it was ORDERED and ADJUDGED, that the said orders should be reversed, and the original appeal dismissed.—And then the judgment proceeds in these words: “And forasmuch as the articles of the 7th of May 1697, entered into by John Pue deceased, in the pleadings named; as also the conveyance of the equity of redemption of the premises, made pursuant thereto, touching which, the appellants in the cross appeal, by their bill, sought to be relieved, appear to have been obtained by notorious fraud; it is therefore further ORDERED and ADJUDGED, that the said articles and conveyance be set aside, so far as the same import an absolute sale or conveyance of the equity of redemption of the lands and premises contained therein; and that the said articles and conveyance be only deemed and taken to be, and do stand as a security for such money only, as, on a fair account to be taken in the said Court, shall appear to have been really and *bond fide* paid by the testator Abraham White, and the respondent Thomas Burrowes, or either of them, as the consideration-money, or as part of the consideration-money, mentioned in the said articles and conveyance; as also for all such other sum and sums of money, as the said White and Burrowes, or either of them, really and *bond fide* paid to, or to the use of the said John Pue, or by his order or direction, or in discharge, or towards satisfaction of any other debt, or sum of money, which was really and *bond fide* due or owing from the said John Pue, and for which the said White and Burrowes, or any person or persons claiming under them, or either of them, had not received satisfaction out of any other lands of the said Pue's, or otherwise; together with interest for the same, at the rate of £10 per cent. from the respective times the said White and Burrowes advanced and paid the same, until such time as it shall appear on the account hereby directed, that they were, or should be reimbursed the same, by and out of the profits of the premises liable to the payment thereof, or otherwise: And it is further ORDERED and ADJUDGED, that the respondent Thomas Burrowes, as also the executrix and devisees of the said Abraham White, do come to an account before one of the Masters of the said Court, for what they, or any or either of them, or the said Abraham White, in his life-time, have, or, without their wilful neglect or default, might have received, by and out of the

rents and profits of the said John Pue's real estate, comprised in the said articles and conveyance; and they are to stand charged with what shall appear to have been by them received as aforesaid, as also with the further sum of £262 12s. 11½d. mentioned in the report of the 9th of July 1712, made in the Court of Exchequer in Ireland, or so much thereof as shall appear to have been paid to the said Abraham White by Arthur Emerson, the assignee of Thady Byrne's mortgage, together with Irish interest for the same, from the time of payment thereof; and in case the said Burrowes, and the devisees of the said White, insist on any [188] other debts of the said Pue's to have been paid by them, any or either of them, then they are to account for what they, any or either of them, or any claiming under them, or either of them, have, or without wilful default might have received, out of the rents and profits of any other estate liable to the payment thereof, or otherwise towards the satisfaction thereof: And it is further ORDERED and ADJUDGED, that if on taking the said accounts, any thing shall appear to remain due to the said Burrowes and the devisees of the said White, the same is to be paid them, with Irish interest, by the coheirs of the said John Pue, at such time and place as the said Court shall appoint; and upon payment thereof, the said Burrowes and the devisees of the said Abraham White, are to re-convey the equity of redemption of the premises to the said coheirs of the said John Pue, or to whom they shall appoint; and also all the estate and interest of them the said Burrowes and the said devisees, or any or either of them, or any other person or persons claiming in trust for them, or any or either of them, by or under the mortgage or conveyance of the said premises from the said Emerson, freed and discharged of and from all incumbrances made by them the said Abraham White and the said Burrowes, or either of them, or any claiming under them, or either of them, or in trust for them or any or either of them; which conveyances are to be settled and approved of by one of the Masters of the said Court, in case the parties differ therein: And it is further ORDERED and ADJUDGED, that the said Burrowes and the executrix and devisees of the said Abraham White, do also assign over to the coheirs of the said John Pue, or as they shall direct, all the securities and other incumbrances, which were taken in by the said Burrowes and White, and which, upon the said accounts, shall appear to be satisfied; and to deliver up the same upon oath, to or for the benefit of the said coheirs, with possession of the said estate, as the said Court shall direct: but if, upon taking the said accounts, it shall appear that the said Burrowes, and White, in his life-time, or his executrix and devisees since his decease, are overpaid; then it is further ORDERED and ADJUDGED, that what shall appear to be so overpaid, shall be paid by the said Burrowes and the executrix and devisees of the said Abraham White, to the said coheirs of the said John Pue, with Irish interest, to be computed for the same from the time of such over-payment, at such time and place as the said Court shall appoint; and thereupon such reconveyances and assignments, are to be made to or for the benefit of the said coheirs; and possession of the estate, and the deeds and writings relating thereto, are to be delivered up on oath, as before directed: and, for the better taking the said accounts, all deeds, writings, securities, books, papers, and accounts, are to be produced on oath, before one of the Masters of the said Court; and all parties accounting are to be examined on interrogatories, for the better discovery of the [189] matters aforesaid, as the said Court shall direct; and they are to have all just allowances upon the said accounts, in taking which accounts annual rests are to be made: and it is further ORDERED and ADJUDGED, that the appellants, who are complainants in the said suit in Chancery in Ireland, be paid their costs of that suit by the said Burrowes, and the executrix and devisees of the said White, to be taxed according to the usage of that Court; and that the said Court do give all proper directions for the better executing this judgment." (Jour. vol. 22. p. 78.)

CASE 11.—LORD FORBES and others,—*Appellants*; ALEXANDER DENISTON and others,—*Respondents* [23rd February 1722].

[Mew's Dig. vii. 188.]

[By an Irish statute, 6 Ann. all deeds executed after the 25th of March 1708, and not registered, are declared void. A lease of lands was neglected to be registered, which the *lessor* taking advantage of, granted a new lease to another person, who brought an ejectment and recovered: held, that the original lessee was relievable in equity; for the statute being made to prevent frauds, shall never be used as a means to cover it.]

**\*\*DECREE** of the Court of Chancery in Ireland, for a perpetual injunction against the first lessee, **REVERSED**.

The case is stated in 13 and 19 Vin. and 2 Eq. Ca. Ab. in the following terms. It is not perhaps very easy, or very material, to decide which Abridgment agrees best with the report here given at length.

"A statute was made in Ireland, that all leases that should not be registered by such a day should be void. The respondent, who lived in the remotest part of Ireland, not having notice of the act of Parliament, did not register; whereupon another lease was made to one who had notice of the first, and registered, and ejectment brought upon it; but the respondent was relieved."

Viner, vol. 13. p. 550. ca. 9: vol. 19. p. 514. ca. 36: 2 Eq. Ca. Ab. 482. ca. 19.

In 1678, Arthur, Earl of Granard, grandfather to the appellant Lord Forbes, on the marriage of Arthur his eldest son, the appellant's father, settled his estate in Ireland on himself for life; remainder to his said son Arthur, for life; remainder in tail, to the first and other sons of that marriage; with a power in this settlement, for the Earl and his said son Arthur, to make leases for three lives, or 21 years in possession, *at the best improved rent, without fine*; and with an express condition, *that the then rent should not be lessened*.

The Earl in 1693, let part of the estate, called Drumceele, to the respondent Alexander Deniston, for three lives, at £14 per ann. for part of the term, with a rising rent till it came to £28 per ann. although, at the time of the settlement, these lands were let for £28 per ann.

An act of Parliament was made in Ireland, in the 6th year of Queen Ann, which enacted in the words following, viz. "That every deed, or conveyance, (a memorial whereof shall be duly registered according to the rule and directions in this act prescribed,) shall, from and after the 25th day of March in the [190] year of our Lord 1708, be deemed and taken as good and effectual, both in law and equity, according to the priority of time of registering such memorial, for and concerning the honours, manors, lands, tenements, and hereditaments, in such deed or conveyance mentioned or contained, according to the right, title, and interest of the person or persons so conveying such honours, manors, lands, tenements, and hereditaments, against all and every other deed, conveyance, or disposition of the honours, manors, lands, tenements, or hereditaments, or any part thereof, comprised or contained in any such memorial, as aforesaid: and that every deed or conveyance, not registered, which shall be made and executed from and after the 25th day of March 1708, of all or any of the honours, manors, lands, tenements, or hereditaments, comprised or contained in such deed or conveyance, a memorial whereof shall be registered in pursuance of this act, shall be deemed and adjudged as fraudulent and void, not only against such deed or conveyance registered as aforesaid, but likewise against all and every creditor and creditors by judgment, recognizance, statute-merchant or of the staple, confessed, acknowledged, or entered into, from and after the 25th day of March aforesaid, as for and concerning all or any of the honours, manors, lands, tenements, or hereditaments, contained or expressed in such memorial registered as aforesaid."

The price of lands in Ireland being, in the year 1715, advanced, and the said premises being of far greater value than the said rent of £28 per ann. the respon-

dents procured a lease from Earl Arthur, the father of the appellant Lord Forbes, dated the 13th of December 1715, for three new lives, at £30 per ann. and the lease of 1693 was then surrendered; but this new lease was not registered, as required by the said act.

The last Earl Arthur being greatly in debt, the appellant Lord Forbes, out of his duty to him, agreed to pay his debts; and thereupon, by deeds of lease and release, dated the 16th and 17th of September 1717, in consideration of £6670 thereby agreed to be paid by the said appellant, to and for his said father's debts therein mentioned, and of securing to him a rent-charge of £700 per ann. and also £400 per ann. to the Countess of Granard, during his Lordship's life, and an annuity of £100 per ann. to one Melvil, and several other charges on the estate; the said Earl conveyed all his estate to the appellants Robert Doyne and Richard Nutley, in trust for the appellant Lord Forbes.

These sums and charges were a full and valuable consideration for the said Earl's estate for life; and this conveyance was immediately afterwards registered according to the directions of the said act.

When the appellant Lord Forbes looked into the estate, he found the lease obtained by the respondents in 1715, was let at a very great under-value, and not warranted by the settlement, or registered; and therefore he ordered an ejectment to be brought, [191] and upon a trial at the Assizes, in Hilary vacation 1719, a special verdict was found, and returned into the King's Bench in Ireland: and in Michaelmas term 1720, judgment was given for Lord Forbes.

The respondents thereupon, in Easter term following, filed a bill in the Court of Chancery in Ireland, against the appellants and one Richard Stewart; praying to be established in the possession of the premises, under the first lease of 1693, or the last lease made in 1715; and pretended that the appellants, or the said Richard Stewart as their receiver, had notice of the lease before the said purchase in 1717.

To this bill the appellants and the said Richard Stewart put in their answer; and thereby fully denied all fraud charged in the bill, or that any of them had notice of the respondents' lease; and insisted, that the first lease was surrendered, and that the second was not warranted by the powers in the settlement, and was made at a great under-value; and that, by the said act, the same was fraudulent and void as against the appellant Lord Forbes, who was a purchaser for a valuable consideration, and had obtained judgment at law on a special verdict.

Notwithstanding which, and although the appellant Lord Forbes fully proved in the cause that he had paid and secured on his said father's account £8199 14s. and had made good all the considerations in the said deed; yet, upon hearing the cause on the 13th, 14th, and 17th of February 1721, the Lord Chancellor decreed, that a perpetual injunction should be awarded from time to time, to stay the appellants' proceeding against the respondents at law during the continuance of the said last lease; and decreed the appellants to pay costs; declaring, it was a fraudulent purchase in the trustees who bought the estate for the appellant Lord Forbes, they having full notice of the respondent's lease.

From this decree the appellants appealed, insisting (R. Raymond, T. Lutwyche) that there was no colour of equity to support the said lease, contrary to the act of Parliament, and against the special verdict obtained by the appellant Lord Forbes, upon a fair trial; but if there had been, yet the injunction ought only to be continued during the life of the appellant Lord Forbes's father; it being a void lease against the appellant as tenant in tail, being made contrary to the power reserved in the settlement for granting leases. That this decree was against the plain words and intent of the said act of Parliament, which makes prior conveyances, not registered, fraudulent and void against subsequent conveyances which are registered, as well in equity as at law; and especially in this case, where the appellant Lord Forbes was a purchaser for a valuable consideration. That even if a Court of Equity could controul an act of Parliament, there was no ground for doing it in the present case; the appellants, or any person concerned for them, not having any notice of the lease, nor having been guilty of any fraud whatsoever. That the judgment was given at law before the bill was filed, and [192] that upon a special verdict, which stated all that the respondents could insist upon in a Court of

Equity; and therefore it was conceived, that even if the respondents were relieved in a Court of Equity, they were too late, after having made all the defence they could at law, and put the appellant Lord Forbes to a great expence in obtaining the said judgment. That though all persons are parties and privy to acts of Parliament, yet, that none might pretend ignorance of the register acts, they are to be publicly read at every Assizes, and every General Quarter-sessions in each county; and therefore it was hoped that the decree would be reversed, the appellants left at liberty to have the benefit of their judgment at law, and that the respondents' bill would be dismissed with costs.

On the other side it was argued (S. Mead, C. Talbot), that the register act, as appeared by the preamble of it, was made for the benefit of fair purchasers and creditors, against fraudulent and dormant deeds; and was never intended to prejudice any deed or lease fairly obtained, where actual possession always went along with it. That the said Richard Stewart, who acted for Lord Forbes, had notice of the respondent's title and possession, and was fully apprised of the condition, circumstances, and value of the estate, before the conveyance to Doyne and Nutley was executed. That no more was intended to be conveyed to Lord Forbes than the rent and reversion during Lord Granard's life; the yearly value of the estate at that time, according to the rents reserved upon the several leases under which the tenants were in possession, being the occasion of the consideration-money given by Lord Forbes; and upon that foot he had a very beneficial bargain, the yearly rents of the estate then in possession amounting to £1500 or better, besides an estate in reversion, since fallen in, of the yearly value of £900. That Stewart, who was agent to Lord Forbes and his trustees, received from the respondents several sums of money for rent accrued after the conveyance to Nutley and Doyne was executed, and gave acquittances for the same; and which, as the respondents were advised, amounted to an agreement that their lease should stand; or, at least, to a confirmation of it. That if the registry of Lord Forbes's deed, after his having had full notice of the respondent's lease, and receiving rent thereon, should be a means of avoiding the lease, for no other reason than because it was not registered, the act of Parliament, instead of suppressing fraud, would be made use of to establish fraud, and to ruin a number of honest industrious tenants in Ireland. And therefore it was hoped that the decree would be affirmed, and the appeal dismissed with costs.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the said decree of the 17th of February 1721, should be reversed: and it was further ORDERED and ADJUDGED, that all proceedings at law by the appellants, or any of them, against the respondents, or their heirs or assigns, or any claiming under them, to avoid or impeach the said lease in question, dated [1715] the 13th of December 1715, except for breach of the conditions or covenants therein contained, should, during the life of the Earl of Granard, if the term of the said lease should so long continue, be stayed; and that the respondents, their heirs and assigns, paying their rents, and performing their covenants, should be quieted in the possession of the lands and tenements therein demised, during the continuance of the said lease, if the Earl of Granard should so long live; but that after his death the appellants should be at liberty to try their title at law, as they should be advised; but not to take out execution on the judgment in ejectment already obtained: and it was further ORDERED, that the Court of Chancery in Ireland should cause an injunction or injunctions to be issued accordingly; and this present order to be duly performed and put in execution. (Jour. vol. 22. p. 98.)

CASE 12.—JOHN WALKER,—*Appellant*; JOSEPH NIGHTINGALE,—*Respondent*  
[15th March 1726].

[Mew's Dig. i. 934. See Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), s. 58.]

[A. brought his bill for an allowance of a certain sum of money, as a commission upon the sale of goods by auction, where he attended as a puffer to enhance the price of the goods. Bill dismissed with costs; the demand being of such a nature as ought not to have any countenance in a Court of Equity.]

\*\* And Equity will not suffer demands of an unfair nature to be set against fair and just demands in an account; and a cross-bill for that purpose was dismissed with costs.

The DECREE of the Lords Commissioners of the Court of Chancery was AFFIRMED, with £100 costs.

Mr. Fonblanque, in his notes to the *Treatise of Equity*, c. 4. § 4. observes that the practice of *puffing*, as it is called, at auctions, was, in *Bezwell v. Christie, Cowp.* 395, considered as illegal. But the Legislature having since that case enacted, that property put up to sale at auction shall, upon the knocking down of the hammer, subject the auctioneer to the payment of certain duties; unless such property can, by the mode prescribed by the act, be shewn to have been *bought in* by the owner himself, or by some person by him authorized; this seems indirectly to have given a sanction to this practice; which may materially affect the authority of the decision in *Walker v. Gascoigne* [the case here reported], and the opinion in *Bezwell v. Christie*. See *Morrice v. Twining*, 2 Bro. C. R. 326; and stat. 28 Geo. 3. c. 37. § 20, which recognizes these puffers or bidders.\*\*

Viner, vol. 13. p. 544. ca. 13. 2 Eq. Ab. 161. ca. 13. 483. ca. 26. Cited in both books by the name of *Walker v. Gascoigne*.

Sir Robert Nightingale, who was many years resident in East India, returned to England in August 1709; and both before and after that time, to his death, he employed Francis Chamberlain Esq. to manage most of his affairs, which Mr. Chamberlain did chiefly in his own name; and having dealings with the appellant, he intrusted him with several monies, army debentures, and other things of Sir Robert's, for which Mr. Chamberlain took notes in his own name from the appellant or his servant.

Before Mr. Chamberlain had settled any account with Sir Robert Nightingale, viz. on the 16th of July 1722, Sir Robert died; having made his will, and thereof appointed Robert Gascoigne, the [194] respondent's brother, executor; who, pursuant to the direction of such will, took the surname of Nightingale, and afterwards died, having made his will, and appointed the respondent executor thereof, who duly proved the same, and also took the surname of Nightingale, pursuant to a clause in the same will.

Soon after Sir Robert's death, Mr. Chamberlain commenced a suit touching the validity of his will, in the Prerogative Court of Canterbury, against the said Robert Gascoigne Nightingale, and after his death, carried on the same against the respondent, until the 5th of February 1722; when the respondent obtained a definitive sentence against Chamberlain, and a confirmation of the probate formerly granted to the said Robert Gascoigne Nightingale. After which, the respondent applying to Mr. Chamberlain for an account of Sir Robert's effects come to his hands, had three notes delivered him in part of such effects; two of them signed by the appellant, and the other by David Karver his servant, which notes were in the following words, viz.

*I promise to pay unto Mr. Fran. Chamberlain, or his order, on demand, four hundred pounds.*

*Value received for self and Comp.*

£400.

London, May 16, 1709.

John Walker.

*Received, May 2, 1712, of Captain Edward Arnold, a warrant to clear goods, amounting unto the sum of eight hundred eighty three pounds, eleven shillings, and sixpence, which I promise to be accountable for on demand.*

£883 11s. 6d.

John Walker.



*Received the 6th of June, of Mr. Francis Chamberlain, one hundred and twelve pounds, five shillings, and nine pence, in a debenture for Mr. John Walker,*

*per David Karver.*

£112 5s. 9d.

Mr. Chamberlain owned, upon the delivery of these notes, that the money had been often demanded of the appellant, and was not paid, because of several demands made on Sir Robert by the appellant, which could not be adjusted. And the respondent afterwards demanding satisfaction for such notes from the appellant, he owned the same were unpaid, but said, Sir Robert owed him more than the monies came to; and being pressed for the particulars of his demands, delivered an account, making Sir Robert's estate debtor to him £1038 9s. 6d. whereof £784 9s. 6d. was for commission at £3 per cent. on account of goods of Sir Robert's sold at the East India Company's sale; and £200 more, for so much he pretended to have lost by two bales of muslins he had at those sales bid very high for, and which were therefore left upon his hands.

The appellant refusing to pay the notes, unless he was allowed his demands; and the respondent not being able to bring an action at law in his own name, he, on the 24th of July 1723, exhibited a bill in Chancery against the appellant and Mr. Chamberlain, for a satisfaction of the money due on these notes. To which bill the appellant put in his answer, and thereby admitted [195] the notes; but insisted, that in 1709, Sir Robert having many muslins and calicoes to dispose of at a public sale, bid the appellant lay aside his other business and apply himself to that sale; promising to allow the appellant, as customary in those cases, full commission for the whole produce of such sale. That the appellant thereupon undertook and went through the management of the sale, which amounted in all to £26,149 3s. 11d. and his commission at £3 per cent. to £784 9s. 6d. which commission he insisted on, pretending that by his management of the sale he gained for Sir Robert several thousand pounds, and which he believed no other person would have done; he also insisted on £200 more, as a loss sustained by two bales of muslin, which he said were sold at the risk and on the account of Sir Robert; and the rest of the £1038 3s. 11d. he said was due to him for wine and linen sold Sir Robert; and that he was willing to account for the monies due on the notes, if the respondent would allow his said demands; but because great part of the appellant's acts, and Sir Robert's orders, were of a private nature, and impossible for the appellant to prove but by circumstances, he therefore, if the respondent refused to allow them, insisted on the statute of limitations in bar of the respondent's demands.

On the 27th of April 1724, the appellant brought a cross bill against the respondent and Mr. Chamberlain, to be paid the £1038 9s. 6d. and also £500 more, pretended to be due to him for managing a sale of other part of Sir Robert's goods, by Chamberlain's order: and that the said three notes might be delivered up and cancelled. And in this bill the appellant opened and explained his pretended services; saying he was, by Sir Robert's order, to raise the price of his goods at the public sales, by bidding upon the buyers thereof, and thereby increase the value of such goods; and that the reason why the appellant was to have £3 per cent. commission was, for that if he out-bid others he was to pay for the goods, which was very hazardous; and he set forth particularly, that at a sale in 1712, Sir Robert made signs to him to bid on two bales of muslin, which he accordingly did, and lost £200 by them; which loss he also demanded by his bill of the respondent, besides the £784 9s. 6d. for commission.

The respondent put in his answer to this cross bill, and on the 16th of October 1724, brought on his original cause to be heard before the Lord Chancellor Macclesfield, who decreed the respondent to pay Chamberlain, he being only a trustee in the three notes, his costs to be taxed; and that the Master should see what was due from the appellant to the respondent on the said three notes, and compute interest for them, and tax the respondent his costs; and it was further decreed, that the appellant should pay the respondent the said principal money, interest and costs, together with such costs as the respondent should pay Chamberlain. But the appellant then making default, this decree as to him was only unless cause.

[196] The appellant having paid the costs of his default, both causes came to

be heard together, before the Lords Commissioners of the Great Seal, on the 2d of April 1725; who were pleased to confirm the former decree, with this variation only, that the Master should compute interest on the three notes, from the 5th of February 1722; and also take an account of what Sir Robert Nightingale was indebted to the appellant for wine and linen, and allow the same in the account directed by the former decree; but dismissed the cross bill with costs, declaring they saw no cause to relieve the appellant therein.

In pursuance of these decrees the Master made his report on the 25th of November 1725, and thereby certified, that after a deduction of £54 allowed the appellant for his wine and linen, there remained £1624 0s. 11d. due to the respondent for principal and interest on the notes, and for his costs in the original cause. And this report being afterwards duly confirmed, and the appellant served with a writ of execution of the decree, he paid the respondent the whole money.

But notwithstanding this payment, he soon afterwards appealed from the decree, insisting (C. Talbot, T. Lutwyche) that the same was erroneous, and ought to be altered and set aside in the particulars, and for the reasons following: that an allowance ought to have been made to the appellant for the £784 9s. 6d. proved to have become due to him for his commission of £3 per cent. on the sale of goods for Sir Robert Nightingale's account, amounting to the nett produce of £26,149 3s. 10d. being the usual and customary commission given to others in all such cases; or at least it should have been referred to the Master to settle a proper allowance. That although the last dealings between Sir Robert Nightingale and the appellant were in 1712, and Sir Robert lived till July 1722, and during all that time they were near neighbours in the country, and the appellant frequently at Sir Robert's house, yet he never demanded the money on any of the said notes; which afforded a strong presumption that Sir Robert looked upon those notes as satisfied by the services which the appellant had done him; and it could not reasonably be presumed that Sir Robert would let such a sum remain so long in the appellant's hands, if he had not been conscious that the same was accounted for and satisfied by those services, for which the appellant never received any other recompence than the money contained in the said notes: and therefore it was conceived, that the appellant's demands ought to have been allowed, or some reasonable compensation made him for his trouble in Sir Robert's affairs; or that both parties should have been left to their respective remedies at law. That the appellant's cross bill had been dismissed with costs, although it is the common practice of the Court of Chancery, where there are mutual accounts and dealings between parties, for the defendant in the original cause to exhibit a cross bill to have a satisfaction of his demands. And the appellant having a just demand upon the respondent, which he refused to allow, as appeared upon the face of his own [197] bill, the cross bill was therefore proper and necessary, as well for a discovery as relief, and ought to have been retained, and the appellant relieved in the manner thereby prayed. That by the decree the appellant was ordered to pay the respondent not only his own costs, but also the costs which he was to pay the defendant Chamberlain; whereas it appeared, both by the respondent's bill and the evidence in the cause, that the appellant was always ready to come to an account with him, on having a just allowance for his services; besides, the appellant was so conscious of the justice of his demand, that he offered to leave it to the determination of any two indifferent persons conversant in the East India trade; but which the respondent having refused, he ought not to be allowed costs, if he should be excused from paying costs to the appellant. It was therefore hoped that the decree would be reversed, the appellant's bill retained, and the money he had paid the respondent restored to him.

On the other side it was contended (P. Yorke, N. Fazakerley), that the demands of the appellant, even if he had proved, as he had not, that they were grounded on any promise or agreement of Sir Robert Nightingale, were of such a nature as ought not to have any countenance in a Court of Equity; the services pretended to have been done for Sir Robert being no other than attending for a few days at the public sales where Sir Robert's goods were sold, and, by a fraudulent underhand contrivance, enhancing the prices of those goods by bidding upon the buyers of them as if he had been a real buyer himself; and should a Court of Equity decree a satisfaction

of such demands, it would give sanction to a practice contrary to the faith of public sales, and be an injury to the fair and honest purchaser, and therefore ought to meet with the greatest discouragement. That the appellant having made such an unjust defence, and seeking by his cross bill a satisfaction of demands founded upon unfair practices, and being moreover unable to make proof of any promise or agreement of Sir Robert's, it was but just to dismiss his bill with costs; and though he was thereby left to seek his remedy at law, yet it would not have been reasonable to have sent the respondent to law for recovery of a just and uncontroverted debt, and for which he could not maintain any action in his own name, the notes being taken in the name of Mr. Chamberlain, and the respondent only entitled to the benefit of them in equity. The decree therefore being founded on such manifest justice, ought to be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree, orders, and proceedings therein complained of, affirmed: and it was further ORDERED, that the appellant should pay the respondent £100 for his costs in respect of the said appeal. (Jour. vol. 23. p. 74.)

[198] CASE 13.—JOHN GOULD and others,—*Appellants*; WILLIAM OKEDEN and others,—*Respondents* [1st April 1731].

[Mew's Dig. v. 1050; vii. 180.]

[Where a purchaser takes advantage of the distress or ignorance of the vendor, or of any particular authority over him, a Court of Equity may set aside the purchase as fraudulent, even after the purchaser's death.]

**\*\* DECREE of the Lord Chancellor King REVERSED.\*\***

Grounds and Rudiments of Law and Equity, p. 89. 92. by the name of  
*Gould v. Morgan.*

Bartholomew Lane, having a wife and two daughters, and being seised in fee of several messuages and lands in Sembley and Tisbury in the county of Wilts, and in Wimborne in the county of Dorset; by his will, dated the 5th of May 1671, directed that his wife should enjoy his dwelling-house at Wimborne, so long as she remained his widow; and all the rest of his real estate he gave to trustees, on failure of his own issue male, in trust for his two daughters in tail, with divers remainders over. But by a settlement made subsequent to this will, dated the 18th of March 1677, he settled his lands in Sembley and Tisbury on himself for life; remainder to trustees for 50 years, to raise out of the rents and profits £100 per ann. for his wife for her life; remainder, as to one moiety, to his daughter Susan; and as to the other moiety, to his daughter Magdalen in fee.

In the life-time of Lane, Susan, his eldest daughter, intermarried with Robert Coker; and after Lane's death, Magdalen, the younger daughter, intermarried with William Okeden, Esq.

And by indentures of lease and release, dated the 29th and 30th of August 1687, in consideration of that marriage, and of £4800 paid down as the marriage portion of Magdalen, by her father's executors, Okeden and his father conveyed to trustees several estates of £1200 per ann. as to part, to the use of William Okeden for life, remainder to Magdalen for life, for her jointure; remainder to the first and other sons of that marriage in tail male; remainder to the heirs male of the body of William Okeden; remainder to William Okeden in fee. And as to the residue, to the use of William Okeden for life; remainder to trustees for 500 years: remainder to the first and other sons of the marriage in tail male; remainder to be, that in 600 years; remainder to William Okeden and the heirs male of his body; remainder to the heirs of the body of William Okeden; remainder to William Okeden in fee.—The trust of the 500 years term was declared to be, for raising portions for younger children, in case of a son and other children; but if there should be only daughters, that term was to cease. And the trust of the 600 years term was declared to be, that in case William Okeden should die without issue male, and leaving issue female, the trustees were, after his death, to raise portions for such issue female; and particularly, if but one [199] daughter, £5000; but such portion was not to become due, unless such only daughter should survive her father.

In the year 1679, Bartholomew Lane died; whereupon the fee-simple and inheritance of his real estate, except the dwelling house at Wimborne, was vested in the said Susan and Magdalen his daughters, in moieties: and Mary, his widow, having, in 1687, intermarried with one Draycott, Susan and Magdalen became thereby seised in fee-tail of the said dwelling house, in moieties.

Magdalen Okeden died in July 1688, leaving issue only one daughter named Mary; whereupon the said William Okeden became seised of a moiety of all Lane's real estate, as tenant by the curtesy. And in June 1707, the said Mary, his only daughter, intermarried with William Glisson; but this marriage was without the consent of, and displeasing to the father.

Glisson being very careless and extravagant, and having contracted a debt of £170 to one George Pashen, for securing the repayment thereof, he and Mary his wife, by lease and release dated the 26th and 27th of December 1715, and by a fine, conveyed to the said Pashen and one George Clarke, and their heirs, the reversion of an undivided moiety of her grandfather Lane's estate, in trust, by sale or mortgage to raise and pay the said Pashen £170 and interest; and afterwards, in trust for the said William Glisson in fee.

William Glisson's debts increasing, and he being under a necessity of selling the said estate for satisfaction thereof, frequent applications were made by him and his wife to William Okeden her father, to purchase their reversionary interest; and, after several treaties, they agreed at the price of £500. In pursuance whereof, by indentures dated the 17th and 18th of July 1716, executed by Glisson, Pashen, and Clarke, reciting the last mentioned indentures of lease and release, and that Pashen and Clarke had not raised the £170 and that Glisson wanted to raise other money, and had agreed that the premises conveyed to Pashen and Clarke should, for £500, be granted and conveyed to the said William Okeden: it was witnessed, that in consideration of £174 10s. paid by Okeden to Pashen, and £325 15s. paid by him to Glisson, and 10s. paid to Clarke; Pashen and Clarke, at the instance and request of Glisson, conveyed to Okeden in fee, all the said premises conveyed to Pashen and Clarke as aforesaid; and the said William Glisson thereby covenanted against incumbrances, except the said William Okeden's estate for life, as tenant by the curtesy; and also covenanted to make further assurance.

William Okeden being so seised of the said premises, and of a considerable real and personal estate, on the 29th of January 1716, made his will, and thereby devised his personal estate, and particular parts of his real estates, to the respondents, Walter, Hussey, and Bond, and Joshua Churchill deceased, in trust, to be applied in payment of his debts and legacies, and the £5000 to be raised by virtue of his marriage settlement; and he devised [200] the residue of his real and personal estate to his said trustees, for the benefit of the respondents William and Edmand Okeden his natural children, successively in tail male; with remainder to his own right heirs.

On the 18th of September 1718, William Okeden the testator died, leaving Mary Glisson his only daughter and heir at law; who died in January 1719, leaving the appellants Mary and Magdalen, and one son, who afterwards died an infant and without issue.

In November 1722, William Glisson died intestate; whereupon the appellant Place the elder took out letters of administration both to him and Mary his wife; and in May 1725, the appellants brought their bill in the Court of Chancery against the respondents and others, for an account of the real and personal estate of Bartholomew Lane; and particularly, for an account of profits of the estates at Sembley, Tisbury, and Wimborne, conveyed to the said William Okeden as aforesaid, and also to set aside the conveyances thereof; suggesting, that William Glisson and his wife, being very necessitous, were imposed upon by William Okeden and his agents, and drawn in to execute the same for little or no consideration, being under the power and influence of Okeden, and on assurances of kindness, and other promises which were never made good. And the bill likewise prayed relief as to the raising the £5000 provided by the marriage settlement of 1687; and sought also to impeach the will of William Okeden.

The respondents answered this bill, and the respondent William Okeden by his answer set forth the conveyance to William Okeden of the estates at Sembley,

Tisbury, and Wimborne; denied the several charges of fraud and imposition, and insisted on the said purchase being made for a full and valuable consideration, and not obtained by fraud or imposition in any respect whatsoever.

On the 18th of May 1728, the cause was heard before the Lord Chancellor King, who was pleased to decree, that what of the £5000 was not raised, together with the interest thereof from the death of William Okeden, should be raised and paid out of his personal and trust estates; and directed the accounts to be taken for that purpose, with proper directions touching the same, and for the maintenance of the appellants, and placing out their monies for their benefit till their coming of age. And as to the deeds and writings of the real estate, they were to be produced upon oath before the Master, to be inspected by each side, who were to be at liberty to take copies thereof at their own charge; and the same were to remain with the Master for six months for that purpose, and then the parties were to be at liberty to apply to the Court, to have the deeds delivered out to those to whom they belonged, or for any other purpose relating to the lands contained in the said deeds. And as to all other matters and things, the appellants' bill was dismissed as to the defendant Mrs. Morgan, with costs to be paid by the appellants; and the respondents Bond, Walter, and Hussey, were to have their costs out of the testator's estate; and the defendants Farewell and his wife to have 40s. costs out of the trust estate, and the appellants to have their costs as to that part of the bill which related to the raising the £5000 out of the trust estate till the same should be raised.

From so much of this decree as dismissed the appellants' bill relative to William Okeden's purchase, they appealed; and on their behalf it was urged (C. Talbot, J. Floyer), that William Okeden, not having advanced any thing to his daughter either upon or after her marriage, she and her husband and children were, at the time of this purchase, under the most extreme want and necessity; from whence, as well as from their ignorance of the real value of the estate, which was in Okeden's possession, and from the influence of his paternal authority, they were liable to be imposed upon by him. That the great disparity between the real value of the estate, and the sum of £500 advanced by Okeden for the purchase of it, was a strong proof of his having taken an unreasonable advantage of Glisson's distress, ignorance, and dependance upon him, it appearing fully in the cause that the estate was then worth £1800 to be sold. And though he was entitled to an estate for life therein as tenant by the curtesy, yet there ought not upon that account to have been a deduction of more than one third at the most, which would have left above £1200 as the value of the inheritance purchased by him. And this unkindness to his daughter Mr. Okeden completed by his will, whereby he totally disinherited her, and left not only the estate in question, but also all his family estate which was in his power to dispose of, to his two natural sons. It was therefore prayed, that the decree might be reversed as to this point; that the pretended sale might be set aside, and considered as a security only for what was really paid by Okeden as the consideration thereof; and that upon repayment of the same with interest, after a deduction of the profits which had grown due since his death, the estate might be conveyed to the appellants Mary and Magdalen, and their heirs; and that they might have their costs out of his estate.

On the other side it was said (P. Yorke, D. Ryder), that there was not the least proof of any fraud or imposition upon Glisson or his wife in obtaining this purchase, but on the contrary it appeared clearly by the evidence, that they themselves first applied to, and afterwards pressed Mr. Okeden to become the purchaser; that several treaties were had about it, and even when the price was agreed upon, he gave them time to procure a better purchaser; and that the conveyances were not executed, nor the agreement itself completed, till a considerable time had been spent in seeking for a better purchaser, and they themselves declared they could not find one. That the purchase was only of a reversion, after an estate for life, of an undivided moiety then let at £70 per ann. out of which was allowed by the landlord £8 per ann. in lieu of tithes, and all other rates, taxes, repairs, and outgoings to which the premises were liable; and part thereof consisted in old houses; so that this bargain upon the face of it could not be very beneficial, and [202] it appeared in fact that £500 was the most which could be got for it. But how advantageous soever the purchase might be, it was a fair agreement between parties who were capable of

contracting, and had a right to dispose of their own; and it was apprehended to be no ground for a Court of Equity to set aside an agreement made without fraud or deceit, because one party happened to have a good bargain. That Glisson himself never complained of being injured by the sale, but quietly acquiesced till his death, which was six years after: and it was submitted, that an attempt to set aside a purchase after so great a length of time, and upon a charge of gross fraud and imposition, without any proof to support it, was very vexatious; and that therefore the appeal ought to be dismissed with costs.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree as was therein complained of should be reversed: and it was further ORDERED and ADJUDGED, that the deeds of lease and release of the 17th and 18th of July 1716, should be set aside from being an absolute purchase, and be considered only as a mortgage or security for the money really and *bona fide* paid by William Okeden to William Glisson, or to his order, or for his use; and that it should be referred to a Master of the Court of Chancery, to take an account of what was due for principal and interest of the money so paid and advanced by the said William Okeden; and that an account should be likewise taken of the rents and profits of the lands and premises comprised in the said deeds, received by the respondents since the said Okeden's death, or which might have been received without their wilful default, or through the means of the said William Okeden in his life-time: and the Master was to make a rest at the end of every year, and deduct that rest first out of the interest, and then out of the principal advanced by the said Okeden; and if upon taking the said account the respondents should be found to be overpaid, then they should pay the surplus to the appellants, and deliver up to them the title deeds, and convey one moiety of the said estate, free from all incumbrances, to the appellant Mary Gould and her heirs, and the other moiety to the appellant Magdalen Place and her heirs. But if, on taking the said account, there should be any thing found due to the respondents, then on the appellants' payment to them of what should be so found due, the respondents were to convey one moiety of the said lands and estate to the appellant Mary and her heirs, and the other moiety to the appellant Magdalen and her heirs. And it was further ORDERED, that the respondents should pay the appellants their costs in the Court of Chancery, with respect to that part of the bill which related to the matter appealed from; and that such costs should be taxed by the Master. (Jour. vol. 23. p. 657.)

[203] CASE 14.—LAURENCE COTTER,—*Appellant*; JAMES EARL OF BARRYMORE, *Respondent* [3rd April 1733].

[Mew's Dig. vi. 389; vii. 408; viii. 860.]

[A. filed his bill in the Court of Chancery in Ireland, to be relieved against a long lease granted by his ancestors, on the foot of fraud; but not giving sufficient evidence of the fraud, his bill was dismissed with costs. Some years after, A. filed a new bill for the same purpose, charging fresh proofs of the fraud, which were not discovered pending the former suit. Upon hearing this second cause, the lease was set aside; and on an appeal, this DECREE was AFFIRMED, but *varied by consent*.]

See *ante* ca. 6. of this title.

Richard, Earl of Barrymore, being seised in fee of the lands of Ballyvillowne, *alias* Cove, Lissinesky, Tyneglassy, and Bane Collig, in the county of Cork, by indenture dated the 18th of November 1652, demised the same, being then only of the yearly value of £20, to Nicholas Astwood, for the term of 151 years, in consideration of a fine of £160 and of a reserved rent of £12 10s. But as the premises were held either in jointure or dower, by Alice, Countess Dowager of Barrymore, care was taken to provide that this lease should not commence till her decease, which did not happen until fifteen years afterwards; and his Lordship, at the same time, also executed a penal bond for £320 to Astwood, conditioned for performance of the covenants on his part contained in the lease.

By deed dated the 28th of April 1656, Mr. Astwood assigned all his interest

in the lease to Edmund Cotter Esq. the appellant's grandfather, for £160; who, in the year 1660, died, having, by his last will, devised his said reversionary term, when the same should fall into possession, to his two sons, Garret Cotter and James, afterwards Sir James Cotter, the appellant's father, equally between them; and if either of them should die before he had lawful issue, then his part was to go to the survivor.

The Countess Dowager dying in the year 1667, and Sir James Cotter being then in England, his brother and co-devisee, on their joint behalf, entered upon the premises, which they held afterwards as joint-tenants, or tenants in common, till the whole at last came to vest absolutely in Sir James; who continued in the sole enjoyment of the lands, under the said lease and rent, without any interruption, other than that, in the year 1690, one George Gamble got into possession, under a covenant of lease, which the Earl had taken upon himself to make of the premises; but which being soon after given up as a void lease, Sir James was again restored, and enjoyed the lands during the remainder of his life.

Sir James Cotter being afterwards in treaty for purchasing the reversion of this estate, and desirous to protect the term from being merged, by deed dated the 20th of July 1695, assigned over [204] the same to William Cotter, in trust for himself during his own life, and afterwards in trust for his eldest son James Cotter; who, upon his father's death in 1705, became entitled to, and accordingly entered upon, and for some time continued in the quiet possession of the premises, without any contest whatever.

But in Trinity term 1711, the respondent, deriving under a fine levied and a settlement made of the reversion by the said Earl Richard his father, some time in the year 1682, exhibited an original bill, and soon after a supplemental bill, in the Court of Chancery in Ireland, against the said James Cotter and others, to impeach and set aside the interest under the said term of 151 years; in order to which it was, amongst other things, suggested by these bills, that Earl Richard had, in 1668, executed another lease of the same lands to one Vincent Scott for the term of 41 years, at the yearly rent of £12, in trust for the said Garret and Sir James Cotter; and that his Lordship then also acknowledged a statute-staple for a certain sum of money to the said Vincent Scott, which, by a deed of defeazance, was declared to be only intended as a collateral security for the better performance of the covenants and conditions contained in such second lease; and that the said Vincent Scott had also by some deed, declared the same to have been so taken only in trust for the said Sir James Cotter and his brother Garret, and assigned it over to the latter for their joint use and benefit; all which, as was suggested, did amount to a surrender, or at least an agreement to waive the benefit of the former lease for 151 years; and in order to give a greater colour of probability to such pretended agreement, it was further alleged, that their reason for coming into it was a persuasion and conviction they had, that the first lease was either void or voidable, as exceeding the lessor's power or authority to grant the same: and the bills further set forth, that Sir James, in his life-time, and, since his death, the said James Cotter his son, had got into their hands, and fraudulently withheld and suppressed the said several deeds; and that to carry on still the appearance of a title under the first lease, there had been some erasure made in the deed, by which the rent reserved was changed from £9 to £12 a year, with a view of making it the better to correspond with that sum, which had all along been paid annually for the premises; but that the respondent, who was become entitled, as reversioner, to re-enter upon the premises at the expiration of the second lease, was disabled from making out his title, or proceeding at law for the recovery thereof, on account of the said several supposed frauds; and therefore he, by his said bills, prayed a discovery of all these particulars, and to be decreed the possession of the premises.

James Cotter, in his several answers to these bills, admitted to have heard of the second lease to Vincent Scott; but denied that thereby, or otherwise, it was agreed, or ever intended, to surrender or waive the first lease, or that there was any erasure or alteration therein; and therefore insisted upon the benefit of the first lease, as a subsisting lease, which his ancestor had purchased for so valuable a consideration, under an unquestionable title in the lessor, and which there could not have been any motive or inducement for departing with afterwards as was pretended; and he likewise denied the several other allegations of the bills.

Issue being joined, and publication having duly passed, after a long examination of many witnesses on both sides, the cause came on to be heard in Trinity term 1715, and afterwards re-heard in Hilary term following, before the Lord Chancellor of Ireland, assisted by the Lord Chief Justice Forster, and Mr. Justice Dolben; when, upon great consideration had of the several proofs and circumstances in the cause, and more particularly of the deposition of Vincent Scott himself, who was examined as a witness for the respondent, and on his death-bed denied any such agreement as was pretended; and it appearing likewise, that the old lease and bond were uncanceled and entire, without any erasure or alteration whatsoever; and that the taking an assignment of this concurrent or reversionary interest, whether accepted to prevent a law contest with Vincent Scott, or even to protect his first title under a mistaken misapprehension that the same might be questioned by the Earl himself, or Vincent Scott, or any other lessee, were not a sufficient foundation in equity for setting aside the first purchase, the Court decreed both the respondent's bills to stand dismissed with costs; and were also pleased to direct his Majesty's Attorney-general to carry on a prosecution against some agents or solicitors that appeared guilty of indirect practices in tampering with Vincent Scott about his evidence in the cause.

This decree being afterwards inrolled, the appellant, under the sanction of it, treated for and became a purchaser of the remainder of the first term from his brother James, who assigned all his interest over to him for a valuable consideration, by deed dated the 22d of September 1718; in pursuance whereof the appellant immediately entered upon and enjoyed the premises for many years, without any the least interruption or contest.

But on the 27th of July, which was after above five years acquiescence under the decree, the respondent exhibited a new bill in the same court against the appellant, and also against James Cotter, the eldest son of the said James Cotter, Robert Reeves, Francis Bernard Esq. John Rogerson Esq. his Majesty's Attorney-general, and others; stating all that had been before alledged and insisted upon in his former bills; but disclosing no new matter whatsoever, other than the death of the said James Cotter in the year 1720, under an attainder of felony for a rape, of which he had been convicted; and that there had since been discovered fresh proofs to support the allegations of the original and supplemental bills concerning the suppression and concealment of the second lease for 41 years, and the other deeds relating thereto, by the said James Cotter, whilst the former suit was depending; and that the respondent had since got the same into his own power, which bore date respectively upon the 26th of April and 7th of May 1668, together also with another deed, dated the 24th of [206] December 1681; by which it was alledged, that Garret Cotter had assigned or released his interest under the second lease to his brother Sir James; and it was also alledged, that by the second lease Earl Richard covenanted that he, his heirs or assigns, should, within one year after the expiration of the said 41 years term, at the charge of the said Vincent Scott, his executors, administrators, or assigns, renew the said lease for 28 years, to commence from the expiration of the said 41 years, at the same rent; and that an old mortgage made by his father, subsequent to the second lease, though satisfied, was still outstanding in the said Francis Bernard: The respondent therefore prayed, that the said decree of dismissal might be reversed or set aside; and that he might be decreed to the possession of the said lands, and to an account of the profits since the appellant became possessed thereof.

The appellant put in a plea to part of this bill, and insisted, that the several particulars thereby pretended to have been discovered, were not any new matter of fact which had not already been put in issue; but only fresh supplemental proofs of the same facts, which had been before examined into and determined upon in the former cause; and therefore, by the rules and practice of the Court, it was an improper foundation for any bill to reverse or impeach a decree made upon so great consideration: he also insisted upon his being a purchaser for a valuable consideration, long before the conviction of his said brother, and without notice of any title the respondent had to impeach the same. And by his answer to the rest of the bill, the appellant sets forth at large the several reasons which induced him to believe that the deeds alledged to be in the respondent's power



were not genuine, or ever concealed by James Cotter; or if they had, yet, that the same being wholly immaterial, they ought not to affect the appellant's title to the premises.

On the 4th of June 1725, this plea came on to be argued before the Lord Chancellor of Ireland, when his Lordship was pleased to over-rule the same with costs.

Afterwards Mr. Attorney-general put in an answer; but insisted upon no title, by reason of the conviction of James Cotter, on account of the appellant's antecedent purchase. And the said Francis Bernard also put in an answer, and thereby submitted to act as the Court should direct.

This cause came on to be heard before the Lord Chancellor upon the 22d, 23d, 24th, 27th, 29th, and 30th days of April 1730; and upon the 3d of July following, his Lordship was pleased to direct a trial at law to be had by jury of the county of Corke, upon the following issue; viz. whether the said several deeds, dated respectively the 25th of April, the 2d of May, and the 7th of May, 1668, and the other deed, dated the 24th of December 1681, were in the possession of James Cotter, son of the said Sir James, and when; and whether the said deeds, or any, and which of them were concealed by him or his order?

[207] A trial was accordingly had on this issue upon the 10th of April 1731, before the Lord Chief Baron of the Court of Exchequer in Ireland; but the appellant being disabled to make a defence, by the death of those witnesses who had been examined in the former cause to the same points, the jury returned their verdict in these words, viz. "That the said four deeds were in the possession of the said James Cotter, the son of the said Sir James, on the 5th day of December 1711, and that the same were concealed by him from that time, till the time of his death."

This verdict being afterwards certified by the Lord Chief Baron, the cause came on to be further heard before the Lord Chancellor on the 17th of May 1731, when his Lordship was pleased to decree, that the said lease for 151 years should be set aside, and delivered up to the respondent, as having been surrendered and determined by the acceptance of the said other lease for 41 years; and directed an account to be taken against the appellant, from the time he first came into possession, for what he made, or might have made, of the said lands, without wilful default; and that an injunction should be directed to the Sheriff of the county of Corke, awarding him to put the respondent into possession of the premises; and also decreed the said Francis Bernard to convey the legal estate he had therein to the respondent.

From this decree, and also from the order for over-ruling the plea, the appellant appealed; insisting (P. Yorke, J. Strange), that as this, in its own nature, seemed to be a bill of the first impression, so the over-ruling the plea put in to it by the appellant, might become a precedent of the most dangerous tendency; and which, if once established, must lay open the justice of almost every decree to be called in question and re-examined, either upon a real or pretended discovery of further evidence to the same points, which had already been controverted and determined, and thereby introduce the utmost confusion, not only among the immediate suitors themselves, but all those deriving under them by purchase or otherwise, and be a great inlet to perjury and subornation. That the issue directed in this cause, and the facts found upon it, were plainly immaterial; and what ought not, therefore, in any sort to impeach or affect the appellant's title to the lands in question: because neither the first acceptance or subsequent assignment of the new lease by Vincent Scott to Garret Cotter, ever amounted to a legal surrender even of his own moiety of the old lease; and if any act thus done had wrought a surrender of his moiety, yet it could not affect the contingent interest either present or future of the other joint-tenant, who was then in another kingdom, and an entire stranger to the whole transaction. Nor could the subsequent assignment alledged to have been made in 1681, amount in any sense to more than the release of one tenant in common to another, of whatever interest passed under the second lease. But there was not the least colourable foundation for presuming either of the joint-tenants ever agreed or intended to waive the benefit of a valuable interest, to which their title was clear and unquestionable, and which had been

purchased by their father at so high a price; especially considering the evidence of Vincent Scott, who best knew the truth of the whole transaction, and to the time of his death persisted in his denial of any such agreement. It was however objected, that it appeared by the evidence of one Richard Barry, a witness examined in the former suit, that on pretence of the lease for 151 years being a void lease, either because it exceeded the power which Earl Richard had to make leases, or because Nicholas Astwood happened to die in the life-time of the Countess Dowager, his Lordship, soon after her death, entered and distrained upon the premises, which gave birth to a law-suit on his part to set aside that lease; and that this dispute was afterwards compromised by an agreement between him and Garret Cotter, by which the old term was to be surrendered, in consideration of a new lease for a less number of years, to be perfected by the same lessor. But it was apprehended, that the bare stating of this loose parol evidence was sufficient to shew the improbability of its being true in almost any one particular: for though it should be admitted, that the lessor had only a particular estate in these lands, which might make any act he did void, as against his remainder-man, yet, as it evidently could not be so against himself, there did not seem to be any colour or pretence for contesting the same in his life-time. Besides, it was hardly conceivable how any such suit should have taken its first rise by distraining upon the premises; or why, if it ever had been begun and carried on, there should not be now extant the least footsteps of any such proceedings upon record; or why the second lease for 41 years, with a covenant to renew for a further term of 28 years, should have been thought a more certain interest, or in less danger of being avoided than the other. But what rendered the whole of this evidence yet more improbable, and almost incredible, was, that it appeared of the respondent's own shewing, that the lessor had an absolute estate of inheritance in the premises, the respondent claiming by a settlement under him, which necessarily implied an antecedent power in him to execute the lease now contested; besides, it further manifestly appeared, that the lease to Astwood was made for 151 years, to commence absolutely at the death of the Countess, and not to depend upon his surviving her, or any other contingency whatever. Lastly, that although the old lease should be looked upon as an interest agreed to be surrendered, yet the appellant ought to have enjoyed the entire benefit of the second lease, which was allowed to be the only recompence and consideration for giving up so valuable a purchase as the other; nor ought he to be deprived of the benefit of the further term thereby covenanted to be granted, by being decreed to account for the profits from the time of his coming into possession, notwithstanding such covenant fully appeared in the cause, and amounted to a lease in equity for that term. It was therefore hoped, that the orders, and decree appealed from, would be reversed, and the respondent's bill dismissed with costs.

[209] On the other side it was contended (C. Talbot, T. Lutwyche), that the concealment of the several deeds mentioned in the issue and verdict by James Cotter, the appellant's brother, and the subsequent transactions relating thereto, were unknown to the respondent, and not discovered till long after the dismissal of his former bill; and that several of these facts happening after such dismissal, could not be made use of in the former cause. That the appellant had neither in his answer or plea sworn to any particular consideration being paid for the purchase; nor did the instrument under which he claimed to be a purchaser, mention any particular consideration; nor had he proved that he ever paid or gave any consideration for such purchase: he ought therefore to be considered only as a volunteer, and must be affected with the fraud and ill practices of his brother James in relation to the deeds. Besides, it appeared in the cause, that James Cotter executed the assignment in the absence of the appellant, and without any previous agreement or communication with him concerning the same. And as to the appellant's having any benefit of the covenant for renewal, it appeared by the covenant, that application was to be made for such renewal within a year after the expiration of the 41 years lease; but the appellant's brother, instead of applying for a new lease, fraudulently set up the lease for 151 years; and by his answer in the former cause, expressly waived the benefit of that covenant, as did the appellant likewise by his answer in the present cause. It was therefore prayed, that the orders and decree might be affirmed, and the appeal dismissed with costs.

After counsel had been heard on this appeal, the parties came to an agreement, which being reduced into writing and signed, was delivered in at the bar, and desired to be made the order of the House. It was accordingly ORDERED and ADJUDGED, that the decree complained of should be so far varied, as that the appellant should have the benefit of the renewal of Scott's lease for 41 years of the lands in question for the term of 28 years, from the expiration of the said 41 years lease, according to the terms of the covenants therein; and that the appellant should be let into possession on the 1st day of May next; and that the respondent should answer a year and a half's rent of the estate in question, from the 1st of November 1731, to the 1st of May 1733, at £163 a year, amounting to £244 10s. and the appellant was to answer for fifteen years reserved rent of the premises, at £12 a year, from the 1st of May 1718, to the 1st of May 1733, amounting to £180, which being deducted out of the said £244 10s. there remained due to the appellant £64 10s. which the respondent was to pay to the appellant on the said 1st day of May next; and the appellant was to deliver back the possession of the said estate to the respondent on the 1st day of May 1737, when the said 28 years would expire: and no costs were to be paid by either party in his cause, either here or in Ireland; and with these variations, the decree was affirmed. (Jour. vol. 24. p. 224.)

[210] CASE 15.—JAMES HUNTER,—*Appellant*; JOHN SHEPPARD and others,—*Respondents* [17th April 1769].

[Mew's Dig. vii. 261; x. 466; xi. 1060.]

[A. usually employed B. as his agent to buy hops of the several planters in and about Canterbury, but having in a particular season omitted to give him any orders at the usual time, B. enters into a partnership with three others, for purchasing hops of that year, for their mutual benefit. The hops are accordingly purchased, but A. having intelligence of this transaction before they were delivered, prevails upon B. to declare to the planters, that he bought them as A.'s agent, and by that means A. got the hops delivered to him. Held that this was a fraud upon the partners of B. and that A. should account for the value of the hops, according to the highest price for which he sold them.]

\*\* DECREE of Lord Chancellor Camden AFFIRMED. See *ante*, Case 8, and the note there, and also Case 9 of this title.\*\*

The appellant was for many years one of the most considerable dealers in hops in England, and living in London, he employed one Abraham Rye to buy hops for him of the hop planters and others in Kent, for several years, whereby Rye was the appellant's known agent to all the gentlemen, both planters and hop-dealers in and about Canterbury; and the appellant having been many years in trade, had constantly, by himself or Rye, bought the principal planters' hops in that neighbourhood, and was looked upon by several of them as their constant purchaser of hops, at the common market price, and his connections with them were so well known to all the dealers in hops in and about Canterbury, that few or none of them, for a series of years, attempted to treat with those gentlemen for their hops, until the year 1764, when the respondents, being dealers in hops at Canterbury, and hearing from Rye that he had received no express or particular orders from the appellant so early as usual, intimated to him that the appellant had employed another agent, and so prevailed upon Rye to enter into an agreement with them, for buying hops of that season on his and their joint account. Rye was immediately dispatched to Sir Thomas Pym Hales and other the appellant's friends, whose hops he had usually bought, and agreed for the purchase of them as he had formerly done, without declaring for whose use he bought them; but Sir Thomas Hales and the other gentlemen considered him as buying for the appellant, and for him only.

Hops bearing a greater price in that year than usual, made the appellant backward in contracting for any considerable quantity, till he found how the markets

went; and receiving a letter from Mr. Geoghegan relative to his hops, the appellant wrote him an answer on the 17th of September 1764, which he inclosed to Rye, purporting, that he should be ready to give Geoghegan as high a price for his hops as any one else would when they were bagged; and until then, he thought it impossible to put a fair valuation upon them; desiring Rye in his letter to keep him regularly advised of what passed in the country, and as soon as there was an opening [211] for doing business, Rye might depend upon having his orders; and that the appellant should buy ordinary hops, as well as fine hops in pockets. By another letter from Geoghegan, of the 20th of September, he informed the appellant that they should not differ if possible, being very desirous of dealing with the appellant for his part, and perhaps for Lady Hardres's; and about the 26th of the same month, the appellant wrote to Rye, that he should be at Canterbury in the middle of the next week, and accordingly arrived there on the 29th, meaning to buy the hops of Geoghegan, Hales, Hardres, Beckingham, Hougham, and Abbott; but being informed by some people, that Rye had the day before bought for him what are called the bourn hops, and also Hales's hops, and by others, particularly the respondent Sheppard, that Rye had bought them for himself, Sheppard, and others; the appellant, to get at the truth, went to Geoghegan, who told him he had sold Rye all the bourn hops at £9 per hundred for the appellant's use, and desired the appellant, as he was then in the country, to advance him some money on account thereof, which the appellant accordingly did; and Geoghegan hearing the next day that Sheppard pretended that Rye had bought the hops for him, declared that nobody should have them but the appellant, as they had been in treaty before about them; that he always intended giving the appellant the preference, and had sold them to Rye as the appellant's servant, and on his account. The appellant went next to Sir Thomas Hales, who told him, that since he had sold his hops to Rye, for the appellant's use, he heard that Sheppard laid claim thereto; but that he looked upon Rye as the appellant's agent, and had treated with and sold him his hops for the appellant's use, but if the appellant was not disposed to take them at the price fixed to Rye, being £8 15s. per hundred, it should be no bargain; that he would keep them, and not deliver a single pocket to Rye but on the appellant's account; adding, that Sheppard and the others were entire strangers to him; whereupon the appellant agreed with Sir Thomas Hales for his hops at £8 15s. per hundred, and paid him £700 in part thereof. One Mrs. Abbott likewise, the wife of Charles Abbott, a hop-planter, came to the appellant and informed him, that she had been treating with Rye, the appellant's agent, for sale of her husband's hops, that they had differed about the price, and as she understood that Rye had treated with her on the appellant's behalf, she therefore offered to sell them to the appellant, who accordingly agreed with her for the purchase of all her husband's hops, at different prices. These several parcels of hops thus bought of Geoghegan, Hougham, Hales, and Abbott, were soon afterwards delivered in London to the appellant's use, and he paid for them all.

But in Michaelmas term 1764, the respondents thought proper to file their bill in the Court of Chancery against the appellants, Sir Thomas Pym Hales, Geoghegan, Hougham, Lady Hardres, Beckingham, Corbett, Abbott, and Rye; setting forth, that on the 27th of September 1764, they had made an agreement with Rye [212] for purchasing the hops of Hales, Geoghegan, Hougham, Hardres, Beckingham, Corbett, and Abbott, on their joint account, to the intent that the same might be afterwards sold for their equal benefit; and that Rye should, on his own and the respondents behalf, treat with Hales, Geoghegan, Hougham, Hardres, Beckingham, Corbett, and Abbott, or some of them, for the purchase of their several parcels of hops of that year's growth. That accordingly Rye went the next day to Sir Thomas Pym Hales, and agreed with him for the purchase of all his hops, at £8 15s. per hundred, Geoghegan's at £9 per hundred, Abbott's at £8 15s. and paid them some money on account. That all these contracts were made on the joint account of Rye and the respondents, whereof Sir Thomas Hales and the others were then informed, or soon after, and that they were in several instances confirmed, and in part performed by the respective owners delivering Rye samples of the hops, accepting money from him towards payment, and promising to perform the agreements. That the appellant had never directed or authorised Rye to contract for the pur-

chase of these hops, nor had, before Rye's entering into such contracts, any expectation that Rye would contract with Hales, Geoghegan, Hougham, Hardres, Beckingham, Corbett, and Abbott, for the purchase of their hops: but, on the contrary, although the appellant had in some past years employed Rye as his agent for buying hops in the neighbourhood of Canterbury, he had, on some displeasure conceived against him, dismissed Rye for two years before September 1764 from such employment, and resolved to employ him no more in that capacity, whereof he had given Rye notice; and had several times declared, he would no more employ him in that business, and had therefore sent him no orders in that year to buy hops as he had constantly done before, except in the year 1763, but had come himself into the neighbourhood of Canterbury, in the month of September, in order personally to buy hops, which was not usual with him while he employed Rye. That in all former years, the appellant, long before the 28th of September, applied to the owners of the hop grounds personally, or by letter, concerning their hops, but had made no such application to them before the 28th of September 1764; on the contrary, he had some short time before that day written a letter to Rye, declaring he was quite idle in the hop trade, and had then no thoughts of buying any; and on his journey to Canterbury in September, had offered to employ another person as his agent to buy hops for him; and had also declared several times, that Rye had contracted for his own and the respondents, and not on the appellant's account. That Rye hearing on the 27th of September, that some persons were arrived, or soon expected in the neighbourhood of Canterbury, expressed that very evening an inclination to Sheppard, instantly to go from Canterbury to Hales, Geoghegan, and Abbott, and contract for their hops, lest the west country Quakers should be before him: and though he was dissuaded by Sheppard from going that night, he went early the next morning; agreed with Hales, Geoghegan, and Abbott, and [213] brought and delivered to Sheppard samples of the hops, and publicly declared he had bought them for himself and the respondents, boasting of his management in getting the start of the Quakers, who were entering as he came out of Hales's yard. That on the 29th of September, Rye met Sheppard in Canterbury; and after telling him of the purchase he had made of hops on his own and the respondents account, represented to Sheppard that he had occasion for money, who gave him £72 and £50 on account; that on the same day, after contracting with Hales, Geoghegan, and Abbott, Rye had entered into treaty to sell his part of these contracts; and had, after the appellant claimed a right to the hops, declared, that he had no order or authority from him to buy or treat for these or any hops whatsoever in that year, and to shew that the hops were contracted for on his own and the respondents account, and not on the appellant's, he produced a letter to him from Sir Thomas Hales, intimating, that if he chose to have the hops, he must come the next morning by 8 o'clock, for that other persons would come and see them at 11 o'clock that morning. That Rye, at the time of producing this letter and at other times, promised that the hops should be delivered for the joint use of him and the respondents, and to go with Sheppard the next morning to Hales and others, and inform them that the contracts were made on his and the respondents account; and they had notice thereof before they delivered the hops. That Mary Abbott acknowledged her husband's hops were bought on Rye's and the respondents joint account, and promised to deliver them for their use, making her a present of five guineas, it being usual with her to require a small present from the persons with whom she from time to time bargained for sale of her husband's goods, to any considerable amount. That Hales's letter to Rye was evidence, that Hales considered Rye as treating with him on his own account, and not as an agent; and if Rye had on the said treatise mentioned the appellant's name to Hales, Geoghegan, and Abbott, which the respondents did not admit, he had done it only with a view of inducing them to sell him their hops, as the appellant had dealt with them before, and they knew him to be a person of good circumstances; whereas the respondents having never before dealt with them, were strangers, and the hops were of a large value: and Rye afterwards informed them that the contracts were not for the appellant, but on his own and the respondents joint account. That the respondents gave notice to Hales and the others, forbidding the delivery of the hops to the appellant, long before they were delivered to him; but the appellant finding, that by the rise

of hops which soon after happened, the contracts were beneficial, resolved to obtain them for himself at the price agreed for by Rye; and thinking that Rye's having been employed by him as his agent in buying hops, afforded a favourable opportunity of effecting his design, he had, by some reward or promise, or by again employing Rye in his service, prevailed on him to declare to Hales and the other hop owners, that the said contracts were made on the ap-[214]-pellant's account; and the appellant had made the like declaration; but that, notwithstanding this, the hop owners ought to deliver them to the respondents, upon payment of the money remaining due; and if any of them had been delivered to the appellant, such delivery was an act of fraud, and the respondents ought to have satisfaction. The bill therefore prayed, that an account might be taken of all the hops agreed to be purchased, and the price thereof according to the terms of the agreement, and of all money received by or for the use of the hop planters, towards their payment; and if the hops had not been already delivered to the appellant, that they might be delivered to the respondents, they paying such money, if any, as remained unpaid in respect of the price thereof; and if the hops had been delivered to the appellant, and he should have sold them or any part thereof, that he might account with and pay the respondents their shares of the profit made by such sale.

The appellant by his answer admitted his having bought Hales's, Geoghegan's, and Abbott's hops, and having sold part thereof, the other part remained unsold; but insisted he was entitled to the whole benefit thereof, without rendering any account, or making any satisfaction for them to the respondents, being a purchaser of the hops for a fair and valuable consideration; and that the transaction was fair, open, and honest on his part, without any deceit, fraud, or circumvention whatsoever. He admitted he had given no particular or express orders to Rye, for buying the hops of that year, but had in general retained him as his agent; and particularly agreed with him that he should not buy hops for any other person. That about three weeks before the appellant went down to Canterbury, he informed Rye that he was to continue buying hops for him as usual, and had never dismissed Rye from that employment, nor ever resolved so to do, or to employ him no more, though he might on some occasions have declared his dissatisfaction at Rye's conduct. That he never paid or promised Rye any money, or other benefit, profit, or advantage, in consideration of his making such declaration as the respondents had alleged in their bill, or in consideration of his being any ways instrumental in procuring the hops to be sold or delivered to him, otherwise than his accustomed commission; nor had promised any benefit to the hop owners, above what was agreed to be paid them for the hops, save ten guineas to Abbott's wife. That between the 19th of September and the 17th of November, he had bought hops at or about Canterbury to the amount of £30,000 several persons being concerned with him in the purchase. That forty-one pockets of Geoghegan's and Hougham's hops were sent to the warehouse, and seventy pockets of Hales's and twelve pockets of Abbott's to the warehouses of the other persons concerned therein: and until the accounts between him and those other persons were settled, he could not set forth whether Hales's and Abbott's hops would or would not turn out profitable; but that thirty-three pockets, part of the forty-one, had been sold at dif-[215]-ferent prices, from £9 to £10 7s. 6d. the hundred, and had produced £425 1s. 6d. and the remaining eight pockets were still unsold; and after valuing the said eight pockets at the then market price, and deducting the necessary expences and outgoings attending the sale of the thirty-three pockets, there would be a loss and not a profit upon the forty-one pockets. That in 1764, hops being later than usual, and thinking they bore too high a price, the appellant forebore ordering Rye to buy any for him, until he himself should go to Canterbury. That he had usually given orders to Rye, sometimes in writing and sometimes by word of mouth, for upwards of seven years last past, to buy hops for him about September in each year, or as soon as they were usually gathered and fit for sale; and that Rye had many times bought hops for him without receiving any immediate orders, being generally retained by him as his agent for that purpose. That having occasion for a large quantity of hops, he had treated with several persons himself, and employed John Kingsford and Thomas Giles to buy hops for him, on the usual commission of one shilling per hundred weight. That he still employed Kingsford and Rye, but not Giles, and

might have occasion to employ several persons for buying hops in and about Canterbury. He admitted that the hop owners, considering him as the purchaser, had delivered the hops in question to him as the real purchaser thereof for a fair and valuable consideration.

Rye by his answer said, that on the 27th of September 1764, being in company with the respondents, the conversation turning upon hops, he informed them that he expected orders from the appellant to buy the bourn hops, and the hops of Hales. That the respondents then intimated to him, that the appellant would not become the purchaser of the said hops, nor of any hops till Christmas, and would have engaged him to purchase the bourn and Hales's hops for their and his (Rye's) account, but he then declared he would not purchase the hops on any other person's account than the appellant's, if he would have them. That hearing some persons were about buying the bourn and Hales's hops, he was alarmed thereat, and having no positive directions from the appellant to buy for him, he determined to run the risque of buying them himself, rather than they should fall into the hands of strangers; and that the respondents told him, that if he purchased them they would be concerned with him therein, and he should be concerned with them in the purchase of some other hops which they had in view, to which Rye assented; and in the morning of the 28th of September, he went and agreed with Geoghegan, Hougham, Hardres, and Beckingham, at £9 per hundred, and gave Geoghegan one guinea earnest. That he afterwards went and agreed with Hales and Abbott, at £8 15s., £8 10s., and £7 per hundred weight. That he was at that time, as he had been ever since 1757, the appellant's known agent for buying hops in and about Canterbury, and had for some years, as such, bought Geoghegan's, Hougham's, Hardres's, and Beckingham's hops, and the [216] preceding year Hales's, and then appeared to the hop owners as such; nor did he at all inform them to the contrary. That the appellant coming to Canterbury on the 29th of September 1764, applied to Geoghegan, Hales, and Abbott, and purchased their hops at the price Rye had agreed for, except ten guineas to Abbott's wife: he denied that he entered into any agreement with the respondents for purchasing the hops on their joint account, or that he alone should, on the behalf of himself and the rest of the respondents, treat with the hop owners for the purchasing their hops, otherwise than as aforesaid: but admitted, that it was agreed between them that they should purchase diverse other hops on their joint account, and that the respondents had since purchased divers quantities of hops under that agreement, but refused to admit Rye to have any benefit thereby. That he was never dismissed by the appellant from his service as agent; on the contrary, the appellant had corresponded with him as his agent in the summer of 1764, in such manner as he had usually been accustomed to do; and that he had not received any gratuity, reward, or satisfaction from the appellant for purchasing the said hops, or being instrumental in procuring them to be delivered to him, other than the usual commission: and no part of the hops had been delivered to him, nor had he received any benefit therefrom. That the appellant, on the 26th of September 1764, wrote to Rye: "I thank you for hinting to me of John Pickman's hops. I should like to buy them or any other of that kind, but I suppose he will not stay for my coming down, which I do not think will be before the middle of next week, although I cannot plead business, for I never had a prospect of doing so little business since I have known the trade. I am quite idle, and am resolved to be so till hops are cheaper. You are so kind to write to me of the highest prices that are given with you, but not a word of what low prices are going for brown hops. Information on that head would be grateful to me from Mr. Rye. I hear it reported that £6 10s. to £7 and £7 10s. have been prices for a great many of your hops this week. Pray tell me what you know has been done in bags or low priced pockets, and what you think could be done in them." That at the time he bought the hops, he took small samples thereof, and afterwards returning to Canterbury, laid them in the parlour window, when some of the respondents looked at and examined them. Denied his receiving £72 from Sheppard for the purposes mentioned in the bill, but for the purpose of disposing thereof to such persons as Sheppard, Rayner, and one John Lade, had contracted with for several ensuing growths of hops, as they should have occasion to call for it. That he had received £50 on the same account,

and several other sums, which he had accounted for; and would have accounted for the £72 but Sheppard refused to accept it, under pretence that he had paid the same on account of the hops in the bill mentioned. Denied his having promised the respondents, that the hops agreed for should be at [217] any time or place delivered for his and the respondents joint use, not having purchased them in the name of any particular person; and the hops were not then bagged up. And said that Hales told him, in the appellant's presence, that at the time Rye bought his hops, he understood they were bought for the appellant, and that the appellant should have them.

The defendants Hales, Hougham, Abbott, and Geoghegan, by their answers said, that they had looked upon Rye as the appellant's agent, and had sold him their hops for the appellant's use; they knew nothing of Sheppard, Rayner, or Royle, nor had ever heard that Rye was concerned with them, but knew that he was the appellant's agent.

The cause being at issue, and the appellant not thinking himself at all answerable to the respondents for any part of the above transaction, and there being no charge of fraud against him, the complaint being against Rye only, he thought it unnecessary to examine witnesses. But those examined for the respondents fully proved the agreement entered into between them and Rye, and his purchasing the hops in question on their joint account.

On the 30th of June 1767, the cause was heard before the Lord Chancellor Camden, who was pleased to declare, that the plaintiffs, together with the defendant Rye, entered into partnership upon the 27th of September 1764, in all the hops which Rye should purchase of the planters in that year, for their joint benefit; but that Rye having afterwards, in breach of his agreement, and in collusion with the appellant, procured all the hops in question, so bought for the benefit of the partnership, to be delivered over to the appellant; his Lordship further declared, that Rye had no right, in taking the account prayed by the plaintiff's bill, to any benefit or advantage of his fourth share of the partnership under the said agreement; and decreed, that it should be referred to the Master, to take an account between the appellant and the respondents, as to the *quantum* and value of the several parcels of hops in question; and in taking such account, the Master was to inquire for what sums the same had been sold by the other defendants the planters, when the same were delivered to the appellant; and whether the appellant, or any of his partners, had sold any of the hops in question at any time before the 20th of November 1764; and if the Master should find that any such had been sold before that time, then he was to inquire at what prices the same had been so sold, and that the best price that should be proved to have been given should be the measure of the plaintiff's damages sustained by the breach of the said partnership; but in case none of the hops had been sold before that time, or if proof should not be made touching the price at which the same were sold, then that the Master should inquire and state to the Court, what was the highest price given for hops of the like quality that year, at any time before the said 20th of November; and that the Master should compute the difference be-[218]-tween the value of the hops as if sold at the best price, and the value of them at the price they were so delivered out to the appellant; and that such difference should be divided into four equal parts, and that the appellant should pay to each of the plaintiffs one such fourth part; and that the appellant and Rye should pay to the plaintiffs and the other defendants their costs of suit to the time of the decree, to be taxed by the Master: and his Lordship reserved the consideration of subsequent costs until after the Master should have made his report.

The appellant conceiving himself to be much aggrieved by this decree, appealed from it; insisting (F. Norton, A. Forrester), that he did not appear guilty of one single act of imposition upon the respondents, or of the least collusion with Rye to their prejudice. Rye had for several years been the appellant's known agent in the country for buying hops, and was so in 1764. The hop planters knew him in no other light, and whatever declarations the appellant might make to Sheppard, in August or September 1764, or to Allen on the 29th of September 1764, against his future employment of Rye, would not alter the question. These two witnesses, for any thing which appeared to the contrary, were little better than strangers to the appellant; nay, one of them swore their conversation to have been at a casual



meeting on the road. But however seriously these expressions might be considered by the respondents, the appellant's reason for using them was very different from what they supposed. The trade was at that time very particularly circumstanced, hops being in 1764, like South Sea stock in 1720, or India stock in 1767, and it required great precaution to deal in them with safety and advantage; in all which cases, the great art is to conceal the real intention; and the appellant being the most considerable dealer in England, was not obliged to let into the secret every man who pleased to speak to him on the subject, whether upon the road or elsewhere. To such he might say he would employ Rye no more, or would buy no hops that year, and this to prevent the price from being raised upon him. Such finesses most dealers think themselves at liberty to use at certain periods; and that the appellant never really meant to dismiss Rye, was proved by the correspondence between them of the 17th and 26th of September, as set forth in the answers; the last of which, though partially stated in the bill to serve the intended purpose, proved to demonstration, not only that Rye was still employed by the appellant, but that the appellant did actually intend buying hops, and was only postponing it for a very few days until his arrival at Canterbury, on account of their very high price. But taking it in the strongest light against the appellant, how it could avail the respondents was difficult to prove; surely a declaration made only on the 29th of September could not apply to a partnership said to be entered into between Rye and the respondents on the 27th; and the similar preceding declarations made by him in August and September were plainly unknown to the respondents on the 27th, when they attempted inveigling Rye into a [219] partnership with them, in fraud and prejudice of the appellant; not upon any express dismissal of Rye by him, but upon an implied one only, or change of intent as to buying hops, grounded singly on his not having sent his orders to Rye so early as usual. The fraud therefore was manifestly not on the side of the appellant, but of the respondents. They were indeed guilty of a double fraud; first upon the appellant, and next upon the hop planters. Aware, as they themselves set forth in their bill, *that the hop planters would be cautious of dealing with them as strangers*, they sent Rye to treat with the hop planters, without declaring on whose part he treated. These, totally strangers to any clandestine transaction between Rye and the respondents, treated with him upon the old footing of his being the appellant's agent, and positively swore they did so. A manifest proof of the fraudulent intent of the respondents, who, conscious of their want of credit with the hop planters, availed themselves of Rye's known character of being the appellant's agent, to draw the others into a contract. As honest and fair dealing men, they should have treated above board, as the appellant had always done, and as they charged by their bill the Quakers meant to do. The appellant was all this while totally ignorant of this underhand practice, nor was there a tittle of proof to the contrary; and when he first obtained an account thereof, on his arrival at Canterbury on the 29th of September, he instantly went to Geoghegan and Sir Thomas Hales, who both informed him of their having sold their hops to Rye, as his agent, and for his use; and the former required an advance of money from him upon account, which the appellant complied with, and then came out the truth of the transaction from most unquestionable testimony; for it was very indifferent to the planters whether they sold their hops to Rye as the appellant's agent, or as a partner with the respondents; to whom however, as never dreaming of their supposed concern, they never applied for payment, but to the appellant only.

These facts totally excluded the most distant idea of the appellant's colluding with Rye, to deprive the respondents of the benefit of their supposed partnership; for he neither did or could collude to deprive those of a contract, who themselves stated their own collusive manner of coming at it; namely, that of employing the appellant's known agent, without which, and that agent's appearing as such, it could not have been compassed. The collusion therefore with Rye, if any there was, was theirs and not the appellant's: and if they were really aggrieved, their remedy was against Rye, and him only, who was their dupe; or, if they would have it so, a party in the contrivance to deceive both the appellant and the hop planters. But the appellant, who dealt in *optima fide* with the planters as a purchaser for a valuable consideration, and equally ignorant of this underhand work, could never be answerable to the respondents. Lastly, that however right the decree might be as to

making the highest price which the hops actually sold for by the appellant, before the 20th of Novem-[220]-ber 1764, the measure of the respondents damages; yet as to those remaining unsold after that day, the rule should not have been the highest price given for hops before that day, but the profit actually made thereof.

On behalf of the respondents, it was said (W. DeGrey, C. Yorke), to be plain beyond dispute, that they entered into partnership with Rye on the 27th of September 1764, for purchasing the hops in question; and that the respondents at that time considered Rye, according to the truth of the fact, as a man quite unengaged, and at liberty to buy hops, etc. upon commission, for any person. It was also plain that he accepted such employment, and acted in consequence of it, confessedly in partnership with the respondents; and though by his answer he endeavoured to account for his subsequent extraordinary behaviour to them, by saying he was the known agent of the appellant, and so received by the planters, he not informing them to the contrary; yet it was well known, and fully proved in the cause, that he was a common agent for buying hops, corn, etc. upon commission. That the appellant, who certainly gave no orders to Rye for purchasing hops in the year 1764, asserted in his answer, that he never dismissed Rye, or intended so to do; and that Rye was his ordinary agent, and used often to buy hops for his use, without any positive orders for that purpose: and in case that colour should not be deemed sufficient, the appellant set up other pretensions to the hops in question, viz. the having bought the growths in former years, and having before written to Mr. Geoghegan touching his growth in 1764. In answer to all which suggestions it might be truly said, that the appellant never bought Sir Thomas Hales's growth but once before, viz. in the preceding year, and never bought the growth of Abbott and his wife, who neither of them knew or ever saw the appellant; and it therefore became necessary for Rye to describe the appellant to them, as the gentleman who rode with him about the country; and with respect to his treaty with Mr. Geoghegan, it was evident that neither of them looked upon themselves as bound by it; the appellant saying he would be idle, and Geoghegan ordering his steward to sell the hops without waiting for the appellant, or thinking himself obliged to give him any preference, although Rye afterwards in fact became the purchaser of them from Geoghegan. That the correspondence which subsisted between the appellant and Rye, in the year 1764, was meant by the appellant for no other purpose than to gain all possible intelligence from Rye in that critical year, but not by any means carried on with any view to employ him; and though the appellant said, that three weeks before he went to Canterbury he told Rye to buy hops as usual for him, yet in his letter of the 26th of September 1764, he said he was idle, and determined to remain so till hops should be cheaper; which declaration was a countermand to any former orders to Rye, if such had been given, and a prohibition to make purchases on the appellant's account. And accordingly Rye so understood it; for he received this letter on the 27th of Septem-[221]-ber, and on the next day bought the hops in question, in partnership with the respondents. That from the whole evidence it appeared plainly, that the appellant never thought of possessing such a quantity of hops upon his arrival at Canterbury, but finding afterwards the advantage to be made by obtaining them, his sole view was to effect it; and though he pretended to have possessed himself of the hops without any fraud or circumvention, and that the planters themselves, at the time of contracting, deemed Rye the appellant's agent; yet the appellant himself well knew that Rye was not at that time his agent; and so it appeared from the letter of the 26th of September, and many other circumstances. And it being clear that he deceived Sir Thomas Hales and Mr. Geoghegan, and bribed the wife of Abbott, there was the strongest reason to believe that indirect practices must also have been used by the appellant with Rye. For it was observable that neither of them had entered into any proof in support of their assertions; that the answers of both were calculated to prove Rye in general to be the appellant's agent, and if that pretence would not succeed, the appellant insisted that he was a fair purchaser. But to support these propositions he had entangled himself in a series of contradictions; and the assertions in both the answers were in many respects falsified by the evidence for the respondents: who had proved fraud upon the appellant, and the collusion between him and Rye, in as full a manner as the nature of so artful and secret a transaction would admit.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed. (MS. Jour. *sub anno* 1768-9, p. 778.)

[222] CASE 16.—MATTHEW KENRICK and others,—*Appellants*; JOHN HUDSON and others,—*Respondents* [22d February 1773].

[Mew's Dig. vii. 179, 379, 382. See Jud. Act, 1873, s. 24: *Derry v. Peek*, 1889, 14 A. C. 360.]

[It is the peculiar province of Courts of Equity to give relief in all cases of fraud, or of contracts in which any advantage is unduly taken by either of the parties of the distress or necessity of the other. And therefore, where A. purchases a rent-charge of B. for a certain sum of money, and gives his bonds for part of the purchase money, and afterwards unfairly gets the bonds into his own possession, a Court of Equity will oblige him to pay the principal and interest thereby secured.]

**\*\*DECREE** of Lord Chancellor Bathurst **AFFIRMED**. See *ante*, Case 2 of this title, as to fraudulent suppression.

Though Courts of Equity will not relieve against agreements, merely on the ground of the consideration being inadequate; yet if there be such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a command over him which may amount to a fraud. *Treatise of Equity*, b. 1. c. 2. § 9.\*\*

Sir James Collet, upon his marriage with Dame Elizabeth his wife, in July 1700. settled his estates in the county of Kent upon the said Dame Elizabeth for her life, for her jointure, with remainder to the first and other sons of the marriage in tail male successively, remainder to the daughters of the marriage in tail, with remainder to the right heirs of Sir James in fee.

Sir James afterwards died, leaving Dame Elizabeth surviving, and James Collet Esq. his only son and heir, and several daughters.

James Collet wanting to raise a sum of money in the lifetime of his mother. who was then in possession of the estate, as her jointure under the settlement, applied to Thomas Hudson, father of the respondent, to advance the same; and accordingly, by indenture dated the 9th of January 1734, between the said James Collet of the one part, and the said Thomas Hudson of the other part; and by a fine levied by Collet, pursuant to this deed, in consideration of £600 Collet granted to Thomas Hudson, his heirs and assigns, an annuity or yearly rent-charge of £150 to commence from the decease of Dame Elizabeth Collet, and to be payable out of and charged upon divers estates in the county of Kent, therein particularly described; to hold the said annuity unto and to the use of the said Thomas Hudson, his heirs and assigns, for ever, from and immediately after the decease of the said Dame Elizabeth Collet, payable quarterly, free from all taxes and deductions, with powers of entry and distress in case of non-payment. And by this indenture Collet covenanted with Hudson, that if he the said James Collet, or any issue male of his body, survived Dame Elizabeth, then he and such male issue would suffer one or more recovery or recoveries, to bar all reversions and remainders expectant of and in the premises.

[223] In 1739, Thomas Hudson died intestate, leaving Mary his widow, and the respondent John Hudson his eldest son and heir; who upon his father's death became entitled to the said annuity of £150 in reversion after the decease of Dame Elizabeth Collet.

The respondent being, in March 1752, very much reduced and in prison, was prevailed upon by his mother to execute an instrument, dated the 11th of that month, whereby he granted a moiety of the said annuity to William Lyster and his heirs, in trust, and for the use of the said Mary Hudson his mother: but this instrument was obtained from him by fraud, and without any consideration whatsoever.

In October following, the respondent being in the most necessitous circumstances, applied to the appellant Kenrick, by the means of Thomas Bradish an attorney, to raise a sum of money for his support, on the credit of the annuity; and Bradish, on such application, laid before the appellant a copy of the indenture of the 9th of January 1734, and after several treaties, during the course of which the appellant Kenrick was made fully acquainted with the distressed situation the respondent was in, and that he was in want of the common necessities of life, Kenrick formed a scheme of procuring an absolute conveyance of the annuity at a very inadequate price: and after he had informed himself of the respondent's title, and that the above deed which had been obtained by Mary Hudson, was a fraudulent one; and that James Collet was in a good state of health, and had a son and daughter then living; and that Dame Elizabeth Collet was infirm, and then upwards of 70 years of age; and knowing the respondent Hudson's great necessities, he declined to advance any money by way of loan on the annuity, but proposed to give the respondent £1500 for the purchase thereof, subject to the contingencies then affecting the same; and also proposed to reconvey the said annuity at any time at the respondent's request, on being paid back the principal money and interest which he should have paid and expended on account thereof; which proposal the respondent Hudson agreed to accept. And accordingly, by indenture dated the 21st of July 1753, made between the respondent Hudson of the one part, and the appellant Kenrick of the other part, it was witnessed, that the respondent, in consideration of £1500 therein mentioned to be to him in hand paid by the appellant Kenrick, did grant, assign, bargain, and sell the said yearly rent-charge of £150 to the appellant Kenrick, his heirs and assigns, for ever. And the respondent, among other things, thereby covenanted to deliver up, or cause to be delivered up, to the appellant to be cancelled, the said instrument of the 11th of March 1752, whereby a moiety of the said annuity had been granted to William Lyster, in trust for Mary Hudson: and which was therein mentioned to have been obtained from the respondent by fraud and imposition, while he was in gaol, and without any consideration whatsoever.

[224] Immediately after the execution of this deed, the respondent fully expected to have received the £1500 the consideration therein mentioned to be paid him, without any deduction; but, to his great surprise, the appellant then insisted, for the first time, to retain in his own hands, out of such purchase money, the sum of £400 till the indenture of the 11th of March 1752 should be delivered up to be cancelled; and the further sum of £200 till the death of Dame Elizabeth Collet, when the appellant Kenrick was to enter into the actual receipt of the rent charge; and also to retain £500 other part of the purchase money, for the pretended purpose of making an insurance on the respondent's life; and he absolutely refused to pay the respondent any more of the consideration money at that time than £400 which sum the respondent's urgent necessities compelled him to accept.

About four or five days afterwards, the appellant Kenrick, with a view to impose on the respondent by raising a colourable consideration, delivered to him two bonds, dated the 21st of July 1753, though executed several days after, in the penal sum of £1200 conditioned for payment to the respondent of £400 upon his delivering up of the indenture of the 11th of March 1752 to be cancelled, and for payment of the further sum of £200 when the appellant Kenrick should be in the actual receipt of the said annuity; and, with respect to the remaining £500 the appellant Kenrick promised that he would in a few days make an insurance on the respondent's life, and that after deducting the charges thereof, which might, as he said, amount to about £80 or £90 he would pay the remainder to the respondent; and though the above deed was made to be an absolute grant or assignment of the annuity, yet the respondent Hudson always apprehended and believed, both from the declarations of the appellant and of Bradish, that he could at any time demand and insist upon a reconveyance of the annuity, on payment of the principal money, and interest, advanced and paid on account thereof.

It appeared afterwards, that, as to a moiety of the above purchase, the appellant Kenrick was a trustee for John Skey Esq. and Admiral Philip Durell.

After the appellant Kenrick had purchased this annuity, he applied to James

Collet, the original grantor; and although he had never attempted to dispute the validity of such grant, but rested satisfied therewith, yet Kenrick entered into a treaty with him to confirm the same to him; and accordingly, by indenture dated the 26th of November 1753, made between the said James Collet of the one part, and the appellant Kenrick of the other part, Collet, in consideration of £36 15s. did ratify and confirm to the appellant Kenrick the said annuity of £150 to hold to the said appellant, his heirs and assigns, for ever, according to the terms of the original grant.

Very soon after this confirmation had been executed, the appellant Kenrick (who had retained £400 part of the purchase [225] money, till such time as the fraudulent deed of the 11th of March 1752, should be delivered up) applied to Mary Hudson, the respondent's mother, and prevailed on her to deliver up the said indenture to him, and to assign to him all her interest in the said annuity. And accordingly, by indenture dated the 17th of December 1753, between the said Mary Hudson and William Lyster of the one part, and the appellant Kenrick and Philip Durell Esq. of the other part; Hudson and Lyster, by the direction of the appellant, and in consideration of £100 paid by him, did assign and set over one moiety of the said annuity to the said Philip Durell and his heirs, in trust for the appellant and his heirs.

Soon after the execution of this assignment, the respondent applied to the appellant, and requested him to pay the £300 residue of the £400 then due to him according to the condition of the bond, and to account for the remainder of the £500 after deducting what the appellant had paid for insuring the respondent's life. But the appellant, instead of complying with this request, told the respondent that he was very ready to permit him to redeem, or re-purchase the annuity, on payment of what he had advanced, together with interest; although he well knew the respondent was unable so to do. He then told the respondent, that he should be at liberty to procure any other person to do it, on such terms as he should agree upon: and in consequence of this assurance, the respondent applied to several persons, and at last prevailed upon Mr. Gervas Shaw to become the purchaser of the annuity. And after the terms had been settled between them, the respondent acquainted Kenrick therewith; who then insisted that he would complete the contract himself with Mr. Shaw, and would receive the money, and account for the same to the respondent.

During the course of the respondent's treating with Mr. Shaw, he had from necessity been obliged to pledge Kenrick's two bonds for £400 and £200 with Shaw for £150 which the respondent had borrowed of him. Mr. Kenrick having insisted upon negotiating the business with Mr. Shaw himself, a meeting was had between them; when Mr. Shaw, who understood Mr. Kenrick was only a mortgagee for about £500 and interest, tendered him £600 in discharge of it; but Kenrick then insisted that he was the absolute purchaser of the annuity, and that he would be paid £1300 as the consideration of his assignment thereof to Mr. Shaw, and also the money which he had paid to James Collet, and the further sum of £94 10s. which he had paid for insuring the respondent's life; and Mr. Shaw having acquiesced therein, Kenrick prepared an assignment by way of indorsement on the conveyance to him, and dated the 26th of June 1754, whereby Kenrick, for the consideration therein mentioned, assigned and conveyed the said annuity of £150 to the said Gervas Shaw in fee.

[226] The respondent Hudson was not present at the execution of this assignment, but Mr. Shaw paid the appellant the £1300 and also, on behalf of the respondent, paid him the money which he had paid to Collet, and for the insurance of the respondent's life; and at the same time the appellant prevailed on Shaw to deliver him up his own bonds which he had given the respondent for securing the £400 and £200 and which were then due and unpaid, alleging that the respondent would have no objection to it, as they could settle matters between themselves. But before the meeting broke up, the respondent came to Kenrick's house, when Shaw acquainted him that he had finished the transaction, and paid Kenrick £1300 and the other sums above stated; on which the respondent desired Mr. Shaw would deliver him up Kenrick's bonds for £400 and £200 which he had pledged with him; but was, to his great surprise, informed that they were in Kenrick's custody.

The respondent then demanded the bonds of him, but he absolutely refused to deliver them up, or to account with the respondent for the residue of the £1300 after a deduction of what he had actually paid the respondent, together with interest; and insisted on retaining both the £1300 and also the bonds of which he had thus surreptitiously got the possession, without paying any thing further to the respondent, who had at that time only received from the appellant £400.

The respondent being in this unfortunate situation, was advised to file a bill in Chancery against Kenrick, for an account and payment of what was justly due to him; and accordingly, in Michaelmas Term 1754, he filed such bill against the appellant, who put in his answer thereto; but the respondent being then, and for a long time afterwards, in the utmost distress, occasioned by the appellant Kenrick's conduct, and wholly unable to carry on his cause to a hearing, the same was dismissed for want of prosecution.

However, some years after this dismissal, the respondent being in better circumstances, and being urged by many of his friends, did, in Easter Term 1766, file another bill against the appellants, and also against Admiral Durell, praying that Kenrick might account for the surplus of the said £1300 and pay the same with interest; and in case he had accounted or paid to the other defendants any part of the said £1300 that then they might account with and pay the respondent so much money as they so received, with interest.

To this bill the appellant Kenrick and the other defendants put in their respective answers; and Kenrick by his answer admitted, that the respondent was, at the time of his agreeing for the purchase of the annuity, represented to him to be in a starving condition, and without shoes to his feet; and the appellant believing the truth of such representations, and being desirous of doing the respondent Hudson a good turn in his distresses, did for that reason, and after much importunity, agree for the purchase thereof; [227] and he admitted, that the consideration money mentioned in the conveyance was £1500 for which sum the respondent Hudson signed a receipt on the back of the indenture; but said that such sum was so inserted merely because he supposed the whole of what he might have advanced and paid for the purchase of the said annuity, when the same should fall into possession, ought to be expressed as the consideration of the said deed. That he had computed that the £400 which he was to pay down to the respondent Hudson, with interest till the annuity might be supposed to fall in, and the further sums of £400 and £200 for which he was to give his bonds to the respondent Hudson, and the interest of the said last mentioned sum of £400 to be computed from the time of payment thereof till the time of his taking the benefit of the annuity, and the money which he should pay for the insurance he intended to make on account of the said purchase, together with the charges he apprehended he might probably be put to in endeavouring to procure the original grant of the said annuity, or to get the same confirmed in a Court of Equity, and to compel an assignment of the grant of a moiety thereof from the respondent Hudson's mother; the expence of which two last mentioned articles Kenrick made no doubt must be defrayed by him, notwithstanding the respondent Hudson had covenanted with him to prosecute the suits necessary for those purposes; and the satisfaction which the respondent Hudson and Brandish thought Kenrick might be well entitled to for his trouble in the transaction, might all together be reasonably stated at £1500 and that he reasonably supposed he might be that sum out of pocket when the annuity should fall in. He said, that such computation upon what he had agreed to pay the respondent Hudson, and the further sums he was likely to pay in securing the annuity in the best manner he could, and the better to enable him to dispose thereof again if he should be so inclined, were the only reasons for inserting the said sum of £1500 as the consideration of the assignment to him, and that it was so inserted with the consent and approbation of the respondent Hudson and Bradish. And he admitted, that no other consideration was agreed to be paid for the said annuity than the £400 so paid as aforesaid, and the £400 and £200 to be paid at the times and upon the terms mentioned in the conditions of the bonds. He also admitted, that the respondent Hudson's mother had assigned the moiety of the said annuity to him, in consideration of £100 and that on the respondent's intimating to the defendant that he had a cheap bargain, he did say that he was ready to take the principal

money he had expended on account of the annuity, and interest, and which he would then willingly have done; but that what he so said was before the original grant from Collet was recovered, and before the assignment from the respondent Hudson's mother was made, and before Collet's confirmation of the annuity was procured; but that after those difficulties were overcome he never made any such offer. He likewise admitted, that he gave the respondent [228] liberty to agree with Shaw for the purchase of the annuity, and promised to confirm any agreement he should make for the sale thereof, provided the respondent would first agree with him how much of the purchase money he should have. Believed he told Shaw, when he informed him he was in treaty with the respondent for the purchase of the annuity, that he (Kenrick) expected £1300 for assigning the same to a purchaser, in consideration of the risque he run of the money he had already paid, and had contracted and bound himself to pay, and of the advantages he had obtained towards better securing the annuity since his purchase. But as he was a *bona fide* purchaser of the annuity, and as he had actually sold one moiety thereof to Mr. Skey, with the privity of the respondent, and as he had run the risque of his monies so paid and contracted to be paid to the respondent, from the 21st of July 1753, to the 10th of April 1754, when the insurance thereof was made, he insisted upon retaining the whole of the £1300 paid him by Shaw.

The defendant Skey put in his answer, and thereby stated, that he was a joint purchaser of the annuity with Kenrick; that he paid, and made himself liable to pay one moiety of the consideration money to the respondent; that it was an absolute purchase, and that he received one moiety of the £1300 paid to Kenrick by Shaw, and insisted on retaining the same. Said he sold one moiety of his share of the annuity to Admiral Durell, since deceased; and that he accounted with him before his death for the half of his moiety of the £1300.

The other defendants, who were the representatives of Admiral Durell, by their answer admitted, that their testator was paid his fourth part of the £1300 and denied any notice of the circumstances attending the purchase.

In November 1766, the appellant Kenrick filed his cross-bill against the respondent and Mr. Shaw, stating the several facts in his answer to the original bill, and praying that he might be considered by the Court as a fair purchaser of the annuity, and might be so declared, free from any account to be rendered to the respondent Hudson.

To this bill the respondent Hudson put in his answer, and thereby stated the several facts set forth in his original bill. And Shaw by his answer stated his purchase of the annuity and the payment of £1300 to Kenrick; and that, previous to such purchase, the bonds for £400 and £200 had been deposited with him by the respondent Hudson by way of pledge for £150 and that such bonds were, by mistake, delivered by him to Kenrick, without the respondent Hudson's knowledge.

Witnesses being examined on both sides, the two causes came on to be heard together before the Lord Chancellor Bathurst, on the 11th of May 1771, who was pleased to decree, that the cross-bill should stand dismissed, with costs to be taxed. And on the original bill his Lordship declared, that the respondent Hudson was entitled to the monies secured by the two bonds respectively dated [229] the 21st of July 1753, for £400 and £200 (after allowing the defendant Kenrick thereout £100 advanced by him to Mary Hudson, and £36 10s. paid by him to James Collet) with interest for the remainder of the said two sums of £400 and £200 after the rate of £4 per cent. from the 22d of June 1754. And referred it to the Master to take an account of what was due for principal and interest on the said two sums of £400 and £200 accordingly, after such deduction as aforesaid. And it was ordered, that the appellant Kenrick should pay to the respondent Hudson what should be found due for principal and interest in respect of the said two sums of £400 and £200. And that the respondent Hudson should pay the defendants, the representatives of Admiral Durell, their costs in the original cause, to be taxed by the Master; and that the appellant Kenrick should repay the same to the respondent Hudson, together with his own costs in the original cause.

From this decree the appellants thought proper to appeal; contending (J. Glynn, J. Dunning), that the deed of the 21st of July 1753, was an absolute conveyance of the respondent Hudson's interest in the annuity to the appellant Kenrick,

and that no evidence had been produced to prove the same to be a conditional or mortgage deed; and therefore Mr. Kenrick had power to assign and dispose of the annuity as he should think proper. That by his industry and diligence, and at his expence, and by Lady Collet's dying before her son James, the several incumbrances affecting this annuity were removed, whereby it became of much greater value when assigned to Shaw, than when Kenrick purchased it of Hudson; and as the bargain eventually turned out advantageous, the appellants were justly entitled to all the benefit and profits which had arisen therefrom. That although it appeared that the appellant Kenrick paid the appellant Skey £650 a moiety of the £1300 which he received of Shaw, and that Skey paid over a moiety of that £650 to the late Admiral Durell, yet Kenrick alone was by the decree ordered to pay the principal and interest on the £400 and £200 bonds, without his being thereby provided with any remedy over against his companions. That Kenrick alone was also decreed ultimately to pay the costs of Admiral Durell's representatives in the original suit, although they appeared interested with Skey in a fourth part of the produce of the annuity; and therefore Kenrick ought not to have been decreed to pay their costs. That pronouncing the decree on the deposition of Shaw, was admitting parol evidence in contradiction to the written deed of July 1754, wherein it was expressly declared, that it had been previously agreed the appellant Kenrick should receive £1300 of Shaw for assigning over the annuity to him.

On the other side, it was said (A. Wedderburn, J. Skynner), to be the peculiar province of Courts of Equity to give relief in all cases of fraud, or of contracts in which any advantage is unduly taken by either of the parties of the distress or necessity of the other; and in the present case each of those ingredients occurred. The appellant [230] Kenrick was a gentleman of the profession of the law, and conversant in business; he in the strongest terms admitted the distressed situation the respondent was in at the time of the contract, and it was evident he availed himself of that situation; for though he confessedly advanced the respondent no more than £400, and by the very terms of the stipulation, as stated by himself, was to advance no more than two sums of £400 and £200 to be paid at a future period, making in all £1000, yet he inserted in the assignment, and made the respondent sign a receipt for £1500 as the consideration of the purchase. That at the time of Shaw's purchase, Mr. Kenrick paid very little more than £500 to the respondent, or on his account. He received £1300 of Shaw, without deduction on account of any contingency; and which sum he had ever since had the benefit of: the bonds therefore which he had given to the respondent became payable; and it was evident he considered himself liable to pay them, as he expressly averred in his answer, that the £1300 received of Shaw, was the consideration of the money which he had paid, and had contracted and bound himself to pay; and his getting the custody of the bonds, in the manner above stated, was a direct fraud upon the respondent, and such as a Court of Equity ought to relieve against.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed: and it was further ORDERED, that the appellants should pay the respondent Hudson, £100 for his costs in respect of the said appeal. (MS. Jour. *sub anno* 1772-3. p. 244.)

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CASE 17.—EDMUND FILMER and others,—*Appellants*; HENRY THOMAS GOTT,—*Respondent* [3d February 1774].

[Mew's Dig. vii. 221. Discussed in *Whalley v. Whalley*, 1821, 3 Bli., 13.]

[J. S. purchases an estate of his aunt for £10,000 which was proved to be worth £20,000 and upwards, but in the conveyance, adds the consideration of natural love and affection. Held that this was a gross fraud upon the aunt, and the conveyance was accordingly set aside.]



**\*\*DECREE of the Court of Chancery AFFIRMED.**

See the note to the preceding case 16; and at the end of the last case under this title Fraud.\*\*

Mary Gott and Sarah Gott, upon the death of their brother, and of another sister named Elizabeth, and after they were considerably advanced in years, became seised in fee simple as co-parceners of several real estates in the counties of Kent and Sussex, consisting of a capital mansion, heriotable manor, and divers farms, let to tenants at very old rents, amounting to £898 3s. 4d. per ann. and of upwards of 2000 acres of valuable woodland, which were not let, but kept in hand.

[231] Mary Gott usually resided in Sussex, and Sarah at Eggarton, near Canterbury, the mansion house upon the Kentish estate; Mary died in July 1768, having first made her will, dated the 13th of October 1760, whereby she devised her moiety of the estates to the respondent (whose name was then Greening) in fee.

The estate in Sussex was considerably the most valuable; and Sarah Gott always left her moiety of it entirely to the management of her agents: no part of it had ever been surveyed, estimated, or understood by herself, after she became entitled to an interest in it.

After the respondent, upon the death of Mary Gott, became entitled, under her will, to a moiety of the real estate, he knowing that Sarah Gott had made her will, and devised her moiety to the appellants Hugessens, (the three infant daughters of a gentleman who was her near relation,) became very desirous to secure the whole estate to himself; and being satisfied that, in case of the death of Sarah Gott, it would be difficult for him to do it, he came to Sarah Gott's house at Eggarton, very soon after her sister's death, viz. in April 1769, and proposed to purchase her moiety. She told him, "she did not choose to sell her share of the estate:" the respondent however, from time to time, repeated his desire to become the purchaser of her moiety; at length tired out by his importunities, and confiding in the solemn assurances which he gave her, that the price he proposed was the full value, she was prevailed upon by the respondent to consent to sell him her moiety of the real estate for £10,000.

At the time of making this contract, which was only verbal, and made in the presence or hearing of none but the two contracting parties, Sarah Gott was 77 years of age, had been absolutely bed-ridden for above three years, was just recovered from a very dangerous illness, and had no friend or agent about her with whom to advise. But having thus consented to the sale, the respondent immediately set out for his own house at Brentford, 70 miles from Eggarton; and used such uncommon dispatch, that he returned to Eggarton on the 2d of May, about three o'clock in the afternoon, with deeds of conveyance prepared and ready to be immediately executed, and accompanied by a witness to attest the execution. He instantly repaired to the old lady's chamber, where he continued till seven or eight o'clock in the evening, when, at his request, she executed deeds of lease and release, bearing date the 1st and 2d of May 1769. The release recited among other things, "That the parties were seised in undivided moieties in fee simple, as tenants in common; and that it had been concluded and agreed upon, by and between the said Sarah Gott and Henry Thomas Gott, for the absolute sale by her the said Sarah Gott, unto him the said Henry Thomas Gott, of the fee simple and inheritance of the said undivided moiety, of her the said Sarah Gott, of and in all the said real estate (except an estate for the life of her the said Sarah Gott in certain estates therein enumerated); and that in consideration thereof the said Henry Thomas Gott should immediately pay unto the said Sarah Gott, the [232] sum of £10,000 in money, and make a demise to her for the term of 99 years, if she should so long live, of the other undivided moiety of the manor house and premises, whereof her moiety was reserved to her for her life." After this recital, the deed witnessed, that in consideration of the said agreement, and in performance thereof on the part of the said Sarah Gott, and in consideration of £10,000 in hand well and truly paid by the said Henry Thomas Gott to the said Sarah Gott; and also in consideration of the demise made, or intended to be made by the said Henry Thomas Gott, and also for and in consideration of the natural love and affection

which she the said Sarah Gott had and bore to the said Henry Thomas Gott, and for other good causes and considerations her thereunto moving, she the said Sarah Gott granted and conveyed to the said Henry Thomas Gott, his heirs and assigns for ever, her undivided moiety of and in the said real estates in the counties of Kent and Sussex, (in the release described,) and also of and in all other the manors, or reputed manors, messuages, or tenements, lands and hereditaments whatsoever, and real estate of her the said Sarah Gott, situate, lying, and being in the said counties of Kent and Sussex, or elsewhere in the kingdom of Great Britain, to which she was, or should, or might be entitled either in possession, remainder, reversion, or expectancy, or otherwise howsoever; with an exception of a life estate in the house of Eggarton, and certain lands in the indenture mentioned, to the said Sarah Gott and her assigns for life, she and they keeping the same in good repair and condition. And the said Sarah Gott was thereby made to covenant, not only for quiet enjoyment from thenceforth, but also that the respondent should receive to his own use all the rents, issues, and profits then due, and thereafter to grow due. At the close of this indenture of release was a covenant in the following words, viz. "and that the executors or administrators of her the said Sarah Gott shall and will, immediately upon her decease, deliver up unto him the said Henry Thomas Gott, his heirs, executors, administrators, or assigns, the quiet and peaceable possession of all and singular the last beforementioned premises (being the premises reserved to her for her life), together with the several chattels stock and things used thereon, or with any part thereof, to and for his and their own use and benefit." And on the back was a receipt for the £10,000 which Sarah Gott signed at the instance of the respondent.

By another indenture, bearing date the same 2d of May 1769, it was recited, that the respondent and the said Sarah Gott being seised or entitled in fee simple, in equal undivided moieties, of or to the manor house, messuages, lands, and hereditaments therein after mentioned, and of other considerable real estates in the counties of Kent and Sussex, an agreement had been made between them for the sale of the undivided moiety of the said Sarah Gott of and in the same estates, subject to her life estate in her moiety of the manor house, messuages, lands, and hereditaments therein after mentioned, in consideration of the sum of £10,000 to be paid to [233] her by the respondent, and of his making a demise to her of his undivided moiety of the said manor house, messuages, lands, tenements, and hereditaments for the term of 99 years, if she should so long live; the respondent then demised his said undivided moiety to her for 99 years, if she should so long live, at a pepper-corn rent.

The respondent, not satisfied with the conveyance which he had thus procured, came again to Eggarton about the latter end of the month of July following, and brought with him a deed poll, prepared and ready (as the other instruments had been) for immediate execution, and bearing date the 24th of July 1769. It recited, that the said Sarah Gott had lately sold and conveyed to the respondent, for certain considerations, all that her moiety of the manor of Eggarton, and capital mansion house, with the lands and estate belonging thereto, among other estates, lands, and premises, in the counties of Kent and Sussex, and elsewhere within the kingdom of Great Britain, and that it was her intention, and so agreed by her at the time of such sale, that all her plate, household goods, stuff and implements of household, utensils and things whatsoever, belonging to her about the said capital mansion house of Eggarton, and the lands thereto belonging, should be also bargained and sold to the respondent; and that he should have and enjoy the same, together with the estates in the said release conveyed, subject to her life estate therein: Then followed these words: "And because it may not be so fully expressed, and my mind and intention so clearly and explicitly declared by the said release as I could wish, and to avoid dispute and controversies after my decease." And then she bargained and sold to the respondent all the plate, household goods, stuff and implements of household, stock both dead and alive, and all other things belonging and appertaining to her, and that should be so at her decease, and be used with, or be in, about, or upon the said capital mansion house, lands, and premises, or any of them; reserving the use thereof to herself for life; and concluding with a general warranty to the respondent.

At the time of executing all these deeds, Sarah Gott was confined to her bed, and remained in that condition to the time of her death; no draft or abstract of the deeds had been produced to her, or to any person on her behalf; nor were the deeds themselves read over by her, or to any of her friends; indeed, if an opportunity had been given her to read them, she was utterly incapable of doing it, on account of her infirmities; and though the respondent, to give the better colour to this part of the transaction, thought fit to say in his answer, that he left the deeds with her in the morning of the 2d of May for her perusal, whilst he went 15 miles further; yet this was positively denied by Elizabeth Shindler, (Mrs. Gott's waiting woman, and the respondent's own witness,) who said, that he did not go from the house and leave any deeds for Mrs. Gott's perusal in his absence, but continued in her room. And though a receipt for the £10,000 [234] was signed by Sarah Gott on the back of the release, yet no part of that sum was paid her; but the respondent prevailed upon her to accept his bond as a security for the payment of it, with interest at 4 per cent.

The person on whose advice Sarah Gott had for several years entirely relied in the management of her affairs, was the appellant Mr. Francis Filmer of Lincoln's Inn. This gentleman usually paid her an annual visit in the long vacation, (either the latter end of July or the beginning of August,) a circumstance which the respondent well knew, and consequently wished to procure a further ratification of his contract before the time of this visit. With that view he called again upon Sarah Gott, about the 24th of July, and paid her in advance £100 as the first quarter's interest of the £10,000 before it was become due, and at the same time got her to execute the last mentioned deed.

In the month of August 1769, the appellant Francis Filmer went to Eggerton; and till then, Sarah Gott had not apprized any friend of the transactions between her and the respondent; the demise and bond (which were the only instruments left by the respondent in her custody) were produced to Mr. Filmer; and in the conversation which then passed between her and him, he convinced her that she had been grossly imposed upon. She therefore immediately directed, that the respondent should be applied to for a production of the deeds which she had executed; and on his declining to produce them, a bill was filed in the Court of Chancery in Michaelmas term 1769, charging, that Sarah Gott's moiety of the real estate was of the value of £20,000 and upwards; and that the personal estate comprized in the deeds was of considerable value; that she had been grossly imposed upon by the respondent, in whom she reposed confidence; and therefore praying, that the deeds or conveyances, or other instruments executed by her, might be cancelled; and that the respondent might reconvey to her, all interest in her real and personal estate which he derived under any deeds or conveyances, or other instruments executed by her; and that he might redeliver to her all deeds, evidences, and writings respecting the title of the premises, deposited with him by her, or any person or persons on her behalf, and for general relief.

The respondent, in his answer to this bill, stated the deeds before mentioned, and insisted on the fairness of the transaction. He said, that apprehending the estates might be better improved and managed, if the same were his sole property, he thought it would be prudent to purchase of Sarah Gott her undivided moiety, if she should be disposed to sell the same, at such price as might not lessen her income, and might enable her to fulfil her intention respecting the Miss Hugessens; and therefore he immediately, or very soon after the death of Mary Gott, mentioned to Sarah his inclination to purchase her undivided moiety; whereupon she told him, she did not choose to sell her share of the estate, because she was about to make, or had made her will, and had devised, or intended to devise the same to Miss Hugessens. He admitted, that no copy, draft, or counterpart of either of the deeds executed by [235] Sarah Gott, was produced, read, or shewn, or offered to be produced, read, or shewn, to any agent or friend of hers, prior to the time when the same were produced to her for execution: he also admitted, that he did not, at any time antecedent to the execution of the said deeds, in any manner apprise any friend or even domestic of Sarah Gott, of his having agreed, or of his meaning or designing to agree with her for the purchase of the said estate and effects. He said he believed, that the whole of the timber trees growing on the said estate,

exclusive of the *coppice wood* and *underwood*, were of the value of £1000 or thereabouts, and no more, to one moiety of which he was entitled; and he said he believed, that at the time of the execution of the said conveyance to him, the fee simple and inheritance of Sarah Gott's undivided moiety of the said real estate in the county of Sussex, including the said timber, might be worth, to be sold, about £8000 or £8300 and the remainder of the estate in Kent, subject to the estate for life of the said Sarah Gott, he rated at the sum of £1000 and furniture, plate, and out-door stock at £700 which sums making together £10,000 was, as he believed, the real, or near the real value of the premises so sold to him, at the time of such sale: and he concluded his answer, with insisting on the benefit of the said purchase.

The respondent having filed a cross bill against Sarah Gott for a discovery; she by her answer thereto said, that she being tired out with his importunity, though she never intended selling her estate, in order that she might not be troubled any more by him about it, at last consented to let him have her moiety: upon which he offered her £9000 and the Eggarton estate for her life, which he assured her was more than her estate was worth, but that she refused to take that price; however, confiding in a degree in the representation made of the value of the estate by the respondent, she told him he should have the said moiety at the price of £10,000 which sum, together with the proposed interest in the estate at Eggarton for her life, she said she then believed, relying on the respondent's account thereof, was the full outside value of the said moiety; and said that the respondent pretended to make a calculation, in order to shew that the price he offered was the full value of the said estate. But she positively said, that she treated with the respondent under an idea, that his account of the value of the estate was fair and honest; and that she intended him no favour or advantage in the bargain, more than what could be derived to him from his purchase of her moiety, at an extended outside price, as she always intended her fortune to go at her death to other objects; and said she told him, that as she knew nothing about the value of the estate, nor could judge of the contents of the deeds, she must depend entirely on what he said about them, and therefore hoped he would not impose upon her; and that she would sign the writings, but as Mr. Filmer would be with her soon, she should shew them to him and acquaint him with the transaction.

[236] The cause being at issue, witnesses were examined on both sides; and the value of the property conveyed by Sarah Gott being one of the essential points in dispute, several witnesses were examined as to that fact.

The witnesses examined for Sarah Gott, were James Hassenden and Thomas How, both of whom had for many years been employed in valuing land and timber, and particularly in the counties of Kent and Sussex; and they, in their depositions, valued Sarah Gott's real property comprised in the conveyance to the respondent, after giving in a distinct estimate of the farms, woods, coppices, etc. at £29,306 15s. out of which sum was to be deducted Sarah Gott's life interest, in so much of the Kentish estate as was reserved to her, and which was valued by the respondent's witnesses, at £1000.

The witnesses examined on the part of the respondent, as to the value of Sarah Gott's moiety of the real estate, (the principal of whom was Edmund Chittenden the respondent's steward,) rated her moiety at £19,417 10s. out of which sum, after deduction of £1000 (at which they rated the life estate reserved to Sarah Gott in the estate, by themselves valued at £195 per ann. though the rent was only £116) there remained £18,417 10s. as the value of the property conveyed to the respondent for the price of £10,000, and this £18,417 10s. stood exclusive of the price of the personalty conveyed, which personalty the answer admitted to be worth £700 and which turned out in fact to be worth double that sum.

John Janes, the respondent's attorney, who drew the deeds, being examined on the respondent's behalf, said, that about the latter end of April 1769, the respondent acquainted the witness, that he had agreed with Sarah Gott for the purchase of her moiety of the estates mentioned in the pleadings, and also for the furniture, plate, china, and stock in and about the house at Eggarton, for the sum of £10,000 and that over and besides this consideration, he had agreed to let her enjoy for her life the whole of her mansion house, with the farm and lands thereto belonging; and

the respondent requested the witness to prepare the necessary and proper deeds and conveyances for carrying the said agreement into execution.

Elizabeth Shindler, a maid servant of Sarah Gott's, who waited upon her person, and had done so for 20 years, on her cross examination on Sarah Gott's part, deposed, that on or about the 2d of May 1769, about three o'clock in the afternoon, the respondent came to Eggarton and brought some deeds with him; that he staid in Sarah Gott's room till about 7 or 8 o'clock in the evening, during which time the witness, as she went into and out of the room, saw some parchment deeds lie upon the bed there, but the respondent did not, during that time, go from the house, or leave any deeds with her for her perusal in his absence: she further said, that Sarah Gott could not in her then situation peruse and read over such deeds, without the assistance of some other person; and that she was not so assisted by any person, unless by the respondent. [237] And on her examination on the part of the respondent, she also said, that when the respondent was at Eggarton in the beginning of May 1769, no conversation passed between Sarah Gott and the respondent in her hearing, touching the £10,000, but that about September following she heard Sarah Gott say, that she had agreed with the respondent for the sale of her moiety of the estate for £10,000, and that he was to pay her £400 a year for her life; and after her death the £10,000 was to be paid to Miss Hugessens; she said, that Sarah Gott then told her, she would show the agreement to Mr. Filmer, with whom she usually consulted in such matters, and that she had informed the respondent of such her intention. She further said, that Sarah Gott informed her, that she should not take the £10,000 of Mr. Gott until she had seen Mr. Filmer, to whom she should shew the agreement, and consult him thereon: that when Mr. Filmer came on a visit to Sarah Gott's house, Sarah Gott called the deponent up stairs, and desired her to get the papers out of the scrutore, and to give them to Mr. Filmer, which the deponent accordingly did, and that Sarah Gott and Mr. Filmer then expressed great dissatisfaction and disapprobation at the deeds; and both said that Sarah Gott had been imposed upon by the respondent, and that Mr. Filmer said Mrs. Gott should have consulted some person on her behalf. That several times afterwards, she heard Sarah Gott declare she had been imposed upon, in not having had the value of the estate; but said she never, before the time of Sarah Gott's conversation with Mr. Filmer, heard her declare any satisfaction or dissatisfaction respecting the deeds. She said further, that the respondent was a great favourite with the deceased Mary Gott; but she did not know of any particular regard or affection which Sarah Gott ever shewed to him. She likewise said, she had heard the respondent himself say, since Mary Gott's death, that he found he was not a favourite of Sarah Gott's.

Samuel Day, another witness, and one of the principal tenants of the estate, deposed, that in May 1769, he was at the respondent's house at Brentford, and had some conversation with him relative to a purchase which he had then lately made from Sarah Gott, of her moiety of the estate in question; in which conversation the respondent informed him, that one half of the estate having been given to him, he had purchased the other half of Sarah Gott, and thought himself happy in so doing, and having the whole estate his own: that the respondent said he hoped he had not given too much for it: that he had given £10,000 and that Sarah Gott would not herself make any price for it, but left the price to him; that he had first consulted his steward Mr. Chittenden before he set the price. And the respondent further said, that if he had set the price at £20,000 he was afraid it would be too much; and if at £10,000 he was afraid she would think it too little; but that he did set it at £10,000 and she accepted it. That the respondent added, he was pleased he had bought it, because Sarah Gott was so open with him, as to declare that she never in-[238]-tended to give him any part of the estate in question; so that if he had not bought it, he should never have had it: that the respondent then asked the witness what he thought of his purchase? to which the witness answered he thought it a good one, and well worth the respondent's money.

On the 10th, 11th, and 12th of December 1770, the cause was heard before the Lords Commissioners for the custody of the Great Seal, when their Lordships ordered, that the parties should proceed to a trial at law, at the next Lent assizes to be holden for the county of Kent, on the following issue: viz. "Whether natural love

and affection was really and truly any part of the consideration of the indentures of lease and release, of the 1st and 2nd of May 1769, in the pleadings mentioned!" And the usual directions were given for that purpose; and the consideration of costs and all further directions were reserved until after the trial of the said issue.

Sarah Gott, conceiving herself aggrieved by this decree, appealed from it to the House of Lords, and the appeal was set down to be heard: but she dying before the same came on, an order was made by their Lordships, dated the 13th of March 1772, upon the petition of the present appellants, stating the will of Sarah Gott, and that the appellants were advised, it was necessary for them to exhibit a supplemental bill in the Court of Chancery, and to prove Sarah Gott's will there, and to have a decree of that Court to carry on the suit brought by her, before they could be entitled to prosecute the said appeal; that the appeal of the said Sarah Gott should be dismissed, but without prejudice to the present appellants bringing a new appeal, in case they should be so advised.

Accordingly the appellants, on the 2d of May 1772, exhibited their supplemental bill in the Court of Chancery, against the respondent, and several persons who were the heirs at law of Sarah Gott, stating the proceedings in the cause brought by the said Sarah Gott, and that she died on the 6th of March 1772, having first made her will, dated the 2d of July 1764, whereby she devised her moiety of all the manors, messuages, lands, tenements, and hereditaments, which she was entitled unto equally with her sister Mary Gott, to all and every the child and children of William Western Hugessen Esq. deceased, lawfully begotten, to be equally divided between them, as tenants in common and not as joint-tenants, and to the heirs of the body and bodies of all and every such child and children lawfully issuing, severally and respectively; and that if any such children should happen to die without issue, then she gave and devised the part and share, or parts and shares, of such of the said children who should so die without issue, to all and every other the child or children of the body of the said William Western Hugessen, equally to be divided between them, as tenants in common and not as joint-tenants, and to the heirs of the body and bodies of all and every such other child and children, severally and respectively: and in case all such children [239] but one, should happen to die without issue, then to such only child, and to the heirs of his or her body lawfully issuing; and for default of such issue, to the respondent, his heirs and assigns for ever. And the said Sarah Gott, by her said will, gave all the residue of her personal estate, (her debts and legacies being first paid,) to the appellants Edmund and Francis Filmer, their executors and administrators, upon trust to place out the monies arising thereby, upon public or other good securities; and to pay the money so to be placed out, unto and amongst all and every the children of the said William Western Hugessen, in equal shares and proportions, if more than one, when they should respectively attain the age of 21, or days of marriage; and in case any of such children should happen to die, before their attaining such age or day of marriage, the share and shares of such child or children so dying, should go and be paid to the survivor or survivors in equal shares and proportions, if more than one: and if all such children but one should die, before his, her, or their share or shares should become payable, then the same should be paid to such only or surviving child at the time aforesaid. And she declared it to be her will, that the interest and annual produce of such money should be paid to such child or children respectively, until the same should become payable; and in case all and every such child and children of the said William Western Hugessen should die before such age or marriage, then in trust for the respondent.—That the said Sarah Gott made a codicil to her said will, dated the 29th of August 1768, whereby she revoked so much of the devise of her real estate as related to her moiety of the mansion house at Eggarton, with the lands and hereditaments thereunto belonging, or therewith used, and then in her occupation; and did thereby devise all her share of the said mansion house and premises, so in her own occupation, to the appellants Edmund and Francis Filmer, upon trust to sell and dispose thereof for the best price that could be gotten for the same, and to invest the money arising by such sale, in the purchase of other lands, tenements, and hereditaments, to be limited to such and the same uses, as were by her said will expressed concerning her whole real estate thereby devised. That the said Sarah Gott made another codicil to her said

will, dated the 16th of November 1769, whereby she revoked the former codicil dated the 29th of August 1768, and thereby confirmed her said will, and all and every the devises and bequests therein contained. And that the said Sarah Gott made another codicil to her said will, dated the 3d of May 1771, whereby, after taking notice of her will, and that subsequent to the making thereof, she was prevailed upon by the respondent, to execute a conveyance to him of the whole of her real estate, (subject to a life estate to her reserved in part thereof,) for the sum of £10,000 which, relying upon his solemn assurances, and confiding in his honour and integrity, she then believed to be the full value thereof; and also taking notice that she had since discovered, that she was grossly imposed upon by the respondent, in the representation he so made of the value [240] of the estate, and that he had greatly abused the confidence she had reposed in him, the estate being of far greater value; and that she had brought her bill in the Court of Chancery, praying that the said deeds might be set aside, and that she was minded and desirous to ratify and confirm her said will in all points, except as to the limitation in remainder to the respondent, which she intended to revoke; she did by this last codicil, not only republish, ratify, and confirm her said will of the 2d of July 1764, and every article, clause, limitation, matter, and thing therein contained, except only so far as respected the ultimate remainder, thereby limited to the respondent, which she did revoke, and expressly declare to be null and void: but did also give and bequeath her whole estate, of what nature or kind soever, whether real or personal, legal or equitable, unto such and the same persons, for such and the same estates, and to, for, and upon such and the same uses, trusts, intents, and purposes respectively, as she had in and by her said will given, devised, and bequeathed her real and personal estate therein named, except only the ultimate remainder thereby limited to the respondent.

The appellants therefore by their said bill prayed, that the witnesses to the will and last codicil of the said Sarah Gott, might be examined, and their testimony preserved; and that the said will and codicil might be declared to be well proved: and that the suit and proceedings by the said Sarah Gott against the respondent might be revived; and that the appellants might be at liberty to prosecute the same, and have the benefit thereof.

To this supplemental bill all the defendants appeared and answered, and the cause having been duly revived, the witnesses to the said will and last codicil of the said Sarah Gott were examined, and publication having afterwards passed, the supplemental cause came on to be heard on the 17th of March 1773, when the Court made a decree, according to the prayer of the supplemental bill.

From the decree of the 12th of December 1770, both parties appealed. In support of the original appeal it was argued (J. Dunning, Ll. Kenyon, G. Hardinge), that though Mary Gott appeared to have paid great attention to the respondent, and actually to have disinherited her sister in his favour, yet there was no ground or colour to say that he was ever considered by Sarah, as in any degree an object of her affection and bounty, when set in competition with the appellants, the Hugessens; on the contrary, he himself admitted in his answer, that upon his first applying to her to sell him her moiety, she answered she did not choose to *sell*, because *she was about to make, or had made, her will, and devised the same to Miss Hugessens*. Nor did this fact rest singly upon the respondent's admission, or upon Sarah's answer to his cross bill, wherein she swore, *that she intended him no favour or advantage in the bargain, more than what could be derived to him from being owner of her moiety at an extended outside price*. But there was also *evidentia rei* appearing on the face of her will, made near five years before; which shewed to de-[241]-monstration, that she never intended any part of her estate for the respondent, so long as the Miss Hugessens, or any descendants from them, should be living. That the transaction respecting Sarah's moiety of the estate, appeared from the whole of the evidence, to have been equally considered both by seller and purchaser, as a sale for a valuable consideration: the respondent himself referred peculiarly and exclusively to that idea in his answer, where he insisted and laboured to shew, that the price he was to pay was a full price; and he had measured it with so much parade of precision, as to use fractions in computing the separate values of the different estates, which when put together, were to amount, by his

calculation, to the very sum mentioned in the deeds. His own attorney (the only person employed in the transaction, and who never saw Sarah Gott in his life) stated the instructions he received *from the respondent*, to prepare the conveyance, as instructions proceeding upon the idea of *a sale for a valuable consideration*, without suggestion or pretence from the respondent of any other consideration. The agreement itself, as stated in the release, imported a sale in consideration of £10,000, and the respondent so treated it, when he conversed with the witness Samuel Day upon the subject. There was not one tittle of evidence, that love and affection made any the smallest part of the consideration, except the bare expression in the deed, which was no more than *clausula clericalis*, absolutely unwarranted by the contract recited, as well as by the instructions proved; and utterly inconsistent with the case made even by the respondent himself in his answer, and with his declaration to Day the witness: and this after-suggestion was so far from colouring over the respondent's case, that his resorting to it now, and chiefly relying upon it when driven from every other defence, was a further and glaring proof of the imposition, and a double hatching of the original fraud.

To consider this transaction then as a mere sale, a grosser fraud was never perpetrated. Mrs. Gott was an old lady, who had for years been confined to her bed; the bargain was made, and the conveyance executed in the dark; no friend of hers, no indifferent person of honour and skill consulted on her part; the interval between the bargain made, and the conveyance executed, was unnaturally short: the respondent's extraordinary expedition was quite unaccountable, upon the idea that he thought the bargain a fair and honest one; the manner in which the deeds were drawn, and the price was to be secured, *a bare personal security by bond*, was prescribed by the respondent himself; the operative part of the deed was a curiosity, it extended infinitely further than the recited agreement, and conveyed *all the estates which Sarah Gott might have in possession, reversion, remainder, or expectancy within Great Britain*; it passed also by express words, *the arrears of rent due to her*, and comprehended *the stock on the farm, household goods, etc.* though there was no evidence to shew, that these articles were at all the objects of the contract, either expressed or implied; the value, according to the estimate of the appellants witnesses, was [242] nearly *three times* the price to be paid; and the respondent's own witnesses (*whose valuation was under 27 years purchase at the present rents, though it was admitted none of them had been raised within the memory of any man living*) valued the lands at nearly *double* the price which was to be paid for them; so that taking the value at a medium between the two estimates, the whole estate, including both moieties, might be fairly and moderately computed at £50,000, notwithstanding which, and though it was clear from the wills of the two sisters, that as Mary intended her moiety for the respondent, Sarah designed hers for the Miss Hugessens, the respondent would by his dextrous management and contrivance, if his bargain was permitted to stand, possess himself of four parts in five, or £40,000, and leave only £10,000 for the Hugessens; who as infants too, were more peculiarly the objects of equitable interposition and redress, against a bargain so preposterous in itself, and so greatly to their prejudice. These circumstances, added to the *confidence* which, as it appeared from the transaction in general, and Day's evidence in particular, the old lady reposed in the respondent, afforded the most ample ground to declare, that the conveyance was obtained by fraud and imposition.

Should it however be insisted, that Sarah Gott had ratified the agreement, by the subsequent acceptance of a quarter's interest; it must be observed, that the payment of that interest betrayed a consciousness in the respondent, that his contract stood in need of such evidence of acquiescence, or something like it, on the part of the old lady; as no other reason could with any colour of probability be assigned, for his paying this quarter's interest *in advance*. But nothing could be inferred to palliate the fraud, from her acceptance of this payment; since, in accepting it, she acted upon her then impression of the nature of the transaction. He had assured her, that the price for which he gave his bond, was the full value; she gave a blind and implicit credit to this assertion; and all her behaviour prior to the time of her being undeceived by Mr. Filmer, proceeded upon that ground: but from that period, the witnesses agreed, she uniformly held a different language, and made



repeated complaints of the imposition. Upon the whole, if any issue was proper to have been directed, it ought to have been a general issue, as to the fairness of obtaining the conveyance and the other deed. The present issue might not be decisive of the merits of the case; and by the manner in which it was directed to be framed, it might let in the respondent to insist, that the appellants were in a Court of Law estopped by the indenture, to say that love and affection were not part of the consideration, that deed having expressed the affirmative. But upon all the circumstances of the case, already proved, the fraud was so apparent, that no issue, or further enquiry into the fact in any shape, was apprehended to be necessary or proper; the former appellant Sarah Gott had a right in equity to immediate relief according to the substance of the prayer of her bill; and the present appellants, to whom that right was derived, were now entitled to [243] a reversal of the Lords Commissioners decree, and to such other directions as might relieve them against a bargain so unconscionable, and procured by so rank an imposition.

In support of the cross appeal it was said (E. Thurlow, A. Wedderburn, J. Morton, J. Madocks), it could not be disputed, but that the consideration of love and affection between the parties, would have been good and sufficient in law to have established the deeds in question, without any pecuniary consideration. That an alliance in blood between the respondent and Sarah Gott was admitted by her, and it was clear that he was taken to be her presumptive heir at law; and in fact was the only person in the line of succession to her, with whom she had any acquaintance. That the devise of her sister's moiety of the estate to him, clearly suggested to her the idea of preserving the whole entire in his person, as the representative of her name and family; and the object she pursued was, not to acquire the largest possible price for her land, but such a sum only as might be sufficient for her other relations. The conditions and terms of the treaty evidently shewed that this was her purpose. She meant to make a *bountiful*, and not a *hard* bargain with him; and no evidence in the cause tended to raise any just ground of doubt against the actual existence of the consideration, solemnly assented to by the unimpeached execution of the deeds. And with respect to all other grounds on which the respondent's several transactions with Mrs. Sarah Gott were attempted to be impeached, there appeared no evidence whatever to induce a proof of fraud, so as to set aside the conveyance; as it was expressly in proof, that she was, and so continued for several months, *well satisfied with the transaction*. Her answer admitted, that she might have sent for whom she pleased, and that the respondent asked her, if she wished to have any particular person or persons to be present as witnesses to the execution of the deeds; and that previous to the execution of them, she told the respondent, that she should very soon acquaint her friend Mr. Filmer with the whole transaction, and consult him on the properest means of disposing of her money, for which she admitted she desired the respondent to give his bond. It was impossible therefore to conceive, that he transacted any part of this business under a confidence, or even belief, that any impropriety in his behaviour could be protected, by any secret or sinister management whatever on his part: and it was now evident from the proceedings stated by the present appellants in their supplemental bill, that at the time of the treaty being made and carried into execution, Sarah Gott had so far considered the respondent an object of her affection and regard, as to have devised all her estate to him in fee, on failure of issue of the bodies of Miss Hugessens, then infants of tender years; and that more than six months after the sale of the estate, sought to be impeached by Sarah Gott's original bill, and even after she had filed that bill, she executed a codicil to her will, whereby she ratified and confirmed the same, and all and every the devises and bequests therein contained. From whence it was manifest, that the testatrix could [244] not entertain the most remote idea that the treaty for, or subsequent sale of the estate, had been begun, carried on, or completed by any fraudulent or sinister means on the part of the respondent; and it was equally manifest that the consideration of natural love and affection was a real active motive upon her mind at the time of the treaty and sale. Lastly, that a difference of opinion as to the value of an estate, or even a price clearly inadequate, was no just ground to set aside a sale between absolute strangers; but where other circumstances of affection, or fancy, appeared to have had a considerable influence, there was no reason for

trying the merits of the transaction by the opinion of a land surveyor. That the respondent being confident that the merits of his case would stand the test of the inquiry which the Court had thought fit to direct for its own information, did not object to the trial of the issue as between the original appellant and himself; but the state of the case being altered by her death, and the proofs on his part corroborated by the several testamentary papers set forth in the supplemental bill, he had presumed to present a cross appeal, praying that the decree of the 13th of December 1770 might be reversed, and the bill against him dismissed.

After hearing counsel on these appeals, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein respectively complained of affirmed\*. (M. S. Jour. *sub anno* 1774, p. 69.)

[245] CASE 18.—JAMES MIDDLETON and others,—*Appellants*; RICHARD WELLES and others,—*Respondents* [6th June 1785].

[Mew's Dig. vii. 228. See *Hatch v. Hatch*, 1804, 9 Ves. 293a: *Liles v. Terry*, 1896, 65 L.J. Q.B. 34.]

[It is an established rule in Courts of Equity, that no gift or gratuity to an attorney, beyond his fair professional demands, made during the time that he continues to conduct or manage the affairs of the donor, shall be permitted to stand; and more especially if such gift or gratuity arises immediately out of the subject then under the attorney's conduct or management, and if the donor is at the time ignorant of the nature and value of the property so given.]

\*\*DECREE of Lord Chancellor *Thurlow* AFFIRMED.

See *ante*, Case 3; and the notes to the Cases immediately preceding this.\*\*

On the 26th of July 1776, William Wilcox, late of Portsmouth, in the county of Southampton, Gentleman, died intestate, unmarried, and without issue, being at the time of his death seised in fee of a considerable real estate, and possessed of large personal property, leaving John Wilcox, late of Ringwood in the same county, since deceased, his first cousin and heir at law, and only next of kin.

The death of William Wilcox was rather sudden, and the acquisition of this property was wholly unexpected by John, who was at this time seventy-two years of age, and had lived for many years at Ringwood in great indigence, having been supported for a considerable length of time by a weekly allowance of 4s.; one half of which was the bounty of William Wilcox, and the other half of a deceased uncle who had made this provision for him by will. His character was very extraordinary: by several of the witnesses examined on the part of the respondents in this cause, he is spoken of as being totally out of his senses, and as being received and treated in that light by the generality of the inhabitants of Ringwood: but whatever difference of opinion may have arisen with respect to his natural capacity, it seems perfectly clear that he had spent a very long life, especially the latter part of it, in an almost constant state of intoxication; and by a series of the wildest absurdities, and the most singular extravagance of conduct in the ordinary transactions of life, had for many years been the established object of public ridicule. He had effectually abandoned all pretensions to common sense; and those who have persuaded themselves into the most favourable opinion of his capacity and intellects, seem to have formed their judgment from some particular instances of

\* In consequence of this affirmance, the issue was tried at the Summer Assizes of 1774, when the jury found a verdict, that natural love and affection was not really and truly any part of the consideration of the deeds of May 1769. And on the 22d of March 1775, the Lord Chancellor Bathurst, on hearing the cause upon the equity reserved, declared that those deeds ought to be set aside for fraud and imposition, and decreed the same accordingly; with the consequential directions as to delivering up possession of the premises, accounting for the rents and profits, and paying the costs both at law and in equity. (Register, *Lib. A.* 1775, p. 305.)

(what they thought to be) cunning, rather than from any general tenor of rational behaviour. He had in the early part of his life worked in the woollen manufactories as a journeyman; but for many years before his death he had followed no employment. He had in general a lodging in which he might have lived if he had thought fit, but he was more frequently to be found, in the night as well as the day, in the streets of Ringwood, or its neighbourhood, noisy and riotous to excess; preaching, [246] swearing, talking to the walls and trees, and guilty of every act of extravagance. He was the public sport and jest of the town, and called so universally by the nick-name of Dr. Luley, which by some of his absurdities he had acquired, that many people never knew him by any other name.

The appellants James and John Middleton were brothers, and both attorneys; the former living at Ringwood, the latter at Rumsey, in the same county. As the object of the present suit was to set aside certain deeds by which John Wilcox conveyed the whole property which he acquired by the death and intestacy of William, to the said appellants, it seemed necessary to state rather minutely the facts which followed the death of William Wilcox. This event, which took place at Portsmouth late in the night of the 26th of July, was communicated, about five o'clock in the morning of the 27th, to Mr. Thomas Binsted an attorney of Portsmouth, who had been well acquainted with William Wilcox in his life-time. The intelligence was immediately conveyed by letter from Mr. Binsted to John Willis an attorney of Ringwood, since deceased; which letter was sent by express, and arrived at Ringwood about twelve o'clock of the same night. Mr. Willis immediately sent the letter to the appellant James Middleton, who, in consequence thereof, at six o'clock in the morning of the 28th, sent for John Wilcox, and acquainted him with the death of his cousin, and proposed their going immediately to Portsmouth. At eight o'clock of the same morning, the appellant James Middleton and John Wilcox went from Ringwood together in a postchaise. On their way to Winchester and Portsmouth, at Rumsey, they called upon the appellant John Middleton, and, being joined by him, they proceeded to Winchester; at which place the two brothers, on the same day, although that happened to be Sunday, procured letters of administration to be granted by the Consistory Court of the Bishop of Winchester to the said John Wilcox of the goods and chattels of William Wilcox; and John Wilcox took the usual oath as to his belief of the intestacy of William, the two Middletons becoming his securities, as usual in such cases. On the morning of the 29th, the two appellants James and John Middleton, and John Wilcox, proceeded to Portsmouth, when the former, professing to act on the behalf and account of John Wilcox, took possession of the house and effects of the intestate; but it appeared, that the ready money which was found in the house at the time of his death, was taken away for safe custody by Mr. Binsted, and was never produced to John Wilcox, but remained with Mr. Binsted until the 10th of September following, when it was delivered by him to the appellants James and John Middleton. During the stay of the appellants and John Wilcox at Portsmouth, where they continued about ten days, the design of the appellants to obtain to their own use the property of which they had undertaken the management on the part of John Wilcox, became apparent. They first prepared the draft of a will, purporting to be the will of John Wilcox, by which he was made to bequeath the whole of the property, [247] both real and personal, to the two brothers. This draft was produced and read over by them (John Wilcox himself being absent) in the presence of James Collins, who was examined as a witness in the cause; but, after they had read it, they expressed their disapprobation of it, alleging as a reason, that a will being liable to alteration, he might probably be persuaded to alter it on his return to Ringwood, and therefore they immediately destroyed it. No further step of consequence was taken during their stay at Portsmouth at that time; but after having proceeded to Havant in the same county, in order to view some small copyhold lands, part of the intestate's real estate, they returned to their respective homes, carrying John Wilcox with them to Ringwood.

The said appellants afterwards finding it necessary to take out a prerogative administration in the name of John Wilcox, in order to enable him to get possession of the stock standing in the name of the intestate in the books of the Bank, on the 11th of August the appellant James Middleton sent directions to London to take

a commission from the Prerogative Court for that purpose, which was accordingly obtained, and was returned to the said Court on the 14th of the same month, and on the 19th the letters of administration issued. But previously thereto, and without waiting for its arrival, on the 16th of August the said appellants carried John Wilcox to Portsmouth, and remaining there, on the 20th of the same month they obtained from him a deed of gift of all his estate, both real and personal, to their own use, reserving to him only 20s. a week for his life. This deed was drawn by the appellant James Middleton himself, and it was engrossed by the other appellant John; but was not perused by, or shewn either in the draft or the engrossment to, any friend or attorney of John Wilcox, previous to its being engrossed or executed. By this deed, bearing date the 20th of August 1776, and made between the said John Wilcox, by the name and addition of John Wilcox, of Ringwood in the county of Southampton, Gentleman, heir at law and sole next of kin of William Wilcox, late of Portsmouth Common in the said county, Gentleman, deceased, of the one part; and the said appellants, by the names and additions of James Middleton, of Ringwood aforesaid, Gentleman, and John Middleton, of Rumsey, *infra*, in the said county of Southampton, Gentleman, of the other part; reciting, that the said William Wilcox, on or about the 27th day of July then last, died intestate, leaving the said John Wilcox his heir at law and sole next of kin; and that he the said John Wilcox being perfectly satisfied of the said William Wilcox's friendship and good intentions towards the said appellants, who were also nearly related to the said intestate, and that from the public declarations of the said William Wilcox in his life-time, it was very much to be expected that he would have given the greatest part of his real and personal estate to the said appellants, if the said intestate had made a will; and that the said John Wilcox being at that time very old and infirm, so as not to be able to manage and transact the affairs of the said intestate, and being desirous of fulfilling the good intentions and designs of the said William Wilcox towards the said appellants, he the said John Wilcox had voluntarily proposed and agreed to grant, bargain, sell, and assign all the said William Wilcox's real and personal estate to the said appellants, in trust, for the several uses and purposes thereafter particularly mentioned: it was thereby witnessed, that for the consideration aforesaid, and also in consideration of the natural love and affection which the said John Wilcox had and bore towards the said appellants, and of the sum of five shillings to him in hand paid by the said appellants at or before the sealing and delivery thereof, he the said John Wilcox did freely and voluntarily give, grant, bargain, sell, assign, transfer, and set over unto the said appellants, their heirs and assigns, an ancient freehold dwelling-house and garden, with the appurtenances, and a cottage thereunto adjoining, in the town of Ringwood aforesaid; and also a freehold dwelling-house and garden, with the appurtenances, on Portsmouth Common aforesaid; and four small copyhold estates of inheritance in and held of the manor of Havant aforesaid; which tenements were late the property of the said William Wilcox, and of which he died seised and possessed in fee; to hold unto the said appellants, their heirs and assigns, for ever. And it was thereby further witnessed, that for the considerations aforesaid, and of the sum of five shillings to the said John Wilcox in hand paid by the said appellants at or before the sealing and delivery thereof, the said John Wilcox did freely and voluntarily give and assign, transfer and set over unto the said appellants, their executors, administrators, and assigns, all the household furniture, monies, securities for money, government securities, and all other the personal estate of the said William Wilcox, which the said John Wilcox was then possessed of and entitled unto as his administrator and sole next of kin, to have and to hold all the household furniture, monies, securities for money, government securities, and other the personal estate and effects of the said John Wilcox, thereby given, assigned, and set over unto the said appellants, their executors, administrators, and assigns, as their own proper goods and chattels for ever. All which said freehold and copyhold premises, household furniture, and other the personal estate so given, granted, bargained, sold, and assigned unto the said appellants, their executors, administrators, and assigns, were so given, granted, and assigned unto them, in trust, in the first place, to pay and discharge all the just debts of the said William Wilcox due and owing at the

time of his decease; and after payment thereof, then, in trust, to pay unto Dinalh Stocker and Barbara Darley, both of Portsmouth Common aforesaid, spinsters, late servants of the said William Wilcox deceased, one annuity of £10 8s. each, to be paid them, or their assigns, respectively, quarterly, during their respective natural lives, to commence from the 29th day of September then next ensuing: and also, in trust, to pay unto the said John Wilcox, and his assigns, one annuity of fifty-two pounds, to be paid him by weekly payments, at and after the [249] rate of 20s. a week, for and during the term of his natural life, clear of all deductions, to commence from the day of the date thereof: and from and after payment of the said debts and the said three several annuities, in trust for the said appellants James and John Middleton, their heirs, executors, administrators, and assigns, for ever, as tenants in common, and not as joint tenants, and to and for no other use or purpose whatsoever: and the said John Wilcox, for the considerations and purposes aforesaid, did thereby empower the said appellants to recover and receive all such sum and sums of money as were due and owing to him as administrator aforesaid: and the said John Wilcox, for himself, his heirs, executors, and administrators, did thereby covenant and agree to and with the said appellants, their heirs, executors, and administrators, that they the said appellants, their heirs, executors, administrators, and assigns, should and might from thenceforth peaceably and quietly enter into, have, hold, use, occupy, possess, and enjoy the said tenements and premises, goods, chattels, and personal estate and effects, and receive and take the rents, issues, and profits thereof, without the lawful let, suit, trouble, or interruption of the said John Wilcox, his heirs, executors, administrators, or assigns, or any person or persons lawfully claiming or to claim by, from, or under him or them.

The subscribing witnesses to the execution of this deed were Edward Hunt of the Dock-yard at Portsmouth, Esquire, Mary Ridge of Portsmouth Common, widow, since deceased, and Thomas Grant of the Dock-yard, Portsmouth, Gentleman, three persons of undoubted credit, who had all been well acquainted with William Wilcox in his life-time, but were all total strangers to John Wilcox and his character: they were sent for by the said appellants, and by John Wilcox under their direction, for this express purpose; and on their arrival, the deed was read over to John Wilcox, who executed the same in their presence, and they subscribed their names as witnesses to the execution.

It is plain that in the haste the appellants made, they lost sight of the nature of part of the estate, and the proper means of procuring a legal title to it; but finding out the defect afterwards when they were got back to Ringwood, by indentures of lease and release, bearing date respectively the 3d and 4th of September 1776, and made between the said John Wilcox, by the name and addition of John Wilcox of Ringwood in the county of Southampton, Gentleman, heir at law of William Wilcox late of Portsmouth Common in the said county, Gentleman, deceased, of the one part; and the said appellants of the other part; the release reciting the said deed of gift; and that the said John Wilcox, in order to vest the freehold and inheritance of the said freehold tenements and premises in the said appellants and their respective heirs, and further to support and manifest their title to the same, had agreed to grant and convey the said freehold tenements and premises unto the said appellants; the said John Wilcox did for the purposes aforesaid, and in consideration of the sum of 10s. to him in hand paid by the said appellants, grant, bargain, and re-[250]-lease unto the said appellants, their heirs and assigns, the said ancient freehold dwelling-house and garden with the appurtenances, and the said cottage thereunto adjoining, in the town of Ringwood aforesaid; and the said freehold dwelling-house and garden, with the appurtenances, on Portsmouth Common aforesaid, together with all deeds, evidences, and writings touching or concerning the premises, or any part thereof, to hold unto the said appellants, their heirs and assigns, for ever, as tenants in common, and subject to the trusts mentioned and declared in the said deed of gift.

On the 7th of September following, John Wilcox was admitted to the copyhold premises as heir at law of William Wilcox, and afterwards surrendered the same to the appellants James Middleton and John Middleton, and their heirs, as tenants in common, and subject to the trusts mentioned and declared in the deed of gift;

and the said appellants were accordingly duly admitted thereto. By virtue of which several deeds the said appellants possessed themselves of the whole property of the late William Wilcox, both real and personal, and of all the deeds and writings relating thereto, the real estates being of the annual value of £50 and the personal property, as the appellants acknowledged in their answers, amounting to about £2095.

On the 21st of October, John Wilcox died intestate and without issue, leaving the respondents Susannah Forbes, Mary Lewis, and Catherine Wilcox, his three nieces and heirs at law, and only next of kin. And the respondent Susannah Forbes, after his death, obtained letters of administration of his personal estate and effects, and also of the personal estate and effects of William Wilcox, unadministered by John Wilcox in his life-time.

The respondents John Forbes and Susannah his wife, Christopher Lewis and Mary his wife, and Catherine Wilcox, conceiving the several deeds and surrenders before mentioned to have been fraudulently or unduly obtained from John Wilcox, in Michaelmas Term 1781, filed their bill in the Court of Chancery against the appellants, which bill was afterwards amended; setting forth, among other things, the substance of the matters aforesaid, and praying that the several deeds, conveyances, and surrenders so obtained from John Wilcox, might be set aside for fraud and imposition; and that the appellants James and John Middleton might come to an account with the respondents for the personal estate and effects of William and John Wilcox respectively, which had come to the hands, custody, power, or possession of the appellants, since the death of William Wilcox; and might account for the rents and profits of the real estates of William Wilcox, received by them or either of them since his death, and pay the respondents what should be due to them respectively; the respondents thereby offering to allow the appellants what they paid John Wilcox on account of his annuity of £52; and that the respondents might in their several and respective rights be let into possession of the said freehold and copyhold estates; and that the appellants might convey the freehold, and surrender the copyhold premises, to the [251] respondents; and that all deeds, surrenders, admissions, writings, and securities for money relating to the said freehold or copyhold premises, might be delivered up to the respondents.

To this bill the appellants appeared and put in their answers; and by their first answer, sworn the 23d of August 1781, stated the particulars of the several real estates of which William Wilcox was seised at the time of his death; admitted that William Wilcox was at his death possessed of a considerable personal estate, but they did not state the amount: mentioned the several circumstances of their conduct from the time of the death of William Wilcox, until their first arrival at Portsmouth with John Wilcox on the 29th of July 1776, as before set forth: stated that they had reason to expect that if William Wilcox had made a will, they should have succeeded to the principal part of his fortune: that the appellant James Middleton obtained letters of administration of the goods and chattels of William Wilcox to be granted to John Wilcox by the Prerogative Court of the Archbishop of Canterbury, as before mentioned: that relying that such letters of administration would be duly sent into the country in pursuance of the directions given for that purpose, John Wilcox went a second time to Portsmouth on the 16th of August 1776, and the appellants accompanied him there *in order to assist him in taking a particular account of the whole personal estate and effects of William Wilcox*, and to enable him to pay and discharge such debts as were owing by William Wilcox at the time of his decease, and to defray his funeral expences; but that John Wilcox soon after finding himself indisposed by the fatigue of the journey, he resolved to settle his own affairs, and to make the appellants amends for the disappointment they had met with by William Wilcox not having made a will in their favour, which he well knew and was satisfied would have been the case if William Wilcox had not died unexpectedly after a few days illness; and therefore that John Wilcox spontaneously, deliberately, and of his own accord, gave instructions for preparing a deed for carrying such his resolution and intent into execution: that accordingly a deed, purporting to be a deed of gift, being afterwards prepared pursuant to the instructions so given by John Wilcox, he desired that some of William Wilcox's most intimate acquaintances might be sent for to attest

the execution thereof, to whom he would declare his intentions and reason for doing what he had so resolved on; and that accordingly the said Edward Hunt, Mary Ridge, and Thomas Grant, were sent for at the particular desire and request of John Wilcox, to come to the dwelling-house of William Wilcox; and that the said Edward Hunt, Mary Ridge, and Thomas Grant did, in compliance with such request, attend John Wilcox, when he, being perfectly as they alleged in his senses, and only in company with the said Edward Hunt, Mary Ridge, and Thomas Grant, declared to them, as the appellants were afterwards informed, that he the said John Wilcox had the greatest regard for the appellants, and that he had no other friends in the world, and he knew they were descended from a Wilcox, and [252] nearly related to William Wilcox, and therefore was desirous and had come to a resolution of making over all the estate, both real and personal, which he became possessed of and entitled unto by the death of William Wilcox, to the appellants, they undertaking to pay the said Dinah Stocker and Barbara Darley, the late maid servants of William Wilcox, an annuity of £10 8s. each for their lives, being, as he calculated it, 4s. a week each, John Wilcox declaring he was informed and fully convinced that William Wilcox would have made a further provision for them had he made a will; and also paying unto the said John Wilcox an annuity of £52 a year, by weekly payments of 20s. a week during his life, clear of all deductions: and that John Wilcox further declared to the said Edward Hunt, Mary Ridge, and Thomas Grant, as the appellants were informed and believed, that he well knew the great friendship and regard which William Wilcox had in his lifetime for the appellants, and that he should not die in peace if he did not effectuate what he had thus resolved upon, and that he had taken this resolution freely and uninfluenced by any person whomsoever, and that he had ordered a deed to be prepared for carrying this resolution into execution: they then set forth the deed of gift of the 20th of August 1776, to the purport or effect before mentioned. They also set forth the indentures of lease and release of the 3d and 4th of September 1776, and the surrender of the copyhold; admitted that they converted the personal estate or effects of William Wilcox to their own use. Stated, that they gave bonds to John Wilcox and the other appellants Dinah Stocker and Barbara Darley, in order to secure to them their respective annuities. That on the 30th of August 1776, the appellant John Middleton did, by virtue of a letter of attorney from John Wilcox, sell a sum of £50 long annuities, then standing in the name of William Wilcox, for £1260 which the appellant John Middleton received, and which had been since converted to the use of them the appellants James and John Middleton. Admitted that they got into their custody or power all the title deeds, papers, and writings belonging to the freehold and copyhold estates of William Wilcox. That John Wilcox was 70 years of age and upwards at the time he executed the deed of gift and conveyances; but although it was recited in the said deed of gift, that John Wilcox was then very old and infirm, so as not to be able to manage and transact the affairs of William Wilcox, nevertheless they insisted that John Wilcox was not more old and infirm in his health or constitution than persons at his time of life usually are. They then set forth several instances of the attachment of William Wilcox to the family of the appellants, which they insisted to be the reason which induced John Wilcox to execute to them several deeds in question.

By the further answer of the appellants, sworn the 18th of September 1783, they stated the personal estate of William Wilcox, at the time of his death, to amount to £2095 (including the £1260 received by the sale of the long annuities, as before mentioned,) [253] out of which they applied £130 in defraying his funeral expences and debts, of which £94 4s. 2d. were paid by John Wilcox before the execution of the deed of gift, and the residue by the appellants after the execution thereof. Admitted that the appellant James Middleton prepared the draft of the said deed of gift, and that the appellant John Middleton engrossed the same; and stated that John Wilcox approved thereof, but that John Wilcox being a stranger to the gentlemen of the law in Portsmouth and the neighbourhood thereof, he insisted that the appellants should prepare the deed; and therefore John Wilcox had not any person on his part, except the appellants, to peruse the draft of the deed, or to read over or examine the draft to see if the engrossed deed corresponded with it.

The appellants Dinah Stocker and Barbara Darley, by their answers, sworn the 8th of July 1782, said, that about the 16th of August 1776, John Wilcox communicated to them his intention of settling his affairs while he was then at Portsmouth, and informed them that he had resolved to make a provision for them by allowing them an annuity of £10 8s. each, telling them he was well convinced his cousin William Wilcox would have provided for them if he had made a will. That the other appellants James and John Middleton executed bonds to the appellants Dinah Stocker and Barbara Darley respectively, for securing to them the payment of their respective annuities: that John Wilcox frequently afterwards declared himself to be perfectly satisfied with what he had done for the appellants, and they denied that the annuities were provided for them for any undue purpose.

On the 8th of March 1782, a commission of bankrupt having issued against the respondent John Forbes, the respondents Richard Welles, John Uffington, and Nathaniel Crawford were chosen his assignees; and they therefore, on the behalf of themselves and the other creditors of John Forbes, about the 25th of January 1783, filed a supplemental bill against the appellants, praying that they might have the benefit of the proceedings held in the former suit.

To this supplemental bill the appellants appeared and put in their answers; and the cause being at issue, a commission issued for the examination of witnesses, which was afterwards executed at Portsmouth, and, by adjournment from thence, at Ringwood; when many witnesses were examined on each side, as well touching the capacity and character of John Wilcox, as the other matters and circumstances before mentioned. And several witnesses were afterwards examined in London, as well on the part of the appellants as of the respondents, and, among others, the appellant Dinah Stocker was examined on the part of the appellants, by virtue of an order obtained from the Court of Chancery for that purpose, saving just exceptions.

The respondents having set down the cause for hearing in Easter Term 1784, and having served the appellants with subpoenas to hear judgment, the appellants applied to the Court of [254] Chancery for leave to exhibit articles to impeach the credit of seven of the respondents' witnesses, and on the 20th of April 1784, they obtained an order for a commission to examine witnesses in support of such articles; and the respondents were to be at liberty to examine witnesses in support of their credibility; and upon the execution of such commission, several witnesses were examined on each side for those purposes.

This cause came on to be heard on the 12th, 13th, and 15th of July 1784, before the Lord Chancellor Thurlow, when his lordship was pleased to order and decree, that the deeds of the 20th of August 1776, and the 3d and 4th of September 1776, and the surrender dated the 7th of September 1776, should be set aside, and delivered up to the respondents to be cancelled: and it being alleged that part of the real estates of William and John Wilcox had been sold, it was ordered; that it should be referred to Mr. Wilmot, one of the Masters of the Court, to inquire whether the appellants James Middleton and John Middleton had sold any part or parts of the intestate's real estates which belonged to them at the times of their decease; and if the Master should find that any part or parts of the said estates had been sold by them, it was further ordered, that the Master should inquire whether the same had been sold for an adequate price; and if the Master should find the same had been sold for an adequate price, it was further ordered, that then he should charge the appellants James and John Middleton with the purchase monies received by them for the same, with interest thereupon, at the rate of £4 per cent. per annum, from the time they or either of them received the purchase money, such interest to be computed by the Master: but in case the Master should find that any part of such real estate which had been so sold, had not been sold for an adequate price, then it was ordered, that he should inquire and state to the Court what would have been an adequate price to have been paid for such part or parts of such estate so sold, together with the reasons and occasions of such under-sale; and in such case his Lordship reserved the consideration of any further directions relating thereto until after the Master should have made his report. And it was further ordered, that the real estates in question, then unsold, should be re-conveyed, and the copyhold estates in question should be re-surrendered, by the appellants James



Middleton and John Middleton, to the respondents, at the costs of the appellants, as the Master should direct. And it was ordered, that the Master should take an account of the personal estate of William Wilcox and John Wilcox the intestates, that had come to the hands of the appellants James Middleton and John Middleton, or either of them, or to the hands of any other person or persons by their or either of their order, or for their or either of their use. And that the Master should also inquire what part of the said intestates' estates were out upon securities, and what part thereof had been called in or sold and converted into money by the appellants; and should also inquire upon what other securities the appellants James Mid-[255]-dleton and John Middleton had placed out such monies again, and what interest they had received thereon. And as to such part of the said intestates' personal estates as the Master should find the appellants had not placed out on securities, it was ordered, that he should compute interest thereon at the rate of £4 per cent. per annum, from the respective times that such personal estates had come to their hands. And it was further ordered, that the Master should also take an account of the rents and profits of the said intestates' estates that had come to the hands of the appellants James Middleton and John Middleton, or either of them, or to the hands of any other person or persons by their or either of their order, or for their or either of their use; such account of rents and profits to cease from the time or times when the appellants, or either of them, last received the same. And the Master was to take an account of the debts and funeral expences of the said intestates, and compute interest on such of their debts as carried interest, after such rate of interest as they respectively carried. And the Master was to cause advertisements to be published in the *London Gazette*, for the creditors of the said intestates to come in before him and prove their debts, and fix a peremptory day for that purpose; and such of their creditors as should not come in and prove their debts by that time, were to be excluded the benefit of the decree. And for the better taking of the accounts, and discovery of the matters aforesaid, the parties were to be examined upon interrogatories, and to produce before the Master upon oath all books, papers, and writings, in their custody or power, relating thereto, as the Master should direct; who, in taking the said accounts, was to make unto the parties all just allowances, and particularly an allowance to the appellants James Middleton and John Middleton for what they had expended on the copyhold estate, or otherwise, in order to make a title to such estate to themselves. And it was ordered, that the appellants James Middleton and John Middleton should pay what should be found due from them on the several accounts aforesaid into the Bank, with the privy of the Accountant-general, to be placed to the credit of the cause, subject to the further order of the Court; and any persons interested therein were to be at liberty to apply to the Court concerning the same as they should be advised. And his Lordship did not think fit to give any costs on either side; and any of the parties were to be at liberty to apply to the Court as there should be occasion.

From this decree the appellants thought proper to appeal; and on their behalf it was said (G. Hardinge, T. Erskine), that at the hearing in the Court below, cases were mentioned, upon which it was understood the decree was founded; and particularly the case of *Pierce and Waring*, as set forth in 1 Vezey 380; but in 2 Vezey 260 and 548, the circumstances upon which Lord Hardwicke determined in that case are more fully stated; and it was submitted, that the situation of the Middletons did not comprehend them within the doctrine contained in that case, or any other which had been quoted against them. [256] This was no transaction between attorneys and their client, or a person who confided in them as attorneys; they were all relations, between whom good offices, attachment, and affection had for a number of years subsisted. That Courts of Justice, not being able to dive into motives, liberally construe beneficent acts of one relation to another. That there was no proof of any kind against the appellants Stocker and Darley; and from the testimony of Thomas Parsons, it was manifest that John Wilcox was well convinced of the rectitude of his provision for them. That it might be reasonably presumed that John Wilcox, reflecting in his mind upon the age he had attained, and being in a habit of living which at his time of life he was unwilling to alter, and feeling powerfully the regard he had for the Middletons, and grateful to them

for their acts of kindness and humanity to him, determined in executing the deed of gift, at once to mark his gratitude, and an act of piety in fulfilling what he believed were the intentions of William Wilcox in their favour. And that what he said at the time of executing the deed of gift, and his declarations after it was executed, proved that he had in fact adopted these proper sentiments.

On the other side, it was said (J. Madocks, J. Scott) to be a rule established in Courts of Equity, that no gift or gratuity to an attorney, beyond his fair professional demands, made during the time he continues to conduct or manage the affairs of the donor, more especially if such gift or gratuity arises immediately out of the subject then under the conduct or management of the attorney, shall be permitted to stand: in the present case, the transaction was on all hands acknowledged to be a gift. It was equally clear that it was a gift made to *attornies* then acting on the part of the *donor* in the management of the *very property* given, and a gift of property the nature and amount of which the donor did not know. That fraud which is implied in the cases alluded to, was in the present case proved by the strongest circumstantial evidence, arising as well upon the face of the deed of the 20th of August, as from extrinsic facts. The design of the appellants shewed itself from the moment that the news of William Wilcox's death arrived at Ringwood, by the appellant James Middleton sending for John Wilcox, and his brother joining the party. The uncommon precipitation with which they carried him to Portsmouth; the taking out letters of administration from the Diocesan Court on the Sunday, before it could be known whether any will existed, were circumstances not to be accounted for, if done by a mere attorney, or a disinterested person; but were easily reconciled to the anxiety of men pursuing their object by indirect means, and aware of the danger of their design being circumvented by delay or the interference of disinterested persons. As to John Wilcox, they seemed to have had a firm reliance on the influence they had over him, as appeared by the conversation they had with James Collins in respect to the will; the draft of which they had prepared for John Wilcox, without any previous communication with him upon the subject, and which they afterwards abandoned professedly on account of the [257] revocable nature of the instrument. The deed of the 20th of August was a general sweeping gift of all the property, freehold, copyhold, and personal, without specification of particulars or value; drawn and engrossed by the appellants, without the advice, perusal, or knowledge of any third person on the part of John Wilcox, and that at a time when it was scarcely possible that either John Wilcox, or the appellants themselves, could be informed of all the particulars of the intestate's personal estate, and especially of his money in the public funds. Nor was there any pretence on the part of the appellants of any account having been delivered to John Wilcox, by which he could form any idea of the amount of what he had acquired by William's death. The recital of the intentions of William Wilcox in favour of the appellants, and the desire of John Wilcox to effectuate those intentions, which indeed the appellants made their main ground of defence, was wholly unsupported by evidence of any kind; the three witnesses, who were undoubtedly persons of credit, and who were very circumstantial in the account they gave of what passed at that time, were totally silent as to any such motives being then mentioned by any body: and it was further remarkable, that the three witnesses having been intimately acquainted with William Wilcox in his life-time, and chosen by the appellants to attest the execution of the deed for that express reason, must have known the intentions of William Wilcox in favour of the appellants, if they in fact existed; and yet nothing of this nature appeared in any part of their depositions; and indeed the appellants had not ventured, by their interrogatories, to ask any one of them a single question upon the subject. Further, as to the recital in the deed of the age and infirmities of John Wilcox, and his being incapable to manage his affairs, the appellants, finding it did not well accord with the rest of their case, thought fit by their answer to give a flat contradiction to their own assertion. No counterpart or copy of the deed was delivered to John Wilcox. The annuity of £52 per annum was not one-third of the income of the property conveyed, and was secured to him only by the bond of the two appellants, it was postponed in the trusts of the deed to the two annuities granted to the maid-servants; so that for any care the appellants took to the contrary, if they had

become insolvent, or the estates had turned out insufficient, he might have been again a beggar, seeing his property out of his own reach in the hands of other people, and the maid-servants, who were supposed to be the objects of his bounty, enjoying his property in preference to himself during his own life-time. That whether his understanding should be considered as naturally deficient, or as worn out by age, or vitiated by intemperance; in either case, the character of this man was not such as to uphold, in a Court of Equity, a voluntary gift of his whole property, two-thirds immediately, and the remainder at his death, without any power of revocation or controul. The transaction itself was much beyond the scope of his ideas, and the habits of his life. The small allowance upon which John Wilcox subsisted, previously to the [258] death of William, being particularly directed by those relations from whom it came to be paid to him *weekly*, and the same mode of payment being adopted by the appellants in respect of the annuity reserved to him by the deed of gift, marked very strongly the opinion of his own family, and of the appellants themselves, that he was utterly unfit to be trusted with the care of money; so that if he had known the amount of his fortune, which he clearly did not, he could not have been competent to determine for himself in such a transaction. But the appellants rest much upon the satisfaction said to be expressed by John Wilcox in his life-time, at the acts done by him in their favour. These expressions, if uncontradicted, which was by no means the fact, would not impeach the case made by the respondents upon any of the grounds above mentioned. If the transaction was vitiated by the state of mind of John Wilcox, his subsequent declarations could not have much weight; if by the undue influence of the appellants, or their actual misrepresentation or wilful concealment in respect of the value of the property in question, both which might be here fairly presumed, these declarations would apply only to what he thought he had done, and not to what he had done in fact. Nor would the subsequent indentures of lease and release, the surrender of the copyholds, or the execution of the letters of attorney, vary the case in the appellants favour. They must be considered as only parts of a transaction bad *in toto*, and therefore could not be taken singly so as to make the case less liable to objection.

Accordingly after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed, with £100 costs. (M.S. Jour. *sub anno* 1785. p. 616.)

CASE 19.—ROBERT MACKRETH,—*Appellant*; JAMES FOX and others,—*Respondents* [14th March 1791].

[Mew's Dig. vii. 189, 199. Explained in *ex parte Lacey* 6 Ves. 625. See also 2 Cox 320: and 2 Wh. and T. L.C. 7th ed. 709.]

[Among the various acts which in a Court of Equity constitute Fraud, the abuse of confidence is one. A. reposing an unlimited confidence in B. makes him a trustee of his estates, for the purpose of paying his debts; B. at the same time negotiates with A. for the absolute sale of those estates to himself, and obtains a conveyance at an under value; B. afterwards sells the estates at a very advanced price. This conduct of B. was held to be fraudulent, and he was decreed to account to A. for the advanced price, with interest and costs; although it appeared, that the purchaser at the advanced price was a considerable loser by his bargain.]

**\*\*DECREE** of Lord Chancellor Thurlow, affirming a decree of the Master of the Rolls, **AFFIRMED**.

The point of this Case may be more accurately stated from the report in 2 Bro. C. R. 400: Thus,

"A trustee for the sale of estates, for payment of debts, purchased them himself, by taking undue advantage of the confidence reposed in him by the [259] plaintiff (the vendor); and *previous* to the *completion* of the contract sold them at a highly advanced price; decreed that he should be a trustee

for the vendor for the money produced by such second sale, with interest and costs, with allowance for money actually paid."

It appears that the Lord Chancellor had considerable difficulty in making up his mind to this case, lest he should establish a precedent dangerous to the general commerce in the sale of estates. The ground on which his Lordship, and finally the House of Lords, affirmed the Master of the Rolls' decree, appears to have been that *abuse of confidence*, which is a general feature in all contracts between usurious money-lenders and distressed extravagant young men of fashion.

See the general note on the subject of Frauds at the end of this Case.\*\*

2 Bro. Chan. Rep. 400.

In the year 1773, the respondent, James Fox, then about 17 years of age, was entitled in possession to an estate of inheritance in tail in divers real estates, in the county of Surry, of the yearly value of £1200 and upwards, subject to his mother's jointure, charged upon part of the said estate. He was also entitled, under the will of the late Lord Bingley, to an estate for his life in remainder, expectant upon the death of the survivor of Sir John and Lady Goodriche, in divers other real estates in England, of the yearly value of £6000 or thereabouts; and if he attained his age of 21 years, he in like manner became entitled in possession for his life, subject to the charges affecting the same, to divers real estates in Ireland, of the yearly value of £6000 or thereabouts; and also to some other real estates and property in England, of the yearly value of £1300 or thereabouts.

In this situation of his property, Mr. Fox, young and unexperienced, engaged in a very dissipated and extravagant course of life during his minority, and squandered away large sums of money, far beyond what were proper to be allowed for his maintenance and education, whereby he became exposed to great distress; and during his infancy, and soon after he attained the age of 17 years, he, in opposition to the repeated advice and remonstrances of the gentleman who was employed as his solicitor, procured large sums of money by selling annuities during his life, and by procuring his friends and acquaintance, who were engaged in the same extravagant course of life, and had barely attained 21, to join with him or give securities for the payment of such annuities. The money thus attained by Mr. Fox was obtained upon terms the most disadvantageous to him that can be conceived, and the means used to obtain it were carefully concealed by him from his solicitor and friends. By this imprudent and dissipated conduct, the respondent, Mr. Fox, was in the year 1776 involved in debt to the amount of £26,000, and in the month of May in that year, he was, although under 20 years of age, arrested by different creditors.

Mr. Fox's distressed situation and conduct could be no longer concealed from his friends, who, upon being made acquainted therewith, found it absolutely necessary to adopt some mode for extricating him from his distress. It was therefore proposed by Mr. Fox's solicitor, who had been appointed to manage his affairs by his friends, and agreed to by Mr. Fox and his friends, that as soon [260] as he should attain 21 he should suffer a recovery of his estates in the county of Surry, of which he was tenant in tail in possession, and that those estates, or a competent part thereof, should be vested in trustees, upon trust to sell the same, and apply the money arising from such sale in paying his debts, and redeeming the several annuities which he and his acquaintance had engaged to pay for him during his life: and in order to get a true knowledge of his situation, both with respect to his debts and annuities, and also with respect to the value of his estate in the county of Surry, so intended to be vested in trustees, it was proposed by his friends, and agreed to by Mr. Fox, that Mr. Farrer, his solicitor, should forthwith endeavour to procure an account of his debts and annuities, by inserting advertisements in the public newspapers, or by such other means as he thought advisable: and that Mr. Fox should, in the mean time, get his estate in Surry valued by some surveyor skilled in the value of lands in that county. And it was also proposed and agreed, between Mr. Fox and his friends, that when an account could be obtained of his debts and annuities, a list should be made thereof, or of such of them as were found to be fair and just; and that such list should be annexed by way of schedule

to the trust deed : and it was likewise determined, that the plan of the deed should be to secure upon the estate to such of the annuity creditors as should agree to liquidate their annuities, and should accept the proposals made to them on the part of Mr. Fox, their principal money, and interest at four and a half per cent. and that such of the creditors who should refuse to sign the proposals, should be excluded from all benefit under the trust deed. And, in order to make the most of the estates, it was proposed that the trustees should sell the same in *parcels and by public auction*.

In May or June 1776, Mr. Fox, with the Rev. Dr. Shepherd, his tutor, set off upon his travels with an intention of making the tour of Italy, and of remaining abroad until he should have attained 21. He travelled almost immediately to Turin, but instead of making the tour of Italy, as had been intended, he very soon went to Paris, where his tutor left him, and *during his residence at Paris*, and after his return to England, he lived in a very dissipated and extravagant manner, and became so very much overwhelmed in debt and distress, that he would have executed almost any engagements or securities that could be proposed to him, in order to raise money to answer his purposes, which was easily discovered by any person who had money transactions with him. At this period the indiscretion and extravagance of Mr. Fox and his acquaintance were so great, that they sold annuities for his life for five or six years purchase, and left part of the money in the hands of the purchasers or procurers of the money, in order to answer the growing payments of the annuities, and without keeping any account thereof; and they also executed bonds and warrants of attorney, to confess judgments to persons whom they employed, without receiving any consideration, and without keep-[261]-ing any account thereof, in order that such persons might raise money thereon by assignments of such securities.

About the beginning of October 1777, in pursuance of directions received from Mr. Fox and his friends, his solicitor, Mr. Farrer, caused advertisements to be inserted in the public newspapers, desiring all the creditors and annuitants of Mr. Fox, and all other persons having any claims upon him, to send in an account of their respective debts, annuities, and demands; and in consequence of such advertisements, a great number of debts and annuities were claimed against him amounting together to £50,000, a list of which debts and annuities was made out by his solicitor, in order that the same might be taken into consideration by Mr. Fox, and his friends and trustees; and in order that such of the said debts and annuities as were found to be just and fair might be scheduled to the intended trust deed. Mr. Fox about the same time employed Mr. Thomas Jackman, an experienced surveyor, who resided in the county of Surry, near his estates in that county, to value the said estates; and Mr. Jackman, after having carefully surveyed the said estates, valued and estimated the same, with the timber growing thereon, (and without the furniture in the house and offices,) to be worth the sum of £45,000 after making an allowance of £1680 for the jointure of Mr. Fox's mother, which was charged upon part of the estate.

Mr. Fox attained 21 in August 1777; and the appellant, being intimate with the Reverend Dr. Shepherd, who had been Mr. Fox's tutor, was upon or shortly after Mr. Fox's attaining 21 informed by Dr. Shepherd, that Mr. Fox had been extravagant, and was greatly in debt, and meant to sell his Surry estate to enable him to pay his debts.

About the same time, and soon after Mr. Fox attained 21, he, without the knowledge of his solicitor or his friends, sold two annuities of £500 and £350 for his life, to the appellant and John Dawes, deceased, who was a particular friend of the appellant, and much concerned with him in annuities and other money transactions, for £5100, being after the rate of six years purchase; and upon this occasion Mr. John Baynes Garforth, the intimate friend and attorney of the appellant, was employed by the appellant to prepare the securities for the said annuities; and for securing those two annuities, Mr. Fox executed to the said John Dawes two bonds and two warrants of attorney, for confessing two judgments against him, bearing date respectively the 23d day of September 1777, the one in the penalty of £6000 and the other in the penalty of £4200, and also executed two indentures, bearing date respectively the said 23d day of September 1777, by which indentures respec-

tively Mr. Fox charged the said two annuities of £500 and £350 upon certain real estates in Yorkshire, of the yearly rent of £1000 and upwards, of which he was then in possession, and entitled to for life; and by each of the same indentures demised the same estates to the said John Baynes Garforth, as a trustee for the purchasers of the said annuities for two terms [262] of 99 years, if he, Mr. Fox, should so long live, upon trust, and with powers of distress and entry, and by sale or mortgage of the said estates, for better securing the regular payment of the said two annuities, which were made payable quarterly; all which securities were prepared by the said John Baynes Garforth, and executed by Mr. Fox without the least knowledge of his solicitor, or any of his friends.

Those two annuities were granted by Mr. Fox within a month after he had attained 21, and when he was in perfect health, at six years purchase, and were most effectually secured by two bonds and two judgments, and by two regular conveyances of real estates in the register county of York, to the said John Baynes Garforth, the intimate friend and attorney of Mr. Mackreth, the appellant, and the said John Dawes. By this loan the appellant gained the confidence of Mr. Fox; and it appears from the answer of the appellant, that at the time of this transaction he knew of the distress of the respondent Mr. Fox, and that he intended to sell his estate in Surry in order to extricate himself from such distress.

The appellant, by his answer, stated, that he was jointly and equally interested with the said John Dawes in the said annuity of £500.

Neither the appellant, nor the said John Baynes Garforth, nor John Dawes, ever discovered the purchase of those annuities to any of the respondent's friends, or his solicitor; but the appellant in his answer stated, that he believed Mr. Fox consulted and advised with the said John Baynes Garforth, who was Mr. Mackreth's friend and attorney, touching the said securities, and employed him to prepare, and that he did prepare the same.

The respondent James Fox having determined after he attained 21 to bar the entail of his estates in Surry, requested his solicitor, the said Oliver Farrer, to become a trustee for him for the sale of those estates, and for payment of his debts; but Mr. Farrer declined to act alone, and requested that the late Lord Grantley and Lord Ligonier, two particular friends of the respondent, Mr. Fox, might be joined in the trust; and he agreed to do the business under their inspection and direction.

In Michaelmas term 1777, Mr. Fox suffered a recovery of all his freehold estates in the county of Surry, and the legal estate therein was thereupon vested in Mr. Farrer, upon trust to convey the same in such manner as Mr. Fox should direct.

Soon after the said two annuities were granted to Mr. Dawes, it appears that the appellant became well acquainted, and had frequent conversations with the respondent, Mr. Fox; and the appellant stated by his answer to the respondent's bill, that he discovered that Mr. Fox had not a good opinion of Mr. Farrer, and did not conceive he meant friendly towards him; and that he was sorry he had vested his estate in him, for that he did not believe Mr. Farrer meant to make use of such confidence for his benefit. If the respondent Mr. Fox ever used such expressions, or professed to entertain such an opinion of Mr. Farrer, it does not appear [263] that Mr. Mackreth attempted to remove it, nor does it appear upon what circumstances such opinion had been formed. Mr. Farrer's situation indeed threw some obstacles in the way of Mr. Fox's raising money upon his estate, upon terms which were improvident, the estate being vested in Mr. Farrer at this time, and remaining vested in him till it was upon the occasion after mentioned conveyed to Mr. Mackreth.

Although the respondent Mr. Fox had borrowed £5100 in September 1777, he was in the month of November in the same year in such distress as to be obliged to confine himself to his lodgings for fear of being arrested for £2000 by the holders of two bills of exchange, drawn by him when at Paris in the preceding summer; and being very anxious to raise that money, the appellant Robert Mackreth, at the request of Mr. Garforth, agreed to advance him £3000 and to take a mortgage for the same upon the estate in Surry. And the said John Baynes Garforth, Mr. Mackreth's solicitor, was directed to prepare a mortgage for that sum. The solicitor of the respondent Mr. Fox was ignorant of this transaction until the 21st or 22d of December, when he was informed by Mr. Fox, that the draft of the mortgage would be sent to him for his perusal on the part of the respondent and himself; and accordingly the draft of the said mortgage was sent by the said John Baynes Garforth to

Mr. Farrer, Mr. Fox's solicitor, on the said 22d December 1777, for his perusal and approbation, as well on behalf of himself as of Mr. Fox; and he accordingly perused and settled the same, and returned it the same evening to the said John Baynes Garforth, and on the following day the £3000 was advanced by the appellant to Mr. Fox, and thereupon he and the said Oliver Farrer executed the mortgage to the appellant, bearing date the 23d of December 1777, by which means the appellant obtained the legal estate in the premises, and thereby strengthened and improved the security for the said annuities of £850 a year, for which he had judgments as well as securities on the Yorkshire estates. And it is to be observed that the estate being thus divested out of Mr. Farrer, the respondent might be dealt with for his estate afterwards without the knowledge or intervention of Mr. Farrer his solicitor.

Mr. Fox gave part of the money received from the appellant upon this security to Mr. Farrer, in order to take up the bills from Paris, and the same was applied accordingly. This was the first and only money transaction between the appellant and the respondent Mr. Fox, which Mr. Farrer then knew or had heard of; and supposing it to be so, and being wholly ignorant that Mr. Fox had sold two annuities for £850 to Mr. Mackreth and his friend Mr. Dawes upon the terms before stated, and apprehending that the appellant had advanced the money upon a very short notice, and as he then supposed without any knowledge of Mr. Fox's title to his estates, Mr. Farrer, in conversation with the appellant, treated the transaction as very friendly on the part of the appellant.

[264] The appellant, by advancing and procuring to be advanced to Mr. Fox the sums of £5100 and £3000 obtained to so great a degree the confidence of Mr. Fox, that Mr. Fox was induced to appoint Mr. Mackreth one of his trustees for the sale of his estates, and payment of his debts, and also to consent that Mr. Mackreth should nominate the other person who was to be appointed a trustee for that purpose. Accordingly on the said 23d of December 1777, Mr. Farrer being with Mr. Fox, the appellant came into the room to them, and after some conversation Mr. Fox said, he believed the appellant would have no objection to be one of his trustees for sale of his estates, and payment of his debts; and faintly asked Mr. Farrer if he would be another? Mr. Farrer hesitating in his reply, the appellant immediately said, that Mr. Farrer very well knew Mr. Dawes, and that he was a man of property; and that as he and the appellant well knew one another's modes of doing business, and could treat better than most people with annuity dealers, he hoped Mr. Fox and Mr. Farrer would have no objection to Mr. Dawes being the other trustee. Mr. Farrer then, in the presence of the appellant, stated the plan he had proposed to adopt on behalf of Mr. Fox, in order to relieve him from his distress; and the persons whom he had recommended to Mr. Fox as trustees for that purpose; but he declined to act as a co-trustee with the appellant: Mr. Fox, however, assented to Mr. Mackreth's nomination of Mr. Dawes as co-trustee; whereupon Mr. Mackreth or Mr. Fox said, that the sooner the trust deeds were prepared the better; and Mr. Mackreth then said, he hoped Mr. Farrer would have no objection to their being prepared by Mr. Garforth, and settled by Mr. Burton; to which Mr. Farrer replied, he did not care who did the business, provided Mr. Fox was relieved from his difficulties; on which Mr. Mackreth declared, and repeated in very strong terms, that nothing should ever be done in the business (or that they should never think of doing any thing in the business) without Mr. Farrer being advised with and consulted on behalf of Mr. Fox. In the course of this conversation, and in the presence and hearing of the appellant, Mr. Farrer stated, that Mr. Fox's estates in Surry had been valued, and that he had frequently conferred with Mr. Jackman, the surveyor, who had valued the estates, and had been informed by him, that the same were well worth £45,000, subject to the jointure of the respondent's mother, and without the furniture. And Mr. Farrer stated Mr. Jackman's valuation, and the amount thereof, to the appellant, and told him, that he verily believed it would sell for much more; and therefore repeatedly advised, that the estate should be sold by auction, because he had heard, and from good authority, that there were persons who were very desirous to buy the same; and the appellant assented, or seemed to assent, to the propriety of the advice so given by Mr. Farrer. The appellant then requested that Mr. Farrer would permit Mr. Garforth to call on him, to take instructions for the trust deed; [265] to which Mr. Farrer assented, and Mr. Garforth called upon him accordingly,

and he gave Mr. Garforth the best and fullest information and instructions upon the subject in his power.

After this meeting with the appellant, Mr. Fox for the first time stated to Mr. Farrer the annuity transaction between him and the appellant, which was the first intimation Mr. Farrer had of such transaction. Mr. Farrer having, in pursuance of advertisements and otherwise, collected a long account of debts claimed against Mr. Fox, made out a state thereof, and sent the same, on the 29th December 1777, to the appellant, with observations and remarks thereon; and about the same time Mr. Farrer wrote a letter to him, purporting, that he hoped, by the joint endeavours of Mr. Mackreth and Mr. Dawes, the annuitants would be brought to reasonable terms. The amount of such debts, including what was due to Mr. Mackreth and Mr. Dawes, was upwards of £50,000, reckoning the original sums advanced or said to be advanced for the purchase of the several annuities therein mentioned, which were upwards of £5000 a year. And in the list of debts so sent, there was an account of the several sums of money, and annuities claimed by the executrix of Thomas Chandless, deceased, amounting to about £3400. Upon that claim Mr. Farrer made the following memorandum: "N.B. There is not a farthing due on Chandless's demands—on the contrary they owe Mr. Fox £60." But notwithstanding this memorandum, the sum of £2460 was inserted in a schedule annexed to the draft of a proposed trust deed prepared by Mr. Garforth, under the direction of Mr. Mackreth, as due to Chandless.

The draft of a deed of trust was prepared by Garforth, for the purpose of vesting Mr. Fox's Surry estates in trustees, to be sold. This draft contained some unusual and extraordinary covenants on the part of Mr. Fox, and purported to vest the estates in Mr. Mackreth and Dawes, subject to the two annuities of £500 and £350 granted by Mr. Fox to Mr. Dawes, (the amount of which annuities was left in blank in the draft of the deed,) and to the payment also of £3000 and the accruing interest thereof, to the appellant, in trust to sell and dispose of the same, either by public sale and auction, or private contract; and until such sale to mortgage or charge the said estates with any money which they (Mr. Mackreth and Mr. Dawes) should think proper to borrow, or should advance themselves, with interest at £5 per cent. and also upon trust to apply all the money to arise by such sale, mortgage, or charge of the said premises (after deducting their and his costs and charges) in the first place in redeeming and discharging of the said annuity of £ to the said John Dawes, and all arrears thereof (if any should have accrued due); and in the next place in redeeming and discharging of the said annuity of £ to the said John Dawes, and all arrears thereof (if any should have accrued due); and in the next place in redeeming and discharging the said security of £3000 to the said Robert Mackreth, and the [266] interest thereof; and the residue in redeeming and discharging the several annuities, and in paying and satisfying the several debts of Mr. Fox in the schedule thereunto annexed mentioned, in case the same should be sufficient for those purposes; but if not, then in redeeming, compounding, and discharging such last-mentioned annuities and debts, in the best manner that they could procure or obtain the same to be redeemed or compounded, by apportioning and paying such residue for redeeming, compounding, and discharging thereof respectively, to such of the annuitants and creditors in the schedule named, as might be willing to accept the same in full satisfaction of their demands on Mr. Fox, in such manner as *they or he should think most proper and advantageous for his benefit*; and upon further trust to pay and apply the overplus money (if any) to Mr. Fox, his executors, administrators, or assigns; and in case any part of the premises should remain unsold, upon trust to stand seised thereof to the use of Mr. Fox, or as he should appoint: and the said draft contained a power (until such sale or sales) for the appellant and John Dawes, and the survivor of them, his heirs, executors, administrators, or assigns respectively, to receive the rents and profits of the said respective premises, except such parts thereof as were limited in use to Mr. Fox's mother during her life, for her jointure; and after deducting and retaining thereout all such costs and charges as aforesaid, to pay and apply the overplus of such rents and profits in such manner as the money to arise by sale or mortgage of, or to be charged upon the said respective premises, was thereinbefore directed to be paid and disposed of: and the said draft contained a



power authorising them the said Robert Mackreth and John Dawes, and the survivor of them, his heirs, executors, administrators, and assigns, to appoint, use, and employ, from time to time, all and every such attorney and attornies, *agent and agents, receiver and receivers*, banker and bankers, and other persons, as they or he should think necessary and proper in the execution of the said trusts, or any of them; and to gratify and pay such person and persons so employed, out of the said trust premises, for their time, labour, and assistance, in such manner as to them, or the survivor of them the said trustees, should seem reasonable, and to deduct and retain what they should so pay on these or any other accounts relative to the said trusts, in such manner as they were thereby authorised and directed to deduct and retain all such costs and charges as aforesaid; and the said draft contained the following extraordinary and unusual covenant, namely, That he, Mr. Fox, would not in any manner molest, interrupt, or obstruct the said Robert Mackreth and John Dawes in the execution and discharge of the several trusts thereby reposed in them, but that he would at all times, at his own costs, upon the request of the said Robert Mackreth and John Dawes, join in any sale or mortgage of the premises, and execute and acknowledge any deeds, assurances, or surrenders, for better conveying and assuring the same premises [267] unto any purchaser or mortgagee, and enter into such covenants as was usual, and do all other acts for the better assuring the premises to the uses and upon the trusts aforesaid.

On the 6th January 1778, the above draft was sent to Mr. Farrer for his perusal and approbation on behalf of Mr. Fox, and on the following day the same was returned by him to Garforth, with a letter, purporting that the terms of the draft were very different from what he (Mr. Farrer) expected, inasmuch as it appeared from the draft, that the annuities granted to the said John Dawes were to continue as annuities till the respondent's estates could be sold, and the purchase money applied by the trustees; and inasmuch as the trustees were thereby empowered to sell and dispose of the estates without the concurrence or interposition of Mr. Fox, and to employ such attornies, agents, receivers, and bankers, and other persons, as they should think proper, without being answerable for their acts, or for any loss which might happen from such attornies, agents, receivers, bankers, or other persons.

On the 8th of January, the appellant called upon Mr. Farrer, who then stated to him his objections to the terms of the draft, particularly with respect to the annuities granted to Dawes, and the unlimited power of sale vested in the trustees; and he also then represented to Mr. Mackreth, that he hoped he did not intend that the annuities to Dawes should remain as annuities till the sale of the estate, but that he meant to have them immediately liquidated, and a gross sum to be inserted in the schedule to be annexed to the trust deed, to bear interest at £5 per cent., otherwise the rest of the annuitants would expect the same terms, and the whole plan proposed by Mr. Fox's friends for extricating him from his difficulties would be defeated.

The appellant admitted these objections to be reasonable, and appeared to blame Garforth, declaring that he had not attended to the instructions given him, but that Mr. Farrer should have the draft prepared in his own way; and for that purpose Mr. Mackreth requested him to call on Robert Burton Esq. in Lincoln's Inn, who had prepared the draft, and state his objections to him. Mr. Farrer accordingly waited upon Mr. Burton, in company with Mr. Mackreth, and after some conversation upon the terms of the draft, Mr. Burton admitted that he thought it was necessary to make some such alterations therein as Mr. Farrer had suggested, and the draft was then left with Mr. Burton for the purpose of making such alterations.

On the 12th January 1778, the draft of the trust deed was again sent to Mr. Farrer, with some alterations made therein by Mr. Burton; but Mr. Farrer, after having perused it as altered, conceived the same to be still imperfect or improper, and made some further observations thereon, either in the margin of the draft, or upon a separate paper; which observations he submitted to Mr. Burton on the day after he had received back the draft, in order that some further alterations might be made therein before [268] the same was engrossed; but Mr. Farrer never knew or heard whether any further alterations were made in the draft or not, for the same was engrossed by Mr. Garforth, without being ever afterwards sent back

to Mr. Farrer, nor did he ever see the same again, nor was he ever further consulted with thereon, or made privy to the liquidating the sums with which the blanks were to be filled up.

During the time that Mr. Farrer was employed in settling the draft of the trust deed with Mr. Garforth and Mr. Burton, Mr. Mackreth, finding that Mr. Farrer objected to Mr. Dawes's annuities continuing as annuities, agreed with Mr. Fox to take the *arrears that might be due*, and to add the same to the principal; and also to lend Mr. Fox such further sum of money as, with what was then due to Mr. Mackreth, would amount to the sum of £10,000; but this transaction was concealed from Mr. Farrer, and no mention was made of it in the draft of the trust deed.

Mr. Fox being in expectation of borrowing a further sum of money from the appellant, and apprehending it was to be advanced upon the trust deed being executed, became extremely anxious, and pressed Mr. Farrer to get the same finished; in consequence of which, on the 15th January 1778, Mr. Farrer wrote a letter to Mr. Mackreth, of which the following is a copy: "Sir, on Sunday last I received the draft, altered, from Mr. Garforth. I waited on Mr. Burton the first moment I could see him, and suggested some further observations, which met with his approbation. I have called upon him this morning, but cannot learn from his clerks whether he has finished the draft or not. My reason for troubling you with this is to assure you, that I will be ready at any place and hour to meet Mr. Garforth and you, and to settle the plan of the schedule, which, in my idea, is a very material thing both to you and Mr. Fox. I have had sent in between £300 and £400 more book debts, which I will furnish you with. Mr. Fox is extremely desirous of having the business concluded; and I flatter myself you will do me the justice to say that it has not been delayed by me. I am your most obedient servant, Oliver Farrer."

Notwithstanding this letter, Mr. Farrer never heard more of the draft of the trust deed, and the schedule was never settled at all, nor was any list of debts or schedule ever annexed to the trust deed, although it was afterwards executed by Mr. Fox. And Mr. Mackreth in his answer says, he believes that after the draft had been perused, settled, approved, and completely finished by Mr. Burton, (Mr. Mackreth's counsel,) the said Mr. Garforth sent for and had the same ingrossed ready for execution on the 16th of January 1778.

During the preparation of the trust deed, the agreement by Mr. Mackreth, before mentioned, to advance Mr. Fox a further sum of money, was entered into, and a draft of a deed poll was prepared by Mr. Garforth, and settled by Mr. Burton, for securing [269] the same upon Mr. Fox's estate in Surry; but it is remarkable, that the loan of such money, the draft of the deed for securing it, and the subsequent execution of the deed, were all concealed from Mr. Farrer: for in the draft of the trust deed, the last time which Mr. Farrer saw it, there was not the smallest intimation that there was any debt due from Mr. Fox to Mr. Mackreth, except the aforementioned sum of £3000 and the money due on account of the annuity transaction. After Mr. Farrer had seen the draft, the recital respecting Mr. Dawes's two annuities was struck out, and instead thereof, the mortgages to Mr. Mackreth for £7000 and £3000 were inserted in the ingrossment of the trust deed.

During the time the trust deed had been preparing, the appellant, although well apprized of Mr. Jackman's valuation of the respondent's estates, privately, and wholly unknown to Mr. Fox or any of his friends, sent down a surveyor from his own neighbourhood, in the county of Hants, to view the estate and report the value to him.

The 16th of January 1778 was the day appointed for Mr. Fox to execute the trust deed, and to receive the further sum of money then intended to be advanced to him by the appellant; and for this purpose he had an invitation to meet Mr. Mackreth to dinner at Mr. Garforth's house; or, as Mr. Garforth in his deposition stated, Mr. Fox and Mr. Mackreth agreed to meet and dine at his house in Lower Brooke Street, in order to execute the additional security and the deed of trust.

The parties met accordingly; but all business was postponed till after dinner; when a treaty was set on foot for Mr. Mackreth himself to purchase the estates of Mr. Fox. The history of this treaty, from the account given of it by the appellant himself, in the answer put in by him to the respondent's bill, is as follows: "That after dinner, and before the respondent Mr. Fox had executed the trust deed, the

respondent, in the course of conversation, said to the appellant, that as he should sell his estates in the county of Surry, he wished the appellant would buy the same, or to that effect; and thereupon the respondent proposed to the appellant to buy the same, and said the same had been valued by Thomas Jackman, together with the timber thereon, at £45,000, and that he (the respondent) thought it was well worth that sum, or to that effect. That upon considering the proposal, the appellant informed the respondent, that he (the appellant) thought £45,000 a very long price, and much more than the value of the said estates, considering that the houses, messuages, cottages, and mills thereon, were valued by Jackman's particular, or rental, at only the clear yearly rent of £285 15s. and the land at only the clear yearly rent of £981 1s. making £1216 16s. and subject to the respondent's mother's jointure of £240 per annum, and £4 a year for Bishop's Mead; and that if he (the appellant) bought the respondent's estates, he should buy the same on speculation, in [270] order to sell out in parcels. That the respondent thereupon informed the appellant, that Jackman had told him he thought the estates would fetch the money he valued them at; to which the appellant answered, that Jackman, in his opinion, had valued the estates at too much money; and the appellant then made a short calculation of the value of the estates, and valued the messuages, houses, and cottages at 14 years purchase, and the land at 30 years purchase, amounting, together with the furniture and other things in the mansion-house, and which was estimated by the respondent as well as the appellant to be of the value of £500, and together with the timber, which was also admitted to be of the value of £4000, to £37,853 14s. and no more. That after two or three hours further conversation, the respondent offered his estates to the appellant for £42,000 which the appellant declined to give, but said he would split the difference, and would give the respondent £39,500 for his estates, in case the respondent would discharge his estates from his mother's jointure; whereupon a long conversation ensued between the respondent and the appellant, and the appellant told the respondent he would not give more. That the respondent not agreeing to accept the terms offered by the appellant, the indentures of the 15th and 16th January 1778 (i.e. the trust deeds) were executed; and that after the said deeds were executed, the respondent, being very pressing that the appellant should become the purchaser of his estate, resumed the conversation relating thereto, and urged the appellant to consider of his proposals; and at length, finding that the appellant was unwilling to alter his last proposal, the respondent expressed a concern what he should do touching his mother's jointure of £240 per annum, payable out of the estate, if he should accede thereto; saying, that he could manage to pay it during the time he himself lived, out of the rents and profits of the estates to which he was entitled for life; but in case of his death before his mother, she would be destitute and without a subsistence. To which the appellant said, that he would agree to give the respondent £39,500 and subject himself to the payment of his mother's jointure, in case she survived the respondent. That the respondent thereupon closed with the appellant's last offer, and declared that he would accept the same. That the respondent soon afterwards rung the bell for or called in the said John Baynes Garforth, who was, for the greatest part of the time while such treaty was proceeding, in another room; and on his coming into the room where the respondent and appellant were, the respondent told Garforth, that he had agreed to sell his estates to the appellant for £39,500 and asked him if it would not be proper to have some memorandum of the agreement drawn up, and signed by the appellant and the respondent, till proper articles could be prepared; and Garforth having replied in the affirmative, the respondent desired him to draw up such memorandum; and [271] it having been also agreed between the respondent and appellant, that the respondent should receive the rent up to Lady-day then next, and on or before that time convey the estates to the appellant, Garforth drew up the memorandum after mentioned. That after the memorandum was drawn up, Garforth, to the best of the appellant's recollection and belief, read over the same; and the respondent, as well as the appellant, approving thereof, did, *about 12 o'clock at night*, sign the same in the presence of Garforth. That the respondent and the appellant afterwards staid and supped with Garforth; and the appellant believes, that Garforth, and also the appellant, being on a very friendly and intimate footing with the respondent, might ask and prevail on him to stay with them longer; and

that the respondent and the appellant did continue together till about three o'clock the next morning, when they parted, after agreeing to meet again on the 27th day of the said month of January, in order to execute proper articles, which the respondent and the appellant directed Garforth to prepare between them for the sale and purchase."

Mr. Garforth, in his deposition, states the directions for preparing the agreement with more caution than Mr. Mackreth in his answer; for Mr. Garforth states, that "on hearing a bell ring he went into the room," when Mr. Fox informed him he had agreed to sell his estates to Mr. Mackreth for £39,500; and they (Mr. Fox and Mr. Mackreth) or one of them, asking if it would not be proper to have a memorandum of the agreement drawn and signed, till proper articles could be prepared, Mr. Garforth declared he thought it would; and deponent was then desired (not saying by whom) to draw up a memorandum for the purpose; and he thereupon drew up the following memorandum; viz. "16th January 1778. Mr. Fox agrees to sell his estate in Surry to Mr. Mackreth for £39,500 with the furniture and other things at his capital mansion-house at Horseley, except plate, linen, books, and family pictures, to be paid on or before the 25th March 1778; and Mr. Fox to receive the rents and profits up to the said 25th day of March next; on or before that time to convey the said estates, clear of all incumbrances, except £4 a year for Bishop's Mead, and a copyhold rent of 40s. a year for an estate in the parish of Bookham."

In the whole of the transaction of the 16th January 1778, Mr. Fox's interest was sacrificed to Mr. Mackreth's; for it is observable that the things necessary for Mr. Mackreth's safety were duly attended to; the mortgage to him for £7000 was duly executed and attested; the agreement by which he got so advantageous a bargain was signed by both parties; but with respect to Mr. Fox, the trust deed, (the execution of which was the principal object of the meeting,) by which Mr. Fox conveyed his estates to Mr. Mackreth and Mr. Dawes, in trust, to sell, and apply the money in discharging his debts, mentioned in a schedule referred to by the deed, was executed by Mr. Fox in a very imperfect state, [272] and without any witnesses attesting the execution, and without any schedule or list of debts indorsed or annexed to it, although the debts in such schedule were referred to in the deed, and were the principal or sole object in view in executing the deed.

The interest of Mr. Fox was equally neglected and sacrificed with respect to the two annuities to Mr. Dawes, and in the manner in which the appellant was permitted to make up the sum of £7000 for which the mortgage was given to him by Mr. Fox.

The consideration for the mortgage of £7000 was made up in the manner following; viz.

|   |    |   |       |    |    |
|---|----|---|-------|----|----|
| In cash and bank notes then advanced  | -- | — | £1635 | 15 | 2½ |
| The principal money advanced for the two annuities  |    | — | 5100  | —  | —  |
| A quarter's arrears of the said annuities, to 23d December 1778, which Mr. Dawes had agreed to accept                                   | —  | — | 212   | 10 | —  |
| Twenty-three days for the said annuities, which Mr. Mackreth claimed for himself, after Mr. Dawes had consented to their being redeemed | —  | — | —     | —  | —  |
|   |    |   | 51    | 14 | 9½ |
|   |    |   | £7000 | —  | —  |

Mr. Mackreth in his answer says, that he applied to Mr. Dawes touching the taking up his said annuities, and Mr. Dawes agreed to accept the said sum of £5100 and the arrears due on the two annuities, being *one quarter up to the 23d December 1777*, amounting to £212 10s. in discharge of the annuities; and Mr. Mackreth agreed to pay him such principal and arrears; and Mr. Mackreth was permitted to charge Mr. Fox for arrears of annuities down to the 16th January 1778, although Mr. Dawes was satisfied with receiving the arrears of such annuities down to the 23d December 1777. And thus Mr. Garforth advised Mr. Fox to execute a mortgage to Mr. Mackreth for £7000 although the sum of £5312 10s. part of that sum, was due to Mr. Dawes, and although Mr. Dawes was not present to give any discharge for the annuities, nor to receive the money, nor in truth did he

receive the money from Mr. Mackreth till six months after; for Mr. Mackreth in his answer says, "That he did afterwards, on the 27th of July 1778, pay to the said John Dawes the said principal sum of £5100 and the said sum of £212 10s. *and interest for the said two sums up to that time.*" The only discharge which Mr. Garforth took for the two annuities to Mr. Dawes was the following memorandum signed by Mr. Mackreth; viz. "16th January 1778. I *do* hereby acknowledge to be satisfied the annuities of £500 and £350 granted by James Fox Esq. to John Dawes Esq. and the interest of the sum of £3000 due on mortgage from Mr. Fox to me, up to this day; and that I am indebted to Mr. Fox in the sum of £120. R. Mackreth."

[273] How Mr. Mackreth became indebted to Mr. Fox in the sum of £120 as above mentioned, he has never explained.

At the time of this treaty between the appellant and the respondent, Mr. Mackreth was in possession of the valuation of Mr. Jackman; and it appears from his answer (stating the circumstances of the treaty) that he had critically examined such valuation. He had also received from Mr. Farrer his advice, that the estates ought to be sold by public auction; and Mr. Farrer's reasons for such advice. The trust deed had also pointed out to him his duty to make the experiment of a sale by public auction; but, what is more material, Mr. Mackreth was at the time of the treaty in *possession of a valuation* of the estate, made by Mr. Hampton, a surveyor of his own, whom Mr. Mackreth had sent down to the estate in December 1777, and who was also employed by the appellant, and has charged him for such employment relating to the said estate from the 8th to the 17th January 1778. This valuation, and the knowledge obtained from it, Mr. Mackreth concealed from Mr. Fox, and it was not discovered that such valuation had been made till the cause was at issue.

On the 20th of January, Mr. Mackreth and Mr. Garforth attended Mr. Farrer, as to settling the schedule to be annexed to the trust deed, although the deed had been executed four days before; and as to the mode of treating with Mr. Fox's creditors; but the execution of the trust deed, the mortgage for £7000 and the sale of the estate, were concealed from Mr. Farrer.

Mr. Garforth prepared further articles of agreement, which were settled by Mr. Burton, Mr. Mackreth's counsel, on the 27th or 28th of January 1778; but these articles were never shewn to Mr. Farrer or any other of Mr. Fox's friends, nor did they know or suspect any thing about them. A blank was left in the articles for the amount of Mrs. Fox's jointure. Mr. Mackreth first signed those articles, and filled up the blank with £240; Mr. Garforth then waited upon Mr. Fox with the articles. Mr. Fox (as Mr. Garforth stated) altered the sum for his mother's jointure from £240 to £300 a year, and then executed the articles in the presence of Mr. Garforth and his clerk. Mr. Mackreth acquiesced in the alteration of the amount of Mrs. Fox's jointure, and re-executed the articles. The articles bear date the 16th of January 1778, (the same day as the first memorandum,) but were not executed till the 27th or 28th of January; and at the same time the £120 which Mr. Mackreth had acknowledged by the memorandum before mentioned to owe to Mr. Fox, was paid to him, as appears by Mr. Fox's receipt dated the 27th January 1778. Two parts of the articles were executed, but both remained in the hands of Mr. Mackreth and his attorney Mr. Garforth. These articles were laid before Mr. Burton as counsel for Mr. Mackreth, but Mr. Garforth (Mr. Mackreth's attorney) was the only person who saw them on behalf of Mr. Fox.

On the 2d of February 1778, Mr. Garforth wrote the following letter to Mr. Farrer, still concealing the execution of the trust [274] deed, and the agreement for the sale: viz. "Sir, Mr. Mackreth is of opinion that another advertisement is necessary for the *creditors of Mr. Fox* to bring in their demands, and has talked with Mr. Fox; which he informs me Mr. Fox approves of: therefore I have this morning sent an advertisement to be inserted in the *Morning Post* and *Public Advertiser*, and in the *London* and *General Evening Post*, for that purpose. I am, Sir, your most obedient humble servant, J. B. Garforth.—P.S. Mr. Mackreth was in hopes to have the writings before this, and begs to *have them immediately.*"

Some time in January or February 1778, Mr. Farrer attended Mr. Fox, by his desire, at his lodgings, and found him very low-spirited, and much out of temper.

Mr. Farrer then learnt from Mr. Fox, that he had signed a parcel of deeds and papers at Mr. Garforth's, and that he did not know what they were, or what might be the consequences; and that it was probable he had signed the trust deed, but that Mr. Fox really could not tell what he had signed; and Mr. Fox desired Mr. Farrer to go to Mr. Mackreth and get an explanation, and let him know so soon as he could. Mr. Farrer immediately called upon Mr. Mackreth and Mr. Garforth, but finding neither of them at home, called again the next day on Mr. Mackreth, and being informed that Mr. Mackreth was not up, he desired the servant to inform him that he came from Mr. Fox, and wished to see Mr. Mackreth upon particular business. Mr. Mackreth returned an answer that he was not well, and thereupon desired Mr. Farrer to call on Mr. Garforth. Mr. Farrer did call upon Mr. Garforth, but could not see him; and upon going to Mr. Fox's lodgings, found he was gone out of town, but could not learn whither he was gone.

On the 7th of February, Mr. Mackreth wrote the following letter to Mr. Farrer: "Dear Sir, I shall esteem it a singular favour if you will be kind enough to send all the writings in your hands of Mr. Fox's Horseley estate to Mr. Garforth some time to-morrow, and I beg leave to assure you it will greatly oblige, dear Sir, your most obedient and very humble servant, Robert Mackreth."

On the 19th or 20th of February 1778, Mr. Fox intending to leave England, executed a power of attorney, authorizing Mr. Farrer to see to the application of the purchase money to arise by sale of his Surry estate; another for receiving money from the Accountant-General of the Court of Chancery; and another for the management of his life-estates in England and Ireland; and at the same time Mr. Fox declared he was determined to go abroad, and not return till his affairs were put in a better train.

On the 27th of February, Mr. Mackreth wrote again to Mr. Farrer for the title deeds, in the following words: "I request, by Mr. Fox's desire, that you will send all the writings of the Surry estate to Mr. Garforth's some time to-morrow." Mr. Farrer returned for answer, That he saw Mr. Fox the evening before he went out of town, but that he had given no directions [275] respecting the writings. Mr. Farrer also informed Mr. Mackreth, that in consequence of his letter, he had ordered schedules of the deeds to be made, and that, on Mr. Fox's order in writing for the delivery, they should be ready, on the usual receipts.

After writing as above, Mr. Mackreth met Mr. Farrer in the street, and again asked for the title deeds, alleging that Mr. Farrer knew that he (Mr. Mackreth) was entitled to them as a mortgagee, without any order from Mr. Fox; to which Mr. Farrer replied, he was determined not to deliver them without an order from Mr. Fox. Mr. Mackreth admits he did not send for the deeds as purchaser; and says he does not recollect or believe that he mentioned any ground for desiring the same. During all this time Mr. Mackreth concealed from Mr. Farrer his having agreed to purchase the estates.

From an entry in the books of Mr. Hampton, the surveyor privately employed by Mr. Mackreth, it appears that he charged Mr. Mackreth for a day's attendance on the 5th January 1778, and for ten days from the 8th to the 17th January. Mr. Hampton was frequently heard to say, that after he had had a view of the estate he advised Mr. Mackreth to purchase it at the price put upon it by Jackman. The appellant concealed from Mr. Fox and his friends that he had ever employed any surveyor to value Mr. Fox's estates; and in his account of money disbursed on account of Mr. Fox, he never made any charge of what he had paid Hampton. And after the death of Hampton, Mr. Mackreth sent for and got into his own possession Hampton's books relating to the estate in question; and the appellant for the first time, when the cause was heard at the Rolls, avowed that he had employed and received information from Hampton relating to the estate.

Between the 28th January 1778, and the 25th April, Mr. Mackreth advanced Mr. Fox £1000 and upwards.

Some time in March, Mr. Farrer for the first time heard of the agreement for the sale between the appellant and Mr. Fox; but there was no pretence to say that he knew the price at which the estate had been sold till April 1778. Mr. Garforth prepared the conveyance of the estate, and laid the same before Mr. Burton, who settled and approved it on behalf of Mr. Mackreth. On the 25th of March 1778,

(the time the conveyance was to be executed,) Mr. Fox was at Paris, and wrote to Mr. Garforth, desiring him to send the writings that were necessary to Calais, but also desired that Mr. Farrer might look them over before they were sent. This requisition of Mr. Fox's for the draft of the conveyance to be shewn to Mr. Farrer, rendered it necessary for Mr. Mackreth to acquaint him with the purchase, which had hitherto been unknown to him and all Mr. Fox's friends. Accordingly Mr. Farrer wrote to Mr. Mackreth, requesting the draft of the conveyance to be sent to him for his perusal on behalf of Mr. Fox; and on the 26th of March, received the draft from Mr. Garforth, together with the following letter: "Sir, I have herewith sent the draft of the conveyance from Mr. Fox to Mr. [276] Mackreth, as approved by Mr. Burton. Mr. Mackreth begs you will be so obliging as to look it over, and return it as soon as you can. I am, Sir, your most obedient servant, J. B. Garforth."

Mr. Mackreth had some time before this period actually concluded an agreement with Mr. Page for the purchase of the estate, by which he (Mr. Mackreth) was to get £11,000; and Mr. Page was to receive the rents as from Lady-day 1778.

The draft of the conveyance sent to Mr. Farrer was very imperfect, blanks being left for the sums due to Mr. Mackreth, and the sum then to be paid, and no copy of the purchase article was sent with it.

On the 1st of April 1778, Mr. Mackreth met Mr. Farrer in Lincoln's Inn. Mr. Mackreth informed Mr. Farrer he was going to call upon him. Mr. Mackreth began a conversation respecting the draft of the conveyance. Mr. Farrer told Mr. Mackreth he must see the purchase agreement before he could settle the draft on behalf of Mr. Fox; upon which Mr. Mackreth took the same out of his pocket, and held it whilst Mr. Farrer read part of it by his side. Mr. Farrer afterwards took the same into his hands, and after he had read the same through, he (Mr. Farrer) immediately exclaimed, "Good God! what, have you bought the estate and furniture, and to be cleared of the jointure, for £39,500, when you knew Mr. Jackman had valued the estate alone, subject to Mrs. Fox's jointure, and without the furniture, at £45,000?" Upon which Mr. Mackreth stated to Mr. Farrer, that the sale was an advantageous one to Mr. Fox; and that it would be a great convenience to Mr. Fox to receive ready money, and get out of his difficulties without further trouble; and that Mr. Fox meant that he (Mr. Mackreth) should get £2000 or £3000 for his trouble, which Mr. Mackreth represented to be very reasonable; but Mr. Farrer then informed Mr. Mackreth, that it was in vain to endeavour to convince him (Mr. Farrer) of the propriety of the measure, for that he could never approve the transaction; and that he would never settle the draft of the conveyance till he had either the *original agreement*, or a copy of it. Mr. Farrer desired Mr. Mackreth to remember, that the purchase had been agreed upon without his (Mr. Farrer's) knowledge; and further declared, that he hoped Mr. Mackreth did not mean to send the purchase money to Calais; and asked what he intended in that respect, but could get no satisfactory answer from Mr. Mackreth.

A few days after, viz. on the 6th of April, a copy of the agreement was sent, either by Mr. Mackreth or Mr. Garforth, to Mr. Farrer; and at the same time Mr. Farrer also received another draft of a deed, which purported to be a draft of an assignment from Mr. Fox to Mr. Mackreth and Mr. Dawes, of the purchase money (after deducting thereout the several sums of money stated to be due to Mr. Mackreth) upon mortgage of the estate, but which sums were not specified in the draft. This draft was settled and approved of by Mr. Burton on behalf of Mr. Mackreth [277] and Mr. Dawes, and was sent to Mr. Farrer for his approbation on behalf of Mr. Fox. Mr. Farrer never settled or approved the draft of the conveyance, but made several observations on it; one of which was, asking how the purchase money was to be paid; and observing, that it ought to be paid into the hands of some banker, to the joint account of Mr. Mackreth and some person on behalf of Mr. Fox, previous to the execution of the deed. And the draft of the assignment of the purchase money to Mr. Mackreth and Mr. Dawes appeared so exceptionable, that he totally disapproved thereof as improper, and what Mr. Fox could not execute consistent with his own interest; and on the back thereof wrote as follows; viz. "I cannot approve this draft on behalf of Mr. Fox. O. F. 7th April 1778."

On the 7th April 1778, Mr. Farrer returned the draft of the intended conveyance, and the draft of the assignment of the purchase money, to Mr. Mackreth.

Mr. Garforth in his deposition says, he attended Mr. Burton with the draft so

returned by Mr. Farrer, and left the same for his perusal and consideration, and to make any alterations in consequence of Mr. Farrer's observations, which he (Mr. Burton) might think necessary; and Mr. Burton having returned the drafts, Mr. Garforth caused the same to be ingrossed, but the drafts were never again shewn to Mr. Farrer, nor did Mr. Farrer ever see the same again, or know how the blanks were filled up, nor was he requested to attend the execution of the deeds.

On the 17th of April 1778, Mr. Fox returned to England, and, as Mr. Mackreth admits by his answer, *greatly distressed for money*; and thereupon Mr. Garforth waited upon and informed him what had been done, and, as he states, communicated to him Mr. Farrer's objections or alterations; on which, Mr. Garforth says, according to the best of his recollection, Mr. Fox declared the same *to be trifling, and made with a view to perplex*.

When Mr. Fox arrived in England, Mr. Mackreth was out of town. Mr. Garforth immediately wrote to him, and on the 25th of April the conveyance was signed by Mr. Fox, but without the privity of Mr. Farrer or any one of Mr. Fox's friends.

By this time the debt claimed by Mr. Mackreth to be due from Mr. Fox amounted to £11,097, which being deducted out of £39,500, the purchase money, there remained £28,403 due to Mr. Fox. £1000, part of the £11,097, appears to have been money supplied by Mr. Mackreth to Mr. Fox on and previous to the said 25th April.

Mr. Fox's confidence in Mr. Mackreth was so great, that when Mr. Fox had executed the conveyance of his estate, and signed a receipt for the whole purchase money, Mr. Mackreth gave him, and he accepted, and Mr. Garforth (whom Mr. Mackreth represents as Mr. Fox's solicitor) permitted him to accept, the following note and memorandum on a piece of unstamped paper; viz. "25th April 1778. Received of James Fox Esq. the sum of [278] £28,403 to account for on demand, with lawful interest. R. Mackreth."

After Mr. Mackreth had given Mr. Fox this note for £28,403 he wrote under it, for some reason which he does not chuse to reveal, the following; viz. "25th April 1778. I do hereby charge all my estates in the county of Surry with the payment of the above sum of £28,403, with interest, as witness my hand, R. Mackreth."

Mr. Mackreth had no other estates in the county of Surry besides those which Mr. Fox had then conveyed to him; notwithstanding which, Mr. Mackreth states by his answer, that Mr. Fox appeared to be perfectly satisfied with the security given by Mr. Mackreth for the purchase money.

Mr. Mackreth denies that the deeds were signed by Mr. Fox without the knowledge of any of his friends, for he says the deeds were executed with the knowledge of Mr. Garforth, and that Mr. Fox advised with him thereon, and that Mr. Garforth drew and approved the deeds, as well on behalf of Mr. Fox as of him (Mr. Mackreth); but Mr. Garforth permitted Mr. Mackreth to charge interest upon £10,000, for which he had a mortgage upon the estates in question, up to the 25th April 1778, although Mr. Mackreth was to receive the rents of the same estates as from the 25th of March preceding, and by the agreement was to have paid the whole purchase money on that day; and neglected to require from Mr. Mackreth either the interest of the purchase money, or a proportion of the rents as from Lady-day up to the 25th April; and by this circumstance Mr. Mackreth gained an advantage of almost £200 from Mr. Fox.

The receipt and note before stated are in the hand-writing of Mr. Garforth, and signed by Mr. Mackreth.

From Mr. Mackreth's account it appears that he paid £358 12s. 7d. (part of which was to Mr. Fox's servants at Horseley) to Mr. Fox, on this 25th April 1778, on account of the £28,403.

On the 27th April 1778, Mr. Farrer attended Mr. Fox at his house, by appointment, when he informed him that he (Mr. Fox) had executed the deeds; and on Mr. Farrer's asking what was become of the money, Mr. Fox said he had got a security for it; and Mr. Farrer then first saw the paper before mentioned.

On the 29th of April, Mr. Mackreth paid on Mr. Fox's account £4000 more.

On the 30th of April, Mr. Mackreth and Mr. Page signed the agreement for sale to Mr. Page for £50,500: Mr. Page paid upon signing the agreement £11,000 to Mr. Mackreth, and immediately took possession, and was to receive the rents as from



Lady-day then last. Mr. Mackreth concealed this sale to Mr. Page from Mr. Fox and his friends, who do not appear to have been acquainted with it till the month of February 1781.

On the 1st of May, Mr. Mackreth states that he paid on Mr. Fox's account £7808 3s. 8d. On the 2d of May, he paid on Mr. [279] Fox's account £1162 10s.; and on the same day Mr. Fox accompanied Mr. Mackreth and Mr. Garforth, to get his mother to sign the conveyance and discharge the estate from her jointure; at the same time Mr. Fox executed a security to his mother for an annuity of £300 and Mr. Mackreth executed *a bond* to pay the £300 a year in case Mrs. Fox survived Mr. Fox. Mr. Dawes was not a party to the conveyance, or privy to the transaction, though named a trustee in the trust deed.

After the conveyance was executed, Mr. Fox began to draw bills or drafts upon Mr. Mackreth on account of the purchase money, and continued to do so till some time in the month of October following; and Mr. Mackreth within that time redeemed some of Mr. Fox's annuities. In the latter end of October 1778, nearly the whole of the purchase money was exhausted, and annuities and debts to a very considerable amount still remained due from Mr. Fox.

Mrs. Fox, the respondent's mother, had granted annuities upon her jointure, those Mr. Mackreth redeemed out of the purchase money, and obtained assignments of them to himself; and at the hearing of this cause, the assignments of two of those annuities remained in force, and in the hands of Mr. Mackreth.

In October 1778, Mr. Mackreth drew out an account of the sums paid by him to Mr. Fox and on his account, and sent it to Mr. Fox, the balance of which account appeared to be (after giving credit for the whole purchase money) only the sum of £733 18s. 9d. due to Mr. Fox. In this account Mr. Mackreth leaves a blank for the sums paid in respect of the redemption of two annuities, and states the items in the manner following; viz.

June 17th. "To Richard Peale's annuity, purchased at six years and a half, and bought in at six years, with arrears, which are to be paid.

July 22d. "To Massey's annuity, purchased at seven years, and re-purchased at six years and a half, with arrears, which are to be paid."

Mr. Mackreth at the end of this account sums up the cash paid to different people by Mr. Fox's orders, with interest charged thereon £28,338 2 9

This summing up of the account exceeds the real and true amount thereof by £1691 3 2

But Mr. Fox placed such implicit confidence in Mr. Mackreth, that, without examining the account, and without regarding any thing further than the sum total of the balance, he drew a bill upon Mr. Mackreth for the said sum of £773 18s. 9d. which Mr. Mackreth paid some time in the said month of October, or in the beginning of November 1778.

[280] Mr. Mackreth in his answer accounts for this error in his account as follows: he says, that when he sent the account to Mr. Fox, not having then finally settled two annuities which Mr. Fox had authorized him (Mr. Mackreth) to pay, he (Mr. Mackreth) put down in the said account such sums to be paid in discharge of the said two annuities as he believed were originally paid for the said annuities, and were then due for the arrears thereof, and thereby made the balance then remaining in his (Mr. Mackreth's) hands, belonging to Mr. Fox, amount to £773 18s. 9d.; and Mr. Mackreth admits that he did, in or about October 1778, send or cause to be sent the said account to Mr. Fox, but with errors excepted; and that he (Mr. Mackreth) did afterwards, on the 5th May 1781, send or cause to be sent or delivered to Mr. Fox *another account*, wherein, after having finally settled the said two annuities, Mr. Mackreth made the balance to be £617 13s. over and above the said other balance of £773 18s. 9d.

Mr. Fox did so implicitly rely upon Mr. Mackreth, that he never examined the accounts, and therefore did not discover the error, although Mr. Fox borrowed money upon extravagant terms from Mr. Mackreth at a time when Mr. Mackreth was the debtor of Mr. Fox, and whilst the account remained in this erroneous state.

On the 30th August 1779, Mr. Mackreth states, that Mr. Fox executed a power

of attorney for surrendering some copyholds, part of the estates in question; and in the month of November, Mr. Mackreth states, that Mr. Page having raised a sum of money by mortgage of part of the said estate, and the deed for making a tenant to the *præcipe* for suffering the recovery, and the indentures of lease and release of the 22d and 23d of December 1777, executed by Mr. Fox and Mr. Farrer, having been delivered to the mortgagee; and Mr. Page having occasion to raise a further sum by mortgage of the said estates, Mr. Mackreth, in order to accommodate Mr. Page with duplicates of those title deeds, applied to Mr. Fox, who executed duplicates of those deeds; and Mr. Mackreth says, that Mr. Fox *having been desired to write to Mr. Farrer*, desiring him to execute the duplicate of one of the deeds, Mr. Fox agreed to do so.

Soon after, a person, who said he came from Mr. Garforth, called on Mr. Farrer with a deed or deeds, and a letter from Mr. Fox, in which Mr. Fox *mentioned that he was informed* it was necessary for him (Mr. Farrer) to execute the said deed or deeds. Mr. Farrer refused to execute the deed; and soon after Mr. Mackreth called upon him, and most anxiously requested him to execute the same, which Mr. Farrer understood from him was a duplicate or duplicates of the deed by which Mr. Farrer had conveyed the legal estate to Mr. Mackreth. Mr. Mackreth assigned as a reason, that the duplicates were wanted to accommodate the person who had bought the estate, by enabling him to raise money on mortgage. Mr. Farrer replied, he should be far from refusing [281] to do any thing to accommodate any gentleman which he could do with propriety, but that as Mr. Mackreth well knew that he (Mr. Farrer) never had and never could approve the sale to Mr. Mackreth, he (Mr. Farrer) was determined not to do any act which might be looked upon as a *confirmation of the transaction*. And Mr. Farrer added, that if a memorandum was indorsed on the deeds, containing the day and year when the duplicates were executed, the real reason for which they were required, and that the execution thereof by Mr. Farrer should not in anywise be construed to operate as a confirmation of the sale to Mr. Mackreth, then he (Mr. Farrer) would execute the same, but on no other terms whatever. Mr. Mackreth used many entreaties to prevail on Mr. Farrer to alter his resolution, but without effect: and Mr. Farrer well remembers, from the singularity of the expression, that Mr. Mackreth told him, that if he would execute the duplicates, he (Mr. Farrer) should have a pull upon him for any thing he pleased; upon which Mr. Farrer returned an answer which immediately put an end to the conversation, and Mr. Mackreth declined to have the duplicates executed upon the terms mentioned by Mr. Farrer.

The execution by Mr. Fox of the power of attorney for surrendering the copyholds, and the duplicates, are insisted upon by Mr. Mackreth as confirmations of the sale to him; but it will appear evident from the following facts, that Mr. Mackreth still retained his influence over Mr. Fox, and that Mr. Fox placed unbounded confidence in Mr. Mackreth, who had become a creditor of Mr. Fox, by advancing him money, after his purchase money was supposed to be exhausted, upon a new annuity at six years purchase; and Mr. Garforth (Mr. Mackreth's particular friend and attorney) had also advanced money to Mr. Fox upon an annuity at five years purchase; and Mr. Fox still remained loaded with so many annuities, and debts to so great an amount, as to be in the utmost distress.

It appears from the schedule annexed to Mr. Mackreth's answer, that on the 12th of November 1778, Mr. Mackreth paid Mr. Peal £525 for the re-purchase of his annuity; and that on the 16th November 1778, he paid Mr. Massey £548 4s. 10d. for the purchase of his annuity. These are the two annuities which cause the difference in Mr. Mackreth's two accounts, as he alleges. He says, when he sent his first account, he not having finally settled those two annuities, he set down such sums to be paid in discharge of the said two annuities as he believed were originally paid for the said annuities, and were then due for the arrears thereof. But he says, after he had sent the said account, he (Mr. Mackreth) finally settled the said two annuities by exerting himself greatly therein for and on the behalf of Mr. Fox, and redeemed or discharged the same for the sum of £592 less than *he had mentioned or stated in the first account*.

It is certain, from Mr. Mackreth's own account, that on the 16th of November 1778, he knew the exact sum paid in respect [282] of those annuities, which, in-

stead of being discharged, were assigned (by regular deeds prepared by Mr. Garforth) to Mr. Mackreth; and those deeds remained in force, and in the hands of Mr. Mackreth, at the hearing of this cause. But although Mr. Mackreth had, as he alleges, made this saving in those two annuities, he never apprized Mr. Fox thereof.

On the 5th of March 1779, Mr. Mackreth, as he alleges, advanced to Mr. Fox (who had then exhausted the whole of the purchase money) £1000 on bond at £5 per cent. and an insurance upon Mr. Fox's life; but Mr. Mackreth did not at this time inform Mr. Fox of the saving *he had made in the redemption of the said annuities*, or of the error in the account which had been sent to him, although, four months before this time, Mr. Mackreth had finally settled those two annuities.

In June 1779, Mr. Fox was *again in distress* for money, and, as Mr. Mackreth in his answer says, in order to raise a sum for his immediate occasion, applied to him to advance £2100 for the purchase of an annuity of £350 during his (Mr. Fox's) life. That Mr. Mackreth agreed to purchase it, but *that he did not refuse to give any greater price than £2100 for the annuity; for he says Mr. Fox applied to him to advance £2100 for this annuity of £350 and that he (Mr. Mackreth) never mentioned any terms on which he would purchase the annuity, the same being proposed by Mr. Fox, to the best of Mr. Mackreth's recollection.* Mr. Mackreth then by his answer says, that he was not at all desirous of purchasing the said annuity, as he had not at that time a *sufficient sum by him*, but *being much pressed by Mr. Fox to become the purchaser*, he consented thereto, and did actually *borrow the greatest part of the money* to enable him to pay Mr. Fox the said sum of £2100 for the said annuity. And he further says, that he did *advance and pay or satisfy* to Mr. Fox the said sum of £2100 for the said annuity of £350 at the time of his granting the said annuity. And he admits, that Mr. Fox, on the 18th June 1779, did execute a bond to him for an annuity of £350 during his (Mr. Fox's) life, and a warrant of attorney to enter up judgment for the same against him. Even at this time, when Mr. Fox's distress was most severe, Mr. Mackreth did not inform him that he was his debtor to a very considerable amount.

The appellant Mr. Mackreth, perhaps aware of the act of parliament respecting the grants of annuities, insinuates by his answer that the sum of £2100 was actually paid by him to Mr. Fox at the time that Mr. Fox granted the annuity; the very reverse is the truth of the transaction, as appears by a paper accidentally found in a hamper of Mr. Fox's old letters and papers. This paper is proved to be in Mr. Mackreth's own hand-writing. It was drawn out by him on the very day the securities for the annuity were executed; and the following is a copy of it; viz.

|   |       |    |   |
|---|-------|----|---|
| [283] "Bond . . . . .                         | £1000 | 0  | 0 |
| Interest, etc. . . . .                        | 28    | 11 | 0 |
| Draft, Castell . . . . .                      | 315   | 0  | 0 |
| Herries . . . . .                             | 150   | 0  | 0 |
| Cash . . . . .                                | 200   | 0  | 0 |
|   | 1693  | 11 | 0 |
| Cash to be paid to Mr. Fox's drafts . . . . . | 406   | 9  | 0 |
|   | £2100 | 0  | 0 |
| Cash left upon a former account . . . . .     | 4     | 0  | 0 |

June 18, 1779.

The sum due to Mr. Fox on this account is . . . £410 9 0"

Instead therefore of Mr. Mackreth's borrowing the greatest part of the money to advance to Mr. Fox at the time of purchasing the annuity, it appears under his own hand that he only then advanced £315, £150 and £200, making together £665, and that the residue of the purchase money for the annuity was £1028 11s. alleged to be then due from Mr. Fox to Mr. Mackreth on bond, and £406 9s. which remained in the hands of Mr. Mackreth.

The above paper, though in Mr. Mackreth's own hand-writing, was not signed by him, although Mr. Fox had actually signed a receipt for the whole £2100 as appears by the memorial of the securities enrolled according to the statute, in which

it is said that £2100 was the consideration paid by Mr. Mackreth. This therefore was an additional evidence of Mr. Fox's unbounded confidence in Mr. Mackreth, and of the use made by the appellant of that confidence.

As to the £4 left upon a former account, Mr. Mackreth gives no explanation; but he admits that he had at this time £617 13s. in his hands, and that in his judgment no persons but those in distress would raise money by sale of annuities at such a price.

Mr. Garforth was concerned in negotiating this business; prepared the security from Mr. Fox to Mr. Mackreth; and he and his clerk attested the execution of the bond and warrant of attorney.

It may appear unnecessary to produce any additional proof of Mr. Fox's implicit confidence in the appellant; but the following transaction is so decisive on the subject, that it ought not to be omitted.

The first account sent by Mr. Mackreth to Mr. Fox concludes as follows:

|   |         |    |    |
|---|---------|----|----|
| " 1778. April 25th. My note of hand to Mr. Fox  | £28,403 | 0  | 0  |
| Six Months Int. 25 April to the 25 Oct.   | 710     | 1  | 6  |
|   | £29,113 | 1  | 6  |
| Cash paid to different people by Mr Fox's order,<br>with interest charged thereon . . . . . | 28,338  | 2  | 9  |
|   | £773    | 18 | 9" |

[284] This account was erroneous, as the appellant Mr. Mackreth admits, he having paid less by £592 than he had charged in the above account. This error Mr. Mackreth had discovered in the November preceding, (eight months before this time,) and yet, although he was now advancing money to Mr. Fox, with that sum and interest admitted to be in his hands, he made no discovery to Mr. Fox, but on the contrary, on the 18th June 1779, the day on which he took the security from Mr. Fox for the annuity of £350, Mr. Garforth copied the conclusion of the first erroneous account, consisting of four articles only, stating the supposed balance to be paid by draft to Mr. Farrer, when the error was fully known to Mr. Mackreth, and Mr. Fox and Mr. Mackreth signed it. This account is in Mr. Garforth's hand-writing, and was retained by Mr. Mackreth, and produced by him at the hearing of the cause. The following is a copy of it:

|   |         |    |   |
|---|---------|----|---|
| " 1778. April 25th. To principal money on note . . . . .  | £28,403 | 0  | 0 |
| Six months interest, from 25th April to 25th October 1778 | 710     | 1  | 6 |
|   | 29,113  | 1  | 6 |
| By cash paid, with interest thereon . . . . .             | £28,338 | 2  | 9 |
| By draft to Mr. Farrer . . . . .                          | 773     | 18 | 9 |
|   | 29,113  | 1  | 6 |

18th June 1779.

Then settled the above account, and the several vouchers delivered up by Mr. Mackreth to Mr. Fox, and Mr Mackreth's note to Mr. Fox agreed to be delivered to Mr. Mackreth.

J. Fox.

R. Mackreth."

Mr. Mackreth well knew, eight months before this day, that this account was erroneous, and he admits that he did so by his answer. The vouchers did not correspond with it. There would have appeared an error in the account in Mr. Fox's favour of £592 in the two articles of Massey's and Peale's annuities said to be redeemed by Mr. Mackreth. And the vouchers for the sums paid for the redemption of those annuities were actual assignments to Mr. Mackreth, then in force; and those assignments, as well as all the other vouchers, were never delivered to Mr. Fox, but remained in the hands of Mr. Mackreth down to the time of the hearing of this cause.

In opposition to the real truth of the case, the respondent, it is to be observed, gives a receipt for the vouchers.

It is observable, that when the trust deed was executed, and the contract for

the sale was signed, a large sum of ready money was advanced by the appellant to Mr. Fox; on the day before the execution of the articles of agreement £120 was received by Mr. Fox from the appellant. On the 25th April 1778, when Mr. [235] Fox executed the conveyance of his estates to Mr. Mackreth, the appellant paid to Mr. Fox's use £358 12s. 7d.—£158 12s. 7d. of which was paid to Mr. Fox's servants. On the 2d May 1778, when Mr. Fox attended the appellant and Mr. Garforth to get his mother to sign the conveyance to the appellant, £1162 10s. was paid by the appellant to the use of Mr. Fox. The account between the appellant and Mr. Fox was settled when Mr. Mackreth advanced Mr. Fox the money for the purchase of the annuity in the manner before mentioned.

On the 30th of August 1779, the appellant (having discovered that some part of the premises was copyhold) applied to Mr. Fox, and requested him to execute a letter of attorney, authorising a surrender of those premises to the appellant. In the month of December 1779, the appellant applied to Mr. Fox, and requested him to execute duplicates of the deeds of the 22d and 23d December 1777, and also duplicates of those deeds by which Mr. Fox had conveyed his estate to the appellant. With these requests of the appellant Mr. Fox complied; and the appellant now insists, that those acts of Mr. Fox are such a confirmation of the sale to Mr. Mackreth, that Mr. Fox cannot in any manner invalidate that transaction. An attention to the circumstances of the case, and the situation in which Mr. Fox then was, will prevent the appellant from deriving any advantage from such pretended acts of confirmation. At the time Mr. Fox executed the letter of attorney before mentioned, near *one quarter* of the annuity of £350 was due to the appellant. In December, when the duplicates of the deeds were executed, half a year's arrears of the said annuity were due to the appellant, and Mr. Fox was in distress so great, that he was soliciting a loan from Mr. Mackreth and Mr. Garforth, of a sum of money upon the grant of an annuity to them by Mr. Fox; and on the 23d December 1779, two days only previous to the execution of the duplicates of the deeds by Mr. Fox and his mother, Mr. Garforth bought of Mr. Fox an annuity of £400 for Mr. Fox's life, at five years purchase, Mr. Garforth retaining out of the purchase money £360 14s. 7d. alleged to be due to him from Mr. Fox for business done; so that in consideration of a bill for business, amounting to £360 14s. 7d. and of £1639 5s. 5d. advanced to Mr. Fox by Mr. Garforth, (Mr. Mackreth's friend and attorney,) Mr. Fox granted an annuity of £400 a year for his life; and for securing the same, Mr. Garforth took a bond and judgment, and a demise of real estates in the county of York, and was actually let into possession of the said estates. Mr. Fox's hope of obtaining pecuniary assistance, when in great distress, was from the appellant, or the appellant's friend Mr. Garforth. His confidence in the appellant was so great, that he thought it *right and necessary*, without consulting Mr. Farrer, to do every thing which the appellant desired him to do; and Mr. Fox was totally ignorant of the price for which the appellant had sold the estate to Mr. Page; and if he had known it, he was [236] equally ignorant that he had any opportunity of obtaining any relief against the appellant.

In the following year, 1780, Mr. Fox being still much distressed for money, had an offer from a stranger of £800 more for the annuity granted to Mr. Garforth, than had been given by him; but Mr. Garforth, by his conduct, prevented Mr. Fox from availing himself of the offer which had been made, under pretence that he had executed declarations of trust of the said annuity to other persons; but on the 5th of May 1781, Mr. Garforth, having heard that the bill in this cause was about to be filed, agreed to assign his said annuity, and did assign the same (without producing any of the declarations of trust respecting the same which he had before said had been given to a stranger) to Mr. Fox, who then gave £600 more for it than Mr. Garforth had given in December 1779.

All the several last-mentioned annuity transactions with Mr. Mackreth and Mr. Garforth were entirely unknown to and concealed from Mr. Fox's solicitor and friends, who do not appear to have been informed of them till some time in the year 1781.

Mr. Fox having exhausted all the purchase money of his estate, and not in the least relieved from his distress by the friendship of the appellant, was compelled, in the spring of the year 1782, to leave England, and to assign over his life estates to trustees for the benefit of his creditors.

In February 1781, Mr. Farrer for the first time accidentally discovered the price which Mr. Page had given Mr. Mackreth for the estate which had been purchased by him from Mr. Fox, and immediately informed Mr. Fox (who had never before heard of it) and his friends, to whom Mr. Mackreth had never mentioned it; and Mr. Fox and his friends, learning from the best legal advice that Mr. Fox would be entitled to relief in a Court of Equity, they determined to seek that relief, and gave orders for proceeding in a Court of Equity for that purpose. And when Mr. Farrer took instructions from Mr. Fox for the bill which was to be filed, Mr. Fox for the first time informed him of the two annuities of £350 to Mr. Mackreth, and £400 to Mr. Garforth, and expressed great anxiety at offending Mr. Mackreth, fearing he would distress him for payment of the said annuity.

The appellant by his answer admits, That (having to his great surprise, after such a length of time, heard that a bill in equity was to be filed against him in the name of Mr. Fox, to set aside his purchase of the estate) he did on the 5th of May 1781, (the same day on which Mr. Garforth assigned his annuity of £400) send the account of the application of the purchase money for the estate to Mr. Fox, drawn out in a different form, and differing from the first account as to monies paid by Mr. Mackreth in redeeming the two annuities from Massey and Peale, and as to the interest of the purchase money, and in the amount of the balance; and the appellant also admits by his answer, that it does [287] appear by the account last sent, that Mr. Mackreth had then in his hands £617 13s. and interest, and no more, out of the purchase money, exclusive of £773 18s. 9d. which was made the balance of the account sent to Mr. Fox in October 1778.

When Mr. Garforth knew that Mr. Fox intended to apply to a Court of Equity for relief, he assigned his annuity, and Mr. Fox obtained from the assignee an additional sum of £600 for that annuity. The appellant knowing that application would be made to a Court of Equity, thought it expedient to rectify an account which he could not but have long known to be erroneous.

When Mr. Mackreth put in his answer in this cause, he for the first time insisted that he had retained the sum of £617 13s. to answer some outgoings from the estate, which he did not know of when he contracted with Mr. Fox for the purchase of it. At the time Mr. Mackreth sent his second account to Mr. Fox, and long before, he knew of those outgoings, as well as at the time of putting in his answer, and yet he took no notice of them in his second account, but stated the sum of £617 13s. as a clear sum remaining due to Mr. Fox, although both Mr. Mackreth and Mr. Fox had in June 1779 finally settled and signed the account; and Mr. Fox had given a receipt for the vouchers, as if they had been then delivered up.

In Trinity Term 1781, Mr. Fox filed his bill in the Court of Chancery against the appellant Robert Mackreth, and the said John Dawes and John Baynes Garforth, thereby setting forth the substance of the several matters before stated; and praying that the sale of the said estates in the county of Surry, so made to the said Thomas Page as aforesaid, might be declared to have been made in trust for the respondent Mr. Fox; and that it might be declared in like manner that Mr. Mackreth and John Dawes, or one of them, was in the circumstances aforesaid answerable and accountable to Mr. Fox for the amount of what the same estate and premises should appear to have been actually sold for to the said Thomas Page; and that an account might be taken, under the directions of the Court, of what was really due and owing from Mr. Fox to the appellant Mr. Mackreth and Mr. Dawes respectively, and upon what security or securities, at the time of such transactions as aforesaid, and what then was justly due and owing to them respectively from Mr. Fox; and that they might be decreed to deliver up to Mr. Fox their respective securities for such debts, Mr. Fox offering that they should be at liberty to retain respectively, out of such purchase money as aforesaid, what should be found justly and *bona fide* due and owing to them respectively from him; and that an account might also be taken, under the directions of the Court, of all and every the sum and sums of money advanced at any time or times by the appellant Mr. Mackreth and Mr. Dawes respectively to Mr. Fox, for or on account of the purchase of any annuity or annuities at any time or times granted by Mr. Fox, or procured to be granted by him, or on his behalf or account, by any other person or persons, to or on ac-[288]-count, or in trust, or for the benefit of them the said Robert Mackreth and John Dawes, or either of them; and also of all

and every sum and sums of money paid or allowed by Mr. Fox, or any other person or persons on his behalf, to Mr. Mackreth and Mr. Dawes, or either of them, or otherwise by them, or either of them, received for or towards discharge of the growing payments from time to time of such annuity or annuities, or any of them, or otherwise in respect thereof, or any of them; and that Mr. Mackreth and Mr. Dawes might be decreed to deliver up to Mr. Fox, to be cancelled, all and every their respective security or securities for such annuity or annuities, Mr. Fox thereby offering that they should retain, out of the purchase money for the said estates, the principal sums so advanced by them respectively to him, at any time or times, on account of the purchase of such annuity or annuities, together with interest for the same from the times of advancing the same sums respectively, upon Mr. Fox's having an allowance thereof of all such sums as had been paid or allowed to, or received by or on account of them respectively, for or on account of the growing payments of such annuity or annuities, together with interest for the same respectively from the times of the payment and receipt thereof respectively; and that an account might also be taken of what had been paid by or on Mr. Fox's behalf or account to Mr. Mackreth, upon account of, or for or towards the discharge of the said annuity of £350 so granted by Mr. Fox to Mr. Mackreth as aforesaid, since the purchase made by him of Mr. Fox's estates; and that he might be decreed to deliver up, and procure to be cancelled, all and every his security or securities for the same, Mr. Fox thereby offering to allow him in account, out of such purchase monies as aforesaid, the said sum of £2100 the consideration money for such annuity, or such other sum as should have been actually paid for the said last-mentioned annuity, and interest from the time of advancing the same, but deducting thereout the several sums which should appear to have been paid to or received by him or on his account, on account of the growing payments of the said annuities, with interest for the same sums from the times of payment or receipt thereof respectively; and that in the mean time Mr. Mackreth might be restrained from proceeding at law upon such bond, warrant of attorney, and judgment as aforesaid, or any of them, and from bringing, commencing, and carrying on or prosecuting any action or actions, suit or suits, or other proceedings at law, against Mr. Fox, to compel payment of the said annuity of £350 or any part thereof, due or to grow due, or otherwise in relation to the same, or upon or by virtue of any of the securities given for the same, by the injunction of the Court; and that an account might be taken of the said sum of £39,500 agreed to be paid by Mr. Mackreth for the purchase of the said effects, and how and in what manner the same, and every part thereof, had been paid, applied, and disposed of by Mr. Mackreth and Mr. Dawes; and that they, or one of them, might be decreed to pay [289] Mr. Fox so much thereof as should appear upon the taking of such account to be justly due to him, and had not been fairly and justly applied in payment of his debts and annuities, agreeable to such plan for the payment thereof as aforesaid; and that they, or one of them, might also be decreed to pay to Mr. Fox the sum of £11,000 or such other sum, beyond and exceeding the said sum of £39,500 as should appear to have been paid and secured to be paid by the said Thomas Page, or any other person or persons, to Mr. Mackreth and Mr. Dawes, or either of them, or by or for their or either of their order or use, or on their or either of their account, for the purchase of the said estates and premises in the said county of Surry, together with interest for such sum from the time of such sale and purchase.

To this bill the defendants put in their answers; and in Trinity term 1784, the respondent William Morton Pitt, Henry Hoare (since deceased), and the respondent James Farrer and James Fox, filed their supplemental bill, stating (among other things), That before any proceedings were had in the original cause, Mr. Fox, by indenture bearing date the 28th May 1782, did, for the considerations therein mentioned, assign unto the said William Morton Pitt, Henry Hoare, Oliver Farrer, and James Farrer, their executors, administrators, and assigns, all sum and sums of money then due, or to become due to him by the means therein mentioned, or on any other account whatsoever, upon the trusts, and for the uses, intents, and purposes in the said indenture particularly mentioned; and also stating, that the said Oliver Farrer had declined to act in the execution of the said trusts, and had, by indenture bearing date the 2d of May 1784, released his right, title, and interest, under and

by virtue of the said deed of trust, to the respondent William Morton Pitt, the said Henry Hoare, deceased, and James Farrer; and praying, that the said William Morton Pitt, Henry Hoare, and James Farrer, might have the benefit of the said suit and proceedings, and the like relief against the appellant as was prayed by the original bill, in as full and beneficial manner as the said James Fox was himself entitled to.

The defendants appeared, and put in their answers to this bill; and the answers having been replied to, and the cause being at issue, several witnesses were examined, as well on behalf of the appellant as of the respondent; and on the 26th, 27th, and 29th of June, and on the 4th, 13th, 14th, and 19th of July 1786, the cause was heard and debated upon before the right honourable Sir Lloyd Kenyon Bart. then Master of the Rolls, when his Honour was pleased to declare, That undue advantage had been taken by the appellant, Mr. Mackreth, of the confidence reposed in him by the respondent, Mr. Fox; and that therefore Mr. Mackreth ought to be considered as a trustee as to all the estates and interests comprised in the conveyance of the 23d and 24th days of April 1778, in the pleadings mentioned, for Mr. Fox, after the execution of the said deeds; and his Honour directed Mr. Pepys, one of the Masters of the Court, to take an account of all sums of money [290] received by Mr. Mackreth, or by any other person or persons by his order, or for his use, from Thomas Page, in the pleadings named, or any other person or persons, for or on account of the sale of the said estates and interests, or any part thereof, and to compute interest thereon after the rate of £5 per cent. per annum, from the time of the receiving the same respectively: and the Master was also directed to take an account of all sums of money paid by the appellant Mr. Mackreth, and Mr. Dawes, or either of them, or by any other person or persons by their or either of their order, or for their or either of their use, for or on account of the purchase of the said two annuities of £500 and £350 in the pleadings mentioned, granted by the deeds bearing date respectively the 23d September 1777; and the Master was also directed to take an account of all sums of money advanced by the appellant, Mr. Mackreth, to or for the use of Mr. Fox, for the purchase of the annuity of £350 secured by the bond and warrant of attorney to confess judgment therein, bearing date respectively the 18th of June 1779; and the Master was directed to state the particular times when and in what manner such sums were advanced; and the Master was also directed to take an account of all sums of money advanced or paid by or for the use of the appellant, Mr. Mackreth, or any person on his account, in respect of the mortgage dated the 15th of January 1778, in the pleadings mentioned, and also under and in consequence of his contract for the purchase of the estate in question, or the conveyance thereof; and the Master was directed to state the particular times when, and the person or persons to whom, such sums of money were paid, and the accounts in which the same were included respectively; and the Master was directed to compute interest on such sums respectively after the rate of £5 per cent. per annum, from the times such sums were advanced or paid respectively: and for the better taking the accounts, and discovery of the matters aforesaid, the parties were to be examined upon interrogatories, and to produce before the Master, upon oath, all deeds, books, papers, and writings in their custody or power relating thereto, as the Master should direct, who, in taking of the said accounts, was to make unto the parties all just allowances; and it was ordered, that Mr. Mackreth should pay unto the respondents their costs of that suit, to be taxed by the Master, so far as respected his insisting on the said conveyance of the 23d and 24th days of April 1778, as a conveyance for his own benefit; and his Honour reserved the consideration of the rest of the costs of the suit, and of all further directions, until after the Master should have made his report: and it was ordered that an injunction should be awarded to restrain Mr. Mackreth's proceeding at law against the respondents for and touching any matters in question in the cause, until further order of the Court; and any of the parties were to be at liberty to apply to the Court, as there should be occasion.

The appellant, Mackreth, conceiving himself aggrieved by this decree, on the 15th March 1787, presented his petition of appeal [291] to the Lord Chancellor, praying that the said decree might be reversed; and the appeal came on to be heard before his Lordship on the 12th of May, the 10th, 12th, 13th, 23d, 24th, and 26th of



November, and 7th and 8th of December 1787, and also on the 11th of December 1788, when his Lordship was pleased to order that the decree should be affirmed. The appellant therefore appealed from both decrees, insisting (C. Ambler, W. Selwyn, G. Hardinge, F. Hargrave) that this was a cause of great importance in itself, and in its general consequence: in itself, as greatly affecting the reputation and property of the appellant; in its general consequence, as it respects the due administration of justice in Courts of Equity, whose power is not arbitrary or speculative, but is restrained by sound and clear principles of right and wrong. That the decree complained of was not founded on such principles. The introductory declaration was totally destitute of support in the facts which it must assume; and the directions which appear on the face of it, consequential to the declaration, were many of them not warranted by the declaration, and were none of them warranted by evidence in the cause. That the words of the declaration, "*undue advantage of confidence*," are properly applicable to a bargain or contract, in which one of the contractors places a confidence in the other, as to the value, goodness, or some property of the thing which is the subject of the contract, and in so doing has been deceived and imposed upon. That these words were so meant, and must be so understood, and that the *purchase of the estate* in question was the *subject matter*, and the only one, appears from the words which immediately follow; namely "and therefore the defendant ought to be considered as a trustee as to all the estate and interest comprised in the *conveyance of 23d and 24th of April 1778*, for the plaintiff, Mr. James Fox, after the execution of the deeds." It was admitted by the counsel for the respondents, on the hearing of the appeal, that the merits of the decree rest on the truth of this declaration. Now it was submitted to be clear beyond a doubt, that the respondent, Mr. James Fox, did not place any confidence in the appellant as to the purchase, but acted upon his own knowledge and judgment. Both parties were competent alike to judge for themselves. It never was doubted throughout the cause that the respondent, Mr. James Fox, is an acute and sensible man. The treaty was accidental (the meeting being for another purpose), and was first proposed by Mr. James Fox, who came prepared and was provided with a rental and valuation of the estate. Both of them were enormous. Mr. James Fox asked a price according to the valuation. Mr. Mackreth pointed out the extravagance of it, and offered what he calculated, *at the time*, to be the just value. He shewed his calculation to Mr. James Fox. Their treaty then broke off; but was in a little time renewed by Mr. James Fox, and after a conversation of some hours, the agreement was made at a medium price. The respondent, Mr. James Fox, was not imposed upon in the sale of the estate. If there was no confidence in this transaction of the purchase, there was no colour or [292] pretence for supposing a confidence between them in any other transaction.

But it is objected, That the appellant was trustee for sale of the estate. Answer, Though the appellant should be considered as an actual trustee for sale of the estate, it did not disable him from contracting with his *cestuique* trust, Mr. James Fox, for the purchase of it upon fair and just term.

Another objection is, That the respondent Mr. James Fox was young and in distress. Answer, He was sensible and capable of judging, and had prepared himself by all proper information. His being in debt was no objection to treating with him, if the bargain was fair. If this could be received as a general objection to any bargain which he could make, his situation would have been deplorable indeed, as no person would then have dealt with him under the terror of that objection to the validity of the contract.

3d objection, That the price was considerably under the real value of the estate. Answer, This is the real and the only question in the cause. If the fact were so, the decree would be wrong in its declaratory part. But, it was submitted, there was not the least pretence for the assertion. The gross rental, as produced by Mr. James Fox, was,

|   |       |    |   |
|---|-------|----|---|
| Land . . . . .  | £871  | 16 | 0 |
| Old Mansion-house, offices, and pleasure-grounds . . . . .  | 200   | 0  | 0 |
| Mill . . . . .  | 50    | 0  | 0 |
| Cottages . . . . .  | 45    | 0  | 0 |
| Yearly profits of East Horseley and Cobham manors . . . . . | 100   | 0  | 0 |
|   | £1266 | 16 | 0 |

And the timber valued at £4000.

The sum given was £39,500, which at any time would be a large price, and was much more so at that period, when money was scarce, and the price of the public funds low; they were fifteen per cent. lower when the appellant bought the estate than when Jackman's valuation was made. The appellant by his counsel, on the original hearing, and on the appeal, over and over again submitted, and even pressed to have the true value, at the time when he made the purchase, ascertained by a jury, or in any other manner.

4th objection, That the respondent, Mr. James Fox, made the agreement without the advice and assistance of Mr. Oliver Farrer, the attorney consulted by him and his friends in his affairs. Answer, The respondent was capable, and chose to do it without consulting Mr. Farrer. If the bargain was fair, this could be no objection to it. Although Mr. Farrer was not consulted at the time, yet the agreement was shewn to him, and he looked over the conveyance on behalf of Mr. James Fox, without making any objections to the price, or to the fairness of the sale; and in a [293] letter Mr. Farrer wrote to the appellant he took notice, that he had read over the draft of the conveyance, to which he appears to make no objection; *and observes, that the appellant instead of a TRUSTEE was become a PURCHASER*, and that Mr. James Fox was bound by the agreement he had made; but did not find fault with the consideration, which he ought to have done if he had thought it inadequate. This observation has the more weight, as Mr. Farrer did find fault with the proposed deed of assignment, by which the remainder of the purchase money was to be left in the hands of the appellant as a trustee for payment of the respondent's debts.

5th objection, That the appellant sold the estate very soon afterwards for a much larger sum than he gave for it: and as to the annuities sold by the respondent Mr. James Fox to the appellant, and also as to the mortgage to the latter, they were unfair transactions. Answer, If the purchase was fair and for adequate consideration, it was not to be impeached by the fact that he sold the estate afterwards to advantage. It is positively sworn by the appellant in his answer, and it is not contradicted or discredited, that he neither was in treaty for the sale of the estate, nor knew any person who would buy it, when he contracted for the purchase of it; and it appears by Mr. Page's deposition, that Mr. Page, the father, did not entertain any intention of treating with the appellant till several weeks after the appellant had agreed for his purchase. The casual circumstance, therefore, of meeting such a purchaser soon afterwards, affords no argument against the fairness of Mr. Mackreth's antecedent conduct in the purchase he had made. It was a mere chance; he might have had the estate upon his hands for a long time, and at last have sold it even to loss, as the person who bought it of him actually did, Mr. Page having lost many thousand pounds by the purchase. The contract was fair and open in every part of it. Besides, the original agreement was followed with many acts of confirmation by Mr. James Fox. The agreement was entered into on the 16th of January 1778; and was put into form and signed twelve days afterwards, on the 28th of January 1778. The draft of the conveyance, after having been shewn to Mr. Oliver Farrer on behalf of Mr. James Fox, and returned without objection was engrossed and executed on the 24th of April 1778, three months after the agreement was made. No complaint was made during all that time by the respondent or by Mr. Oliver Farrer, or any of his friends. Nor was any made until 1781, three years after the purchase was completed. Nor would any complaint have then been made, if they had not heard of the sale by the appellant, and so it was admitted by the counsel for the respondents at the hearing of the appeal; which shews clearly, that, in their opinion, the transaction was in itself fair, and the consideration adequate. The original bill was not filed till 1781. In the intermediate time the respondent, Mr.

James Fox, did several deliberate acts to make the title perfect, which was defective on the first convey- [294] -ance, and even to accommodate the person who bought the estate of the appellant; and Mr. Oliver Farrer did not then object to executing a duplicate of the mortgage deed from Mr. James Fox to Mr. Mackreth, on account of any unfairness in the transaction by the appellant, but required an endorsement to be made of the time and reason of doing it.

The annuities were all fair transactions. The price was six years purchase, which is a very common price for annuities for the life of the seller, and as such has often been admitted to have effect in a Court of Equity. The two first were purchased in September 1777, after the respondent Mr. James Fox was of age, but before he could make any mortgage, or other security. The securities taken for payment of the annuities are common in such cases, and such as any well-advised man would require. Advancing the money on the mortgage was an act of kindness. The money was advanced by the appellant on the spur of necessity, without examining minutely into the title, in order to relieve the respondent, Mr. James Fox, from the apprehensions and danger of an arrest, the appellant having confided in the judgment, and relied on the faith of the person concerned for the respondent, Mr. James Fox, as to the title.

But it is further objected, That although not any one of the transactions taken singly is sufficient to warrant the decree, yet all of them taken together are, as being parts of one settled plan to get the estate: *Quae non prosunt singula, juncta juvant*. Answer, That position, at all times delusive and dangerous, cannot be applied in this case. If it can ever take place, it is where the case depends upon circumstances which conspire one and all to the same end, which cannot be otherwise accounted for, and which irresistibly compel the inference. That is not this case. Every one of the transactions here is perfectly distinct: they are all accounted for independently of each other, and cannot be connected by fair construction: and the estate having been bought at a fair price, it puts an end at once to this, as well as to the other arguments used against the purchase.

That the delay and other circumstances of conduct in the respondents were material to be made known, and have considerable weight in favour of the appellant. The bill was originally filed on the 5th of June 1781, more than three years after the purchase was completed. The answer being put in, a motion was made to dissolve the injunction; and an order for that purpose obtained on the merits. On the 20th of May 1782, the respondent, Mr James Fox, is made to execute an assignment of all money due, or to become due, to him in the cause of Godschall, or any other cause, or on any other account, and of all his personal estates, to four persons therein named, of whom Mr. Oliver Farrer was one, upon certain trusts. On the 2d of May 1784, near two years afterwards, Mr. Oliver Farrer assigned his trust to the other trustees; and on the 9th of August 1784, the supplemental bill was filed in the name of the other trustees. That if [295] any doubt should be conceived upon the value of the purchase, or on the fairness of any one transaction on the part of the appellant, (for which it was however submitted, there was not the least colour) the appellant readily submitted, and made it his very earnest request, that it might be accurately examined either by a jury, or in any other manner which their Lordships might think fit.

On the other side it was contended (J. Scott, J. Mansfield), That every transaction between the appellant, and respondent Mr. Fox, proved, that the respondent reposed an unlimited confidence in the appellant; that he surrendered his understanding entirely to the direction and guidance of the appellant; that the respondent, without hesitation or consideration, did and executed every thing which the appellant required of him; and that the appellant made use of the confidence so reposed in him to his own advantage, and to the prejudice of the respondent Mr. Fox, after engaging to transact nothing material with the respondent without first consulting with his friends. That the transaction of the 16th January 1778, even in the manner in which it is stated by the appellant's answer, could be accounted for upon no other principle, than the implicit confidence reposed in the appellant by the respondent. The respondent, who was treating with Jackman's valuation in his hand, and possessed of Jackman's opinion, that the sum at which he had valued the estate might be

obtained for it, and without any other knowledge upon the subject, submitted to the calculations of the appellant, and to his opinion of the value of the estate; and at 12 o'clock at night sold to him an estate, together with the furniture of the capital mansion house, which estate alone had been valued at £45,000, exclusive of the furniture, and subject to the jointure of Mrs. Fox, for £39,500 discharged from such jointure. That previous to the 15th January 1778, when the appellant purchased the respondent's estate, the appellant had, without the respondent's knowledge, employed his own surveyor to view the estate. The appellant's character of trustee for the respondent enabled him to employ such surveyor to view the respondent's estate; that character gave him the opportunity of so doing, and the appellant was bound to communicate the knowledge which he so obtained of the value of the estate to the respondent, his *cestuique* trust; his concealment of that knowledge from the respondent was a decisive proof that the estate was of far greater value than he represented it to be to the respondent. That on the 16th January 1778, Mr. Mackreth, the appellant, was the trustee of the respondent, Mr. Fox. The evidence of Mr. Farrer proves, that the appellant had obtruded himself into that situation, in exclusion of Mr. Farrer, and the other persons who had been proposed. The appellant was bound in equity to give the respondent the advantage to be derived from a public sale, the probable good effects of which Mr. Farrer had represented to him. If the estate had even been advertised to be sold, Mr. Page would certainly have treated for the purchase; of this advantage the appellant [296] deprived the respondent, by treating with him in private; and therefore the advantage afterwards gained by the appellant must be considered as obtained for the benefit of the respondent.

That in every transaction between the appellant and the respondent, the appellant obtained some advantage over the respondent. In making up the £7000 for which the mortgage of the 16th January 1778 was executed, the appellant charged for the arrears of an annuity up to the said 16th January, which annuity the person who was entitled to it had agreed should be redeemed on the 23d of December preceding. In the purchase of the estate the appellant gained £11,000. In the account made up at the time of executing the conveyance by the respondent to the appellant, the appellant was allowed to receive the rents of the estate from the 25th March, but he did not allow the respondent interest for his purchase money between the 25th March and the 25th April, by which the appellant gained almost £200. In the accounts of the disposition of the purchase money, on the 18th June 1779, the time of the supposed final settlement of such accounts, at the time when the appellant purchased an annuity from the respondent, at six years purchase, there was a large sum of money due from the appellant to the respondent, which the appellant did not account for. In such circumstances, he permitted the respondent to sign an account as finally settled, in which there were blanks for sums of money paid, the total of which account was erroneous; and the appellant permitted the respondent to sign, and took from him a receipt for the vouchers warranting such account, although the vouchers did not correspond with such account, and those vouchers were never delivered to the respondent, but remained in the hands of the appellant. That the acts done by the respondent (which the appellant insists ought to be considered as acts of confirmation) cannot operate as such, under the circumstances of the case. At the respective times at which some of such acts were done, the appellant had the power of supplying to or withholding from the respondent money, of which he was in immediate want; and it appears that at the times at which such acts were done the appellant actually advanced money to or to the use of the respondent. At other times, when other of such acts were done, the respondent was the debtor of the appellant, and liable to be called upon for the arrears of an annuity granted by him to the appellant. During the whole of the period within which such supposed acts of confirmation took place, the respondent was in the utmost distress and want of money. He appears to have considered the appellant as the person from whom he was to expect pecuniary assistance. His confidence in the appellant was implicit; and the appellant's influence over the respondent was unlimited. He was guided solely by the advice of the appellant, and could not be considered as a free agent. The respondent was ignorant of the advantage which the appellant had made of the confidence which the respondent had reposed in him:

so soon as he was informed of it, he [297] enquired if justice would afford him any relief; and having been told by the best legal advice, that a Court of Equity would grant him redress, he immediately sought that redress, and obtained it.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed, with £200 costs. (MS. Jour. *sub anno* 1791, p. 331.)

[\*\* The Cases under this title of *Fraud* being so various, and depending frequently upon the peculiar Facts in each case, it is not easy, on a cursory revision, to deduce any leading principles from them.—The following observations seem applicable and useful; the introduction of them, therefore, in this place, will probably not be unacceptable:

“Principles of decision adopted by Courts of Equity, when fully established and made the ground of successive decisions, are considered by those Courts as rules to be observed with as much strictness as positive law.” *Mitford's Treatise on Equity Pleadings*. And it will be found, that even in cases of *Fraud*, which from their nature must be almost infinitely various in their circumstances, Courts of Equity constantly proceed upon some clear and established principle, sufficiently comprehensive to meet the circumstances of the particular case to which it is applied, and not upon a vague, arbitrary, or indefinite power.

In *Chesterfield v. Janssen*, 2 Vez. 155, Lord Hardwicke enumerates *four species of fraud*, 1. Fraud arising from facts and circumstances of imposition, which is the plainest case. 2. Fraud may be apparent from the *intrinsic value* and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept on the other: these are inequitable and unconscionable bargains, and of such even the common law has taken notice. 3. A third is that which may be presumed, from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is that fraud must be proved, not presumed: but in Equity it is established to prevent taking surreptitious advantage of the *weakness* or *necessity* of another; which knowingly to do is equally against conscience, as to take advantage of his ignorance. 4. A fourth kind of fraud may be collected or inferred, in the consideration of a Court of Equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement.

The first of the above divisions, includes the most numerous Cases of Frauds, both here and in all the reports; and to this may be referred Cases 2, 4, 6, 7, 9, 10, 11, 14, of the preceding series.

As to the second head, it does not appear that a single case can be found in which it has been held, that the *mere inadequacy* of price is a ground for a Court of Equity to annul an agreement, though executory, if the same appear to have been *fairly* entered into and understood by the parties, and capable of being specifically performed; still less does it appear to have been considered as a ground for rescinding an agreement actually executed. In the case of *Kien v. Stukeley*, (*Gilb.* 155. See *ante tit. Agreement*, Ca. 19,) the Court of Exchequer expressly held, that the exorbitancy of the price was not sufficient to discharge the defendant from the performance of his contract: the decree for a specific performance was indeed reversed, but not upon the ground of inadequacy of consideration; (which *Gilbert* calls the great question, and on which there was much contest;) but because the plaintiff had not made out his title by the time stipulated. See also 2 *Atk.* 251: 1 *Bro. C. R.* 9, 22: 2 *Bro. C. R.* 17. And a strong argument in support of the rule may be drawn from several cases, in which *losing bargains* have been actually established and decreed. See 2 *Vern.* 423: 1 *Eq. Ab.* 170: 2 *Vez.* 422: and 1 *Bro. C. R.* 158. See also Cases 2, 16, 17, and 19, immediately preceding, and the reasoning of Lord Chancellor Thurlow in the last case, as reported in 2 *Bro. C. R.* 420.

To the third of these divisions of fraud mentioning the *weakness* and *necessity*, may be added the *dependence*, by means of the confidence or relationship, of the injured party.—And under this head may then be classed, the cases of impositions by guardians, parents, attorney, or counsel, on the infants or clients relying or dependent on them. See Cases 1, 3, 5, 13, 16, 17, 18, 19.

Under the fourth head may manifestly be classed Cases 1, 8, 12, 15; and perhaps some others.

The case (and it seems the only case) in which Fraud cannot be relieved against, in Equity, concurrently with Courts of Law, though discovery be sought, is the case of fraud in obtaining a Will; which since the case of *Kerrick v. Bransby*, (See *post tit. Will.*) is constantly referred to a Court of Law in the shape of an issue *devisavit vel non*. The Courts of Equity have a concurrence of jurisdiction with Courts of Law in all other matters of fraud. See *White v. Hussey*, Pre. Ch. 14: *Hungerford v. Earl*, 2 Vern. 261: *Colt v. Wollaston*, 2 P. Wms. 156: *Stent v. Baillis*, 2 P. Wms. 220: 3 Bro. C. R. 218: Com. Dig. titles Chancery; Fraud. See also Fonblanque's Treatise of Equity.\*\*]

[298]

## GUARDIAN.

CASE 1.—MARY PRESTON and others,—*Appellants*; LORD FERRARD,—*Respondent* [23d May 1720].

[Mew's Dig. xii. 101. See now the Guardianship of Infants Act 1886 (49 and 50 Vict. c. 27), and Custody of Children Act 1891 (54 and 55 Vict. c. 3); also *In re Byrnes*, 1873, 21 W.R. 622.]

[By an act of parliament made in Ireland, 2 Ann. to prevent the further growth of popery, no person professing that religion can be the guardian of an infant; but such guardianship, where the person entitled to it is a papist, shall be disposed of by the Court of Chancery in that kingdom, to some near relation of the infant, being a protestant, and one to whom the infant's estate cannot descend; but if there shall be no such protestant relation, then to some other proper person, who will use his utmost care to educate the infant in the protestant religion, until the age of 21.]

\*\* ORDERS of the Lord Chancellor of Ireland AFFIRMED:

This Case is not reported in any other book.

As the stat. 23 Geo. 3. c. 28, has put an end to appeals from Ireland to the House of Lords here, it does not seem necessary in this place to enter into the present state of the law in that kingdom relative to *Papists*. But see this work under that title.\*\*

That care might be taken for the education of children in the communion of the church of Ireland, as by law established; an act of Parliament was passed in that kingdom, 2 Ann. intitled, *An act to prevent the further growth of popery*; whereby it was enacted, "That no person of the popish religion, shall or may be guardian unto, or have the tuition or custody of any orphan, child, or children, under the age of 21 years; but that the same, where the person having, or intitled to the guardianship of such orphan child or children, is or shall be a papist, shall be disposed of by the high Court of Chancery, to some near relation of such orphan child or children, being a protestant, and conforming himself to the church of Ireland, as by law established, to whom the estate cannot descend, in case there shall be any such protestant relation, fit to have the education of such child; otherwise to some other protestant, conforming himself as aforesaid, who is thereby required to use his utmost care to educate and bring up such child or minor in the protestant religion, until the age of 21 years."

Anthony Preston Esq. commonly called Lord Gormanstown, died a papist, in September 1716, leaving the appellant Mary Preston, commonly called Lady Gormanstown, his widow and relict, and the appellant Jenico Preston, commonly called Lord Gormanstown, an infant of the age of nine years, his son and heir, together with several daughters; and dying possessed of a considerable real estate, subject to a jointure of £500 per ann. payable to the appellant Mary, and some other demands; and the said appellant Mary professing likewise the popish religion, Nicholas Barnwell Esq. who [299] was the next protestant relation of the infant,

in the month of February following, preferred his petition to the Lord Chancellor of Ireland, stating the above facts; and that the appellant Mary, and one Nicholas Preston, who was also of the popish religion, had possessed themselves of the mansion house of Gormanstown, and other the estate of the said Anthony Preston, deceased, and also of the person of the said Jenico Preston, and either concealed him, or had conveyed him away, with intent to educate him in the popish religion; and therefore prayed, that his Lordship would appoint the respondent Henry, Lord Ferrard, guardian to the said Jenico Preston, and that the appellant Mary and the said Nicholas Preston might deliver up the said minor by a short day.—Whereupon, and on producing an affidavit of the truth of these facts, the Lord Chancellor, on the 5th of February 1716, ordered, that the appellant Mary and the said Nicholas Preston should produce the said minor, Jenico Preston, to the Court, in six days after service of the said order; or, in default thereof, shew cause in that time why they would not produce him.

On the 9th of the same month, Nicholas Preston was personally served with a writ of execution of this order, at the house of Gormanstown, where he and the appellant Mary usually resided; and it then appeared, that she had quitted the house, and was withdrawn into England, and had taken the minor with her, so that she could not be personally served with the order.

And therefore, upon the petition of Mr. Barnwell, the Lord Chancellor, on the 19th of February 1716, ordered, that the respondent should be assigned guardian to the said Jenico Preston; he entering into a recognizance, of such penalty as should be approved by a Master, to be accountable for the profits of the said minor's estate and fortune yearly. And accordingly the respondent did, the next day, enter into a recognizance for that purpose.

And upon motion of the said Nicholas Barnwell's counsel, the Lord Chancellor did, on the said 19th of February 1716, order, that service of the said other order at the appellant Mary's dwelling-house, and on Mr. Geering (one of the six clerks, and who had entered a caveat on her behalf, against any order passing for the guardianship without notice to him) should be deemed good service on the said appellant Mary; and that the said Jenico Preston should be delivered to Lord Ferrard, in a week after the service of this order.

The said Mr. Geering, and likewise one of the appellants daughters at the said dwelling-house, being duly served with both the said orders; and the appellant not producing or delivering up the said Jenico Preston, nor shewing any cause pursuant to the said first order; the respondent petitioned the Lord Chancellor, for leave to issue process to a sequestration against the appellant Mary, in order to enforce the performing of the said orders; and thereupon his Lordship, on the 12th of April 1717, ordered, that process should issue, unless peremptorily, on the first seal day before the then next Easter term, on service of that order at the [300] appellant Mary's house, and on the said Mr. Geering, good cause should be shewn to the contrary.

This last order being duly served, and no cause shewn, nor any regard paid to it by the appellant Mary, process of contempt did accordingly issue against the said appellant; and on the 22d of July 1717, the Lord Chancellor ordered, that a Serjeant at Arms should be awarded against her.

But on the 13th of September following, a petition was preferred to the Lord Chancellor, in the name of the Earl of Barrymore, praying, that the said order appointing the respondent guardian to the said Jenico Preston, might be set aside; and that he the said Earl might be appointed guardian: the matter of which petition being, on the 20th of September 1717, debated by counsel on both sides, his Lordship, upon due consideration thereof, and of several affidavits then produced on the behalf of the said Earl of Barrymore, ordered, that the said order whereby the respondent was appointed guardian to the said minor, should be affirmed.

The appellant Mary Preston, on the 9th of November 1717, moved the Court on several affidavits, to set aside the process issued against her; and upon debate of the matter by counsel on both sides, the Lord Chancellor declared, that he saw no reason to set aside the said process; but in regard Mr. Powell, the appellant's then clerk in Court, prayed a month's time to produce the minor, his Lordship ordered, that the said appellant should have a month's further time to produce the said

minor; and that the respondent should stop issuing further process in the mean time.

On the 5th of December following the respondent's counsel informed the Court, that the time given the appellant Mary to produce the minor, expired in vacation; and in case she should not do it, then the respondent's clerk could not issue a sequestration; and therefore prayed, that the said order might, in that respect, be amended: and the Lord Chancellor then declaring, that it was his intention at the time of making the said order, that in case the appellant Mary should not deliver up the minor at the expiration of the said month, the respondent might sue out a sequestration; did order, that in case the appellant Mary did not deliver up the said minor by the time limited in the said order, a sequestration should be awarded against her.

The appellant Colclough likewise petitioned to be admitted guardian to the minor; but no sufficient reason appearing, to induce the Lord Chancellor to grant the same, his Lordship did not appoint him guardian.

From all these orders the appellants appealed; insisting (P. Yorke, C. Talbot), that by the express direction of the said act of Parliament, the tuition and custody of the infant's person and estate, ought to have been disposed of to some near protestant relation; and not to have been granted to the respondent, who was a stranger in blood, and no way related to the infant. That the appellant Colclough was a [301] protestant, conforming himself to the church of Ireland, as by law established, nearly related in blood to the infant, and one to whom his estate could not descend; and therefore ought to have been appointed his guardian, being in every respect qualified for such a trust. That as none of the said orders were duly served on the appellant Mary, there was no just ground to issue any process of contempt, or to award a sequestration against her; and therefore, as the said several orders were erroneous, it was hoped they would be reversed, and that the process of contempt grounded thereon, would be discharged.

On the other side, it was argued (T. Lutwyche, S. Mead) to be the intent of the legislature by the said act of Parliament, to give the Lord Chancellor of Ireland a discretionary power, either to appoint a relation or other person guardian, as he might judge would best execute the office, and was the most likely person to educate the infant in the protestant religion; for otherwise, the true intent of the act would easily be evaded. That the respondent was appointed guardian at the request of Mr. Barnwell, who appeared to be the nearest protestant relation to the infant; and before any other relation had applied to be appointed guardian:—that he had given security to the Court to be answerable for the infant's estate, and was a known protestant, well affected to the present happy constitution, and had a good real estate; and therefore it was hoped the appeal would be dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the several orders therein complained of, affirmed: and it was further ORDERED, that the appellant Mary Preston should pay the respondent £40 for his costs in respect of the said appeal. (Jour. vol. 21. p. 337.)

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[302] CASE 2.—LADY TEYNHAM,—*Appellant*; DACRE BARRETT LENNARD,—*Respondent* [16th April 1724].

[Mew's Dig. vii. 1491. See Guardianship of Infants Act, 1886 (49 and 50 Vict. c. 27), Custody of Children Act, 1891 (54 and 55 Vict. c. 3), and *In re Ecclesiastical Commissioners & Marquis of Salisbury*, 1876, 2 Ch. D. 41: *In re Moore*, 11 Ir. C. L., N.S.]

[A declaration of a father upon his death-bed, that he expected A. his father would take care to see his children educated in the Protestant religion; is a sufficient appointment to make the grandfather guardian of the infant.]

\*\* ORDERS of the Lord Chancellor REVERSED, which had been made for delivering the infant to two persons named by the grandfather, under an



allegation of his (the grandfather's) ill state of health. The judgment of the House of Lords was, That the Grandfather should take the guardianship upon himself *in person*, for that he could not assign his power to another; the appointment of a guardian being a bare *power* and *trust*, and not assignable; as was resolved in *Bedell v. Constable*, Vaugh. 177; in which case, and in Lord Shaftesbury's (2 P. Wms. 102. Gilb. 172), the nature of guardianship by statute (12 C. 2. c. 24.) is particularly discussed. See 2 Eq. Ca. Ab. 486. c. 16. in n.; where it is said that, in the Duke of Beaufort's case, his father having appointed the Duke of Ormond guardian, but he being attainted of high treason, and so incapable, another guardian was appointed by act of Parliament, it being not to be done by any other power. See also *Foster v. Denny*, 2 Ch. Ca. 237. 1 Eq. Ca. Ab. 260. pl. 3. that a guardian appointed under the statute cannot be removed. See further the succeeding case; and 1 Eq. Ca. Ab. title Guardian; and *Spencer v. Chesterfield*, Ambler 146.\*\*

9 Mod. 40. Viner, vol. 14. p. 172. *note to ca. 1.* 2 Eq. Ca. Ab. 486. ca. 16.

Reported in all these books by the name of Reynolds and Lady Tenham.

Richard Barrett Esq. being seised of an estate of upwards of £3000 per ann. in England and Ireland; upon the marriage of his son, the respondent, with the lady Jane, daughter of the Earl of Donnegall, by indentures of bargain and sale and release, dated the 15th and 16th of April 1681, settled the said estates upon his said son, the respondent, for life, without impeachment of waste; remainder to the first and other sons of that marriage; with divers remainders over.

The respondent had issue by Lady Jane, Richard, his only son, who, without his father's consent, intermarried with the appellant, a Roman Catholic.

The said Richard Barrett the son died soon after his marriage, leaving the appellant ensient; who, on the 20th of April 1717, was delivered of a son named Thomas Lennard Barrett; and who, by virtue of the said settlement, would be entitled to the said estate in possession, after the decease of the respondent the tenant for life.

The said Richard Barrett the respondent's son, being sensible of the prejudice it might be, not only to his child and family, but also to the Protestant interest, especially in Ireland, should such child be brought up a Roman Catholic, did, in his last sickness and not long before his death, direct, that the respondent should have the care and tuition of such child when born; alleging, that the appellant had always promised it should be bred up a Protestant: and this direction was then reduced into writing, by way of memorandum or instructions for a will; but before the same could be prepared in form, the said Richard Barrett died.

[303] The infant being near seven years of age, the respondent, pursuant to the request and direction of his said son, did on the 13th of December 1723, petition the Lord Chancellor Macclesfield, for the removal of his said grandson from his mother the appellant; and in regard that the respondent's ill state of health was such as would not permit him to attend the education of the child himself, he did therefore recommend the care of him to Mr. Baynes and Mr. Milner, two of his intimate acquaintance, and offered to make a proper allowance for his maintenance.

Upon hearing this petition, on the 21st of the same month, the Lord Chancellor was pleased to order, that it should be referred to one of the Masters of the Court, to examine if the appellant had any reasonable objections against the said Mr. Baynes and Mr. Milner; and if none should appear, that then, inasmuch as the said infant's father had directed that the respondent should have the care of him, and the respondent had recommended the said Mr. Baynes and Mr. Milner, they should therefore have the guardianship of the said infant: and his Lordship did likewise further order, that the said Master should examine what the respondent was willing to allow yearly for the infant's maintenance; and whether the same would be sufficient, considering his quality, and the estate he would be entitled to.

The Master by his report, dated the 7th of February 1723, certified, that no objections had been made against Mr. Baynes and Mr. Milner's having the custody of the infant; and that, as he could find, the infant had no other estate than what he was entitled to under the said settlement: that the respondent had offered to

allow £200 per ann. for the infant's maintenance; and that the same was a sufficient maintenance for him.

On the 6th of March following, the respondent again applied to the Lord Chancellor, for the removal of the infant from the appellant, and committing him to the care of Mr. Baynes and Mr. Milner: and the appellant having also petitioned, that the order of the 21st of December 1723 might be discharged, and that she might have the guardianship of her son under such restrictions as the Lord Chancellor should see proper: both these petitions were heard on the 18th of March 1723, when the Lord Chancellor ordered, that the infant should be forthwith delivered to Mr. Milner and Mr. Baynes, by his said mother the appellant; that the Master's report of the 7th of February then last, should be absolutely confirmed; and that £200 per ann. should be paid by the respondent to the said Mr. Baynes and Mr. Milner for the infant's maintenance.

From these orders of the 21st of December and the 18th of March 1723, Lady Teynham appealed; insisting (J. Darnall, J. Hungerford), that thereby her child, of but six years and eleven months old, was taken from her, to the endangering of his life or health, as appeared by the affidavits of persons acquainted with him; and was to be put under [304] the care of two gentlemen no way acquainted with, or of kin to him or his family, and who were made guardians upon pretence only that they were appointed for that purpose by the respondent, who it was conceived had no right to be the guardian himself, and consequently no right to appoint any; and the rather, for that the remainder in fee of the said estate belonged to the respondent, if the appellant's son should die without issue. That there seemed to be the less reason for this proceeding, because by the appellant's care the infant had been hitherto brought up a Protestant; that she offered the utmost caution or security to continue so to do, and it was to her care and tenderness that the infant owed what share of health he now enjoyed. That as to the recommendation of the appellant's late husband touching the care and tuition of the infant, and which the respondent had so strongly insisted on in the Court of Chancery, it was proved only by the affidavit of Mr. Milner himself, and was what the appellant never heard of before, nor had any reason to believe; for her husband had been so severely used by the respondent his father, that it did not seem probable he would trust him with the care of his child; but if that transaction was true, yet it would not amount to a devise or disposition of the guardianship of the infant. It was admitted, that the appellant did promise her husband before his death, that the child she was then ensient with should be educated a Protestant, and accordingly she caused him to be christened by a minister of the church of England, and had Protestant godfathers for him, of which the Right Honourable the Earl of Litchfield was one; she also had him taught the Protestant catechism, and instructed him in Protestant books and in the Protestant religion so far as his years and capacity would admit, and had always sent him to Protestant churches, but never to mass. That the appellant had no jointure or dower, nor had her son any maintenance out of the estate, or from the respondent; but the appellant had solely maintained and educated him ever since he was born, out of her own fortune; and had also thereout, in honour of her husband's memory, voluntarily paid about £1000 for his debts, of which the respondent refused to pay any part, though he had never allowed her husband, to the time of his death, more than £40 a year for his maintenance, nor had ever shewn the least regard for his grandson, nor so much as seen him. The appellant therefore prayed, that the said orders might be reversed, and that her said son might be continued under her care, at least for two or three years, she offering to give good security for his being educated in the Protestant religion, and also at her own expence to maintain him and such Protestant tutors and servants as might be thought necessary for him; or in case her said son should be removed from her, then she humbly prayed that he might be put under the care of the Right Honourable Charles Duke of Grafton and the said Earl of Litchfield, they being both of equal degree of kindred to her and her said son.

[305] To this it was answered (P. Yorke, C. Wearg) on the part of the respondent, that the appellant neither had, or pretended to have, any testamentary right to the guardianship of the infant, or that he would be entitled to any estate from her, nor did she deny her being a Roman Catholic; by reason whereof she

would, if convicted, be absolutely disabled from having the custody of any child; and consequently was in the highest degree improper to have the education of a youth, who was not only entitled to so good an estate, but would in all probability be a peer of the realm. That the child being now near seven years old, was of an age most liable to receive such impressions of erroneous principles as might be very difficult, if not impossible to remove. That the appellant's design was obvious, for though she recommended the Earl of Litchfield for the guardianship of her son if it was not granted to herself, yet she desired that the child might be continued with her till he was more established in his health; but how long that pretence might continue, or what might be the consequence of it, would be difficult to determine. That supposing the appellant should religiously observe her promise in educating her son a Protestant, yet she would not be able to prevent her attendants, or others of the Romish persuasion, from having access to him, and instilling the principles of that religion into him, notwithstanding his having had Protestant godfathers, and was never sent to mass. That the respondent's son marrying the appellant without his consent, and dying before the misunderstanding thereby occasioned was removed, was the reason why no settlement was made on that marriage: but on the other hand, the appellant's fortune, consisting in land only, remained entire to her at the death of her husband: and it was believed that by his personal estate, which the appellant possessed herself of, she had more than sufficient to pay his debts. That the respondent had always a very great concern for his said grandson, which was apparent from his having preserved for him, upon the estate which he would be entitled to in Essex, timber to the value of £10,000 and upwards, which had been some time of full growth, and might have been felled by the respondent, for the purpose of increasing his daughters fortunes. That as to the persons recommended by the respondent to have the guardianship of his grandson, though they were not of kin to the respondent, yet were his intimate acquaintance, and gentlemen of such known integrity, that the appellant's own solicitor gave the unexceptionableness of their characters as a reason why he did not attend the Master upon the reference. That all these matters had been fully heard and determined by the Lord Chancellor, who was entrusted with the exercise of that part of the prerogative of the Crown, which concerned the guardianship of the persons and estates of infants, and to whom, by the law of the land, it belonged to appoint guardians: and therefore it was hoped that the appeal would be dismissed, and that the respondent should be at liberty to carry the said orders into execution.

[306] BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the orders therein complained of should be reversed: and it was further ORDERED, that the respondent, the grandfather of the infant, should have the guardianship of him; and that the person of the said infant should be forthwith delivered by the appellant to the respondent, or such person as he should appoint to receive him; and that the Court of Chancery should give proper directions in pursuance of this order. (Jour. vol. 22. p. 321.)

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CASE 3.—ROBERT DILLON and another,—*Appellants*; LADY MOUNT-CASHELL and others,—*Respondents* [20th February 1727].

[Mew's Dig. vi. 1698; vii. 1494, 1496. See Guardianship of Infants Act, 1886 (49 and 50 Vict. c. 27) s. 6, and Custody of Children Act, 1891 (54 and 55 Vict. c. 3.)]

[Where the father of an Infant devises the guardianship to the mother, the Court of Chancery has no power to controul this will, unless upon complaint and proof made of misbehaviour in the mother.]

\*\* The following is a fuller and more accurate state of the case, as far as relates to the question of guardianship; as to the other part of it, see the [argument and the judgment, 4 Bro. P.C. 311, 312].

A. devised his real estate to his three daughters and their heirs; and after-

wards, by a codicil, he devised it over to his wife, in case his three children should die without issue of their bodies; and made his wife guardian to his children, and died. The wife was very young, and in six months after A.'s death married again. The Lord Chancellor of Ireland decreed, that the children should be removed from the mother their guardian, and that the Court would appoint some proper person amongst their relations to receive them; but that the mother should be at liberty to see them as often as she would: but as to the guardianship of the lands, there was no decree made, but there was another bill depending as to that point. But the DECREE of the Lord Chancellor was REVERSED in the House of Lords, and the mother confirmed in the guardianship.

See the note at the head of preceding Case 2.\*\*

\*\* 2 Eq. Ab. 487. c. 18.\*\* 9 Mod. 105. by the name of *Morgan v. Dillon*.

Sir Arthur Shaen Bart. being seised in fee of a real estate of the yearly value of £1300 and possessed of a personal estate to the amount of £16,000 or £17,000 did in the year 1717, being then advanced in years, intermarry with the appellant the Lady Shaen, then Susannah Magan, the respondent Morgan Magan's eldest daughter, with whom Sir Arthur had £4000 portion.

By articles previous to the marriage, dated the 23d of December 1717, Sir Arthur Shaen agreed that the appellant the Lady Shaen should have £500 per ann. jointure issuing out of his real estate, in case she survived him; and that his real estate, chargeable with such jointure, should be settled to the use of himself for life, remainder to his first and every other son to be begotten on the body of the appellant, in tail male successively, according to the usual form of family settlements.

The appellant Lady Shaen behaved herself with great tenderness and affection towards her husband, and by him had issue three daughters, namely, the respondents Frances, Elizabeth, and Susannah Shaen.

[307] By an act of Parliament passed in Ireland, 14 & 15 Car. II. intituled, *An act for taking away the Court of Wards and Liveries, and tenures in capite, and by knight's service*, to the same effect with an act passed in England, 12 Car. II Sir Arthur was enabled to dispose of the guardianship of his children by his will.

Accordingly, on the 26th of September 1724, Sir Arthur made his will, and thereof appointed his Lady sole executrix; and devised to her, by the name of his dearly beloved wife Susannah Lady Shaen, one third part of his personal estate, and £100 per ann. in addition to her jointure provided for her by her marriage articles; and thereby left it at her election to pay all his debts and legacies out of his real or personal estate; and devised, that in case he should have no son, his real estate should be equally divided between his three daughters, Frances, Elizabeth, and Susannah, and their heirs; and appointed £100 per ann. maintenance for each of them until their respective marriages or ages of 21, and appointed his Lady their guardian.

Sir Arthur Shaen, on the 24th of June 1725, made and executed a codicil to his will, and thereby devised, that in case his three daughters should die without issue, the appellant his Lady should have all his real and personal estate in the kingdoms of England and Ireland, to her and her heirs for ever; and soon after died.

After the death of Sir Arthur, the appellant Lady Shaen with her children lived for some time with the respondent Morgan Magan her father; but she having afterwards intermarried with the appellant Robert Dillon, her father was pleased to express so much dislike thereat, that the appellants were forced to remove from his house, and to leave the three children with him; and he also detained all the plate which belonged to Sir Arthur Shaen in his life-time.

Mr. Magan, with a view to have the management of the children and their estate and fortune, did, on the 7th of March 1725, petition the Lord Chancellor of Ireland, praying his Lordship to order, that he the said Morgan Magan, or such other person as his Lordship should think proper, might be assigned guardian to the minors, and have the care and tuition of their persons, and the management of their estate and fortunes; and that the care, custody, and tuition of them might be committed to him, or such person as his Lordship should appoint, upon his entering into a recognizance with security, as by the standing order of the Court

was directed. Whereupon it was ordered, That the appellant Lady Shaen should shew cause the first seal before the then next Easter Term, wherefore the said Morgan Magan should not be appointed guardian to the minors, as desired; and that in the mean time the said minors should continue under his custody and care.

By an order dated the 12th of May 1726, it was ordered, That the order of the 7th of March should be discharged, and that the [308] minors should remain where they then were, viz. in the custody of the said Morgan Magan, until the further order of the Court to the contrary; with liberty for the Lady Shaen to visit them when and as often as she should think fit: and his Lordship was pleased to direct, that the names of some of the nearest relations of the said minors, to whom their estate could not descend, and who were of distinction and fortune, should be given to his Lordship; and that he would then appoint some person to take care of their persons and education.

And by another order of the 27th of the same month it was ordered, that the Right Honourable Catherine Viscountess Dowager Mount Cashell should be appointed guardian to the said minors Frances, Elizabeth, and Susannah Shaen, to take care of their persons and education, upon her giving security by recognizance, such as one of the Masters of the Court should approve of, conditioned that the said minors, or any of them, should not be disposed of in marriage by the said Lady Mount Cashell, or that she should not be privy or consenting thereto, without the leave of the Court; and the appellant, the Lady Shaen, should have liberty to visit them when and as often as she should think fit.

Pending the proceedings on the petition for the guardianship of the children, the said Morgan Magan, on the 26th of March 1726, procured a bill to be filed in the Court of Chancery in Ireland against the appellants, and the tenants of Sir Arthur Shaen's estate and others, in the name of the minors, by Thomas Magan his son, their *prochein amy*, charging the appellants with misapplication of Sir Arthur Shaen's estate, and praying a discovery and account of his real and personal estate; that a receiver might be appointed thereof; and that the personal estate might be divided according to Sir Arthur's will: and charging, that the appellants were suing at law for the plate and part of the assets of Sir Arthur, which were in the hands of the said Morgan Magan: an injunction was prayed to stop such proceedings at law, and any other suit for the said personal estate. And on the appellants taking out a *dedimus* to put in their answer, the plaintiffs obtained an injunction, as of course, according to the prayer of their bill.

The appellants, by their answer, set forth the whole personal estate come to their hands, and also the rents of the real estate, with the tenants names; and insisted that they had not, since the death of Sir Arthur, received so much of the rents as answered the £600 per ann. due to the appellants; they also fully denied any misapplication of Sir Arthur Shaen's estate, and insisted, that the appellant Lady Shaen being sole executrix of her said husband's will, and having thereby power to pay his debts out of the real or personal estate as she thought fit, and being likewise testamentary guardian to the minors, she had in both capacities a right to the receipt of the rents and management of the personal estate during their minorities.

The tenants refusing to pay their rents to the appellants, although they had not received so much as was due to them on ac-[309]-count of Lady Shaen's £600 per ann.; on affidavit made thereof, it was, on the 21st of July 1726, ordered, that the appellants should be at liberty to distrain for the rents and arrears of rent of the said estate, notwithstanding the injunction.

Soon afterwards the plaintiffs preferred a petition, setting forth, that when the motion was made on the 21st of July 1726, his Lordship, as they apprehended, declared, that the injunction which had before issued in the cause, was only an injunction to stay proceedings at law as to the plate and other personal assets, and that therefore the motion was needless; and yet that an order was made upon the said motion, that the appellants should be at liberty to distrain for the rents and arrears of rent of the real estate, notwithstanding the injunction; and that they were apprehensive the appellants, under colour of that order, would oblige the tenants to pay their rents and arrears to them, which were, as they alleged, very considerable, and would not, as they were advised, be safe in the appellant's hands, and was not intended by his Lordship; and the rather, for that the appellants had given no

security to be accountable for the same; and therefore prayed, that the order of the 21st of July might be set aside. And this petition being heard on the 28th of the same month, the said order of the 21st of July was set aside accordingly; though the plaintiffs did not support any of the allegations of their petition by affidavit or otherwise.

The plaintiffs having afterwards amended their bill, by praying an injunction against the appellants suing or distraining for the rents, or molesting the tenants; they again petitioned the Lord Chancellor, setting forth their having so amended their bill, and that the appellants had not put in their answer thereto, and were distraining and harassing the tenants with an intent to receive their rents; and therefore prayed an injunction to prevent the appellants receiving any part of the rents or profits of the said estates, and distraining or molesting the tenants, till they had answered the said amended bill, and his Lordship's further order to the contrary. Upon the hearing of which petition on the 15th of September 1726, though there were no affidavits to support the allegations thereof, it was ordered that such injunction should issue, unless in a fortnight after service of that order, good cause should be shewn to the contrary; and that the appellants should stop receiving any part of the rents or profits of the said estate, and from distraining or molesting any of the tenants thereof, in the mean time.

The appellants put in a full answer to the amended bill, and on the 6th of October 1726, came to shew cause against the injunction; when his Lordship was pleased to order, that the said order of the 15th of September should be discharged, upon the appellants giving such security by recognizance as one of the Masters of the Court should approve of, conditioned to account for such part of the rents and profits of the minors real estate as should come to their hands: and it was further ordered, that such [310] security should be given by the first seal before the then next term; or in default thereof, that an injunction should be and was thereby awarded, to stop all proceedings at law against the respondents for the plate and other effects in the bill mentioned; and to stop all proceedings at law by distress, action of debt, covenant, or otherwise, for recovery of the rents of the minors estate; the same to continue till the appellants should file full and perfect answers to the bill, and the further order of the Court to the contrary.

On the 9th of November following, the plaintiffs moved the Court, that in regard the appellants had given no security, as by the order of the 6th of October 1726 they were directed to do, that the said order might be made absolute; which was ordered, and an injunction awarded accordingly.

These proceedings occasioned two separate appeals by Lady Shaen and her husband Mr. Dillon; one, from the several orders made relative to the guardianship of the infants; and the other, from the orders made concerning the testator's personal estate.

In support of the first appeal it was argued (C. Talbot, T. Lutwyche), that the appellant Lady Shaen being of the communion of the church of England, had an undoubted right to the guardianship of her children by the will of their father; who by virtue and in pursuance of the powers given him by the statute, had regularly devised the sole guardianship of his children to his lady, their mother and natural guardian; and this will the Court of Chancery had no power to controul, especially as there was not the least ground to complain of any misbehaviour in Lady Shaen towards her children. As to the objection, that Lady Shaen had by the will a remainder limited to her of her children's estate, in case of their death without issue, and that therefore she was not a proper person to have the care and custody of them; it was said, that this objection ought to have had no weight with the Court, as it had none with Sir Arthur the father of the children. The right to the guardianship vested in Lady Shaen by Sir Arthur's will, and the remainder devised to her by the same will could not destroy that right; besides, this objection could not ordinarily prevail in any case against the parent of the children. But Lady Shaen's second marriage had been urged as an objection, because it might lessen her affection for the children, and in time destroy it; this marriage however did not necessarily infer a prejudice to the children, nor was there any restraint put upon Lady Shaen in that respect by Sir Arthur's will, or any limitation of her right of guardianship. Her marriage therefore with Mr. Dillon, against whom there was no real objection,

was not a sufficient reason for taking away from her the guardianship which was vested in her both by the testator's will and the act of Parliament.

Against this reasoning it was urged (P. Yorke, N. Fazakerley), that Lady Shaen had entirely quitted and relinquished the minors, and, by her marriage with the appellant Dillon, had put it out of her power to execute the trust reposed in her by Sir Arthur Shaen. That Mr. Dillon [311] had greatly mismanaged his own fortune, and being thereby in very needy circumstances, was a very improper person to be trusted with the persons or fortunes of the minors. That Lady Shaen having a remainder limited to her of the minors estate upon their dying without issue, was the less proper to be their guardian, and had it not in her power, were she ever so well inclined, to take the necessary care of their health, maintenance, and education. And, lastly, that it might be of the utmost ill consequence to the minors to be put into the hands of the appellant Dillon, because his interest was apparently inconsistent with theirs.

In support of the second appeal it was insisted (C. Talbot, T. Lutwyche), that Sir Arthur Shaen, having by his will, pursuant to the power given to parents by the statute made in Ireland, 14 and 15 Car. II. appointed the appellant Lady Shaen guardian to the minors; and it being by that act expressly provided, that the person to whom the custody of such minors should be devised, should and might receive as well the rents and profits of the minors real estate as the personal estate, for their use, and bring such actions in relation thereto as by law a guardian in socage might do; the appellant Lady Shaen ought not to be restrained from exercising the power given to her by that act; nor could she be divested of the estate during the minority of the children, or at least until she had committed some act in breach of the trusts reposed in her by Sir Arthur Shaen's will, and which was not attempted to be made out; nor was there any affidavit to prove that the respondents even apprehended the rents and profits to be unsafe in the appellants hands. And as neither the testator's will or the act of Parliament required any security, the Court of Chancery ought not to have directed any to be given. That the appellant Lady Shaen being executrix of Sir Arthur's will, and likewise a devisee of a third part of his real estate, and having authority to pay his debts and legacies either out of his real or personal estate, at her election; she ought not to be turned out of the receipt of either of them, or restrained from the recovery thereof, at least without some misbehaviour, which was not so much as pretended. That an executrix is under no obligation to give any security, nor is it usual for a Court of Equity to compel an executrix, who is intrusted by the testator with his personal estate, to give security; or at least not upon a bare motion, without any affidavit of insolvency or misconduct. That Lady Shaen being entitled to £600 per ann. as her jointure out of the real estate, and to £300 per ann. thereout for the maintenance of the minors; she ought not to be restrained from receiving the same, or from taking any legal course for the recovery thereof. And therefore it was hoped that the said several restraining orders would be reversed.

On the other side it was contended (P. Yorke, N. Fazakerley), that two thirds of the personal estate of Sir Arthur Shaen belonged to the minors, and ought to be laid out on good security for their benefit; and that the rents and profits of the real estate, subject to the £600 a year payable [312] to the appellant Lady Shaen, likewise belonged to them, and ought to be received and secured for their benefit. That Mr. Dillon having mismanaged and spent his own fortune, and being very much in debt, ought not to be intrusted with the receipt or management of the minors estate; and his being either unable or unwilling to give security for what should come to his hands out of the real or personal estate, plainly shewed that he was not a fit person to be trusted therewith. Besides, the appellants were in contempt for want of a sufficient answer, and the injunction was only to continue until answer, and further order.

After hearing counsel on both these appeals, which came on together, it was ORDERED AND ADJUDGED, that the several orders therein respectively complained of should be reversed, and the injunction dissolved; and that the custody of the Lady Shaen's children should be forthwith given to her as their guardian; and that the Court of Chancery in Ireland should, out of the money appointed for the maintenance of the children, direct the Lady Viscountess Mount Cashell to be satisfied for

the time the children were in her custody; and that the said Court of Chancery should appoint a receiver, to continue till the hearing of the cause or further order of the Court, to collect in such part of the rents and profits of the real estate, and also the personal estate of the testator Sir Arthur Shaen, as had not been received by the appellants or either of them; and that the said Court should, in the appointment of such receiver, prefer the nominee of the appellants, in case the person proposed by them should be fit; and the said receiver should give such security as the Court should direct: and it was further ORDERED, that in the mean time, and until the hearing of the cause, the said Court should order the annuity due to Lady Shaen to be paid to the appellants; and also order payment of the maintenance due by the will unto the children, as the same should grow due; as also payment of the testator's debts and legacies, according to the will; and from time to time give such other orders and directions relating to the testator's estate, and the collecting in and securing the same, as should be just and necessary; and that at the hearing of the cause, the said Court should order and appoint what should appear to them on the whole to be just and proper. (Jour. vol. 23. p. 189.)

[313] CASE 4.—JOHN ANSTIS,—*Appellant*; JOHN GANDY and others,—*Respondents* [31st March 1735].

[Mew's Dig. vii. 1503.]

[Where a Guardian by his will remits to his ward whatever is due to him for his *maintenance*, it will include all demands for his *education*.]

\*\* Guardians ought to limit the expences of the maintenance, etc. of infants, within the bounds of the annual income of the infants.

DECREE and ORDER of the Master of the Rolls AFFIRMED. \*\*

Grounds and Rudiments of Law and Equity, p. 153. ca. 11: 2 Eq. Ab. 196.  
note to ca. 17.

Mary the daughter of John Anstis, the appellant's father, and sister of the half-blood to the appellant, on the 23d of September 1693, intermarried with William Hooper, who, on the 3d of December 1700, died intestate, leaving issue by her the respondent Frances, and Mary, afterwards wife of John Swinnerton Dyer, and his wife enseint with a posthumous son; who was born on the 16th of February 1770, and named William.

Mary, the mother, took out administration to her husband, and possessed his real and personal estate; and upon her husband's death, removed to the appellant's father's house in Cornwall, who maintained her and her children till the time of her death.

On the 3d of February 1707, the mother died, having made her will, and thereby gave the respondent Frances and her sister all her goods and chattels, and made them executrices; and during their minority, appointed her brother-in-law the Reverend Mr. John Penneck, William Bond Esq. and the said John Anstis her father their guardians and trustees.

Mr. Penneck and Mr. Bond declining to act in the trust, the appellant's father solely acted therein, and managed the personal estate given to the respondent Frances and her sister, and also the estates of his grandson William, and maintained him from his birth till his death, in November 1712; and also the respondent Frances and her sister, until June 1713; when they were sent to the appellant in London for their better education.

Upon the death of William the son, his estate came to the respondent Frances and her sister; and the appellant's father managed the same, as well as the estate which before belonged to the respondent and her sister, until his own death; which happened in January 1713, having first made his will, whereby he gave to the respondent Frances and her sister £100 a-piece, and remitted whatsoever was due to him for their maintenance respectively, and what he had laid out about their brother's funeral; and made the appellant his executor.



The appellant, after the death of his father, at the request of the respondent and her sister, took upon himself the care of them, and the management of their estates, and maintained them and their servant from June 1713, to March 1717; during which time he was at considerable expence in their maintenance, cloaths, [314] schooling, and sickness; an account whereof was entered and kept in a book provided for that purpose.

The appellant finding that the respondent and her sister would not be prevailed upon to live within the income of their estates, proposed to Mr. Penneck, their uncle, that they might be sent to live with him in Cornwall to prevent such great expences, and to break off, if possible, the contracts of marriage which they had entered into clandestinely, and to their disparagement; to which proposal Mr. Penneck agreed. But before they left the appellant's house, the respondent being then 20, and her sister upwards of 21 years of age, after examination of all the items of the said account, in the presence of two witnesses, they freely and voluntarily signed the same, amounting to £846 15s. 10d. with the following subscription thereto: "We do acknowledge to have received from our uncle John Anstis Esq. Garter King of Arms, the several sums contained in this account, from the 20th of June 1713. Witness our hands the 1st day of March 1717."

The respondent Frances stopping at Mr. Penneck's house at Exeter, in her way to Cornwall, made a contract of marriage with the respondent John Gandy, and went to his father's house; and they intermarried on the 5th of September 1718, when she was under age, and against the consent of her relations. But before this marriage, the respondent John Gandy and his father were acquainted with the debt due to the appellant; and promised, that the marriage should not be had till these matters were settled.

Upon this marriage, the respondent, and also Mr. Dyer and his wife, entered upon all their estates, and possessed themselves of the stock thereon, which had been bought by the appellant, and received the rents then in arrear, which had accrued due during the time she was maintained by the appellant.

In Easter term 1719, the respondents, together with Dyer and his wife, brought their bill in Chancery against the appellant for an account, and to be paid the rents and profits of the estate, since the appellant's father took possession thereof, according to the value of such estate; and for the personal estate of the respondent's father and mother, and the real and personal estates of their brother, received as well by the appellant's father as by the appellant: to which bill the appellant put in his answer, annexing thereto a full and particular account of all the receipts and payments during the management of the estate by his father and himself.

In Michaelmas term following, the appellant brought his cross bill against the respondents and the said Dyer and his wife, for an allowance for the board and maintenance of the respondent Frances and her sister, and their maid servant, while they lived with the appellant, and for the maintenance of their mother and brother while they were maintained by the appellant's father; and that the respondent and her sister might come to an account with the appellant, and pay him what should appear due thereon, and [315] interest for the balance of the accounts signed by them as aforesaid.

Witnesses being examined, it was fully proved on the part of the appellant, that he, from time to time, admonished the respondent Frances and her sister to live according to their incomes, and therefore caused an account thereof to be delivered them in writing; that the appellant and his wife constantly checked them for running into such great expences; that the respondent Frances and her sister, whilst under the appellant's care, entered secretly into contracts of marriage, which he prevented from taking effect: that all the things bought for the respondent and her sister, were at their particular request; and that an account thereof was entered in a book kept for that purpose; that the appellant requested them, on their first coming to his house, to keep a counter book, which they accordingly did; that they deliberately examined every item of the account, and freely signed the same. And that the appellant, during his care of the respondents, continued a correspondence with Mr. Penneck, and had his approbation of the appellant's management in every respect.

On the 1st of March 1724, both causes were heard before the Master of the Rolls;

when it was, among other things, decreed, that the appellant should account before the Master for what of the personal estate, and the rents and profits of the real estate of William Hooper, the respondent's father, came to the hands of their mother Mary Hooper; and for what of their father and mother's estate came to the hands of the appellant's father, or of any person for his use; and for what thereof came to the appellant's hands, or to the hands of any person for his use; and the Master was to make the appellant an allowance for the board and maintenance of the respondent's mother and brother, during the time they respectively lived with the appellant's father, and for the maintenance of the respondent and her sister, during the time they lived with the appellant, since the death of his father, not exceeding the interest of their fortunes; but the appellant was not to have any allowance for the respondent's maintenance during the life of the appellant's father; and the respondent's sister, after she came of age, having signed an account of what money, cloaths, and necessaries she received from the appellant, (being the account before mentioned to have been signed by the respondent and her sister,) the same was to stand and be allowed as against her, with liberty to falsify or surcharge the same; and the appellant was to be answerable for what of the respondent's father's estate came to the hands of her mother, no farther than her assets would amount to pay; and costs were reserved till after the Master's report.

On the 9th of December 1731, the Master made his report, and thereby certified, that old Mr. Anstis, from the death of Mr. Hooper the father, had the management of the personal estate, and received the rents and profits of the real estate of the respondent's [316] mother and brother, and maintained them to the time of their respective deaths: that the account, touching the same, being very perplexed and intricate, he had forbore entering into the particulars, but had, to the time of the mother's death, set and allowed the rents and profits of their estates against the maintenance of her and her son: that the appellant, by his answer, had admitted to have been received by his father and himself, or their agents, from the death of the mother, to the time of the respondent's marriage, after deducting all payments and outgoings, £890 13s. 5½d. one half whereof, being £445 6s. 9d. was the share of the respondent Frances; besides which, he had charged the appellant with two legacies of £20 and £100 given the respondent by her aunt's and her grandfather's wills, amounting with interest to £182, so that the whole charge against the appellant, as between him and the respondent, amounted to £627 6s. 9d. out of which the Master had allowed £225 for the maintenance of the respondent Frances, from the death of her grandfather on the 22d of January 1713, to the 2d of March 1717, after the rate of £55 per ann. which, as he computed, was the income of her fortune; as also £47 10s. being one half of the maintenance of the respondent's brother, amounting together to £272 10s. which being deducted from the £627 6s. 9d. left a balance coming to the respondent of £354 16s. 9d.

The appellant took several exceptions to this report, which came on to be argued before the Lord Chancellor King on the 6th of July 1733; and the first exception being, for that the Master had not made the appellant any allowance for the board and maintenance of the respondent's mother, during the time she lived with the appellant's father, nor for the board and maintenance of William Hooper, the respondent's brother, whilst he was maintained by the appellant's father, during the life-time of his said mother, pursuant to the decree; it was ordered, that it should be referred back to the Master on that exception, with this direction, that the maintenance was discharged up to the 28th of May 1706, and the Master was to make the appellant an allowance for maintenance to the death of the respondent Frances's mother; and the appellant was to account for the profits accrued due since the said 28th of May 1706.

The fourth exception was, for that the Master had not allowed the appellant several sums paid and disbursed by his father for the respondent Frances and her sister, whilst they were placed by him at a boarding-school at Exeter, after their mother's death, amounting to £121 15s. 8d.—The fifth exception was, for that the Master had not allowed the appellant £32 for two years wages, and board of a tutress kept by the appellant's father in his house, to teach and instruct the respondent Frances and her sister.—The seventh exception was, for that the appellant was not allowed for the half or share belonging to the respondent Frances, of the

cattle and other goods on her estate, at the time of the respondent's entering thereon, and which they and Mr. Dyer and his wife took into their possession, of the value of £147 12s.—being part of the produce of that estate, during the time the respondent Frances lived with the appellant, after the death of his father; for which moiety of cattle and goods, the respondent John Gandy, by his examination to interrogatories before the Master, submitted to account.—The eighth exception was, for that the appellant was not allowed £58 18s. 6½d. due and in arrear for rent of the respondent Frances's estate, at the time the respondents entered into the possession thereof, and which accrued due during the time the respondent Frances and her sister were maintained by the appellant, after his father's death.—The ninth exception was, for that the appellant was not allowed the sums of £40 and £9 11s. which the respondent John Gandy, by his examination, admitted to have received, or which he might have received of Sampson Couch, being other part of the produce of the respondent's estate, within the time aforesaid.—The eleventh exception was, for that the Master by his report certified, that the appellant, by the schedules to his answer had charged only £47 17s. 7d. as paid by him to doctors, surgeons, and apothecaries for the respondent Frances and her sister; whereas it appeared by those schedules, that he had paid on this account for the respondent, only £40 19s. 9d. and likewise several other sums, amounting to £27 0s. 6d.—All these exceptions his Lordship was pleased to over-rule, and to make the appellant no allowance whatsoever in regard to his disbursements for physic, or on account of the respondent's sickness.

He therefore appealed from both the decree and order, contending (J. Willet, E. Green) that the general rule whereby guardians are restrained from exceeding in expences the income of the infant's fortune, admits of exceptions upon particular emergencies; for if it should be laid down as an universal unalterable rule, that guardians, who (as in the present case) have used all possible endeavours to prevent such expences, yet shall not be entitled in Equity to be reimbursed, no person will be induced to undertake the guardianship of infants; since he must either be guilty of a breach of his duty, or run the hazard of losing what he may expend to save the minor from immediate ruin. But if this rule be without exception, then surely it must be understood to comprehend the income received, and the expences laid out during the whole continuance of the minority; and not be interpreted in so strict a sense, as to confine guardians from laying out in the latter and more chargeable part of such minority, upon just considerations, what had been saved out of the income in the former part of it; and therefore the appellant ought to be allowed the money saved by his father during his management of the estates, and the whole income during his own management, towards reimbursing him what he had expended in the maintenance and education of the respondent Frances, and in necessities on her account. That the obligation upon minors to [318] repay or allow guardians such sums as have been expended in cases of necessity, or for the minor's good, depends upon proof of the actual laying out the same, and not solely upon the allowing or signing accounts thereof by the minors after their coming of age; and therefore it was apprehended, that no distinction ought, in Equity, to be made in the case of two sisters and co-heiresses, who had received the money upon the same considerations, but that both should be made equally liable. That the decree ought not to have been varied upon arguing the exceptions, by which variation the appellant would lose upwards of six years maintenance of the respondent Frances's mother, and near six years maintenance and education of William the son; especially, as that part of the decree was agreeable to the proof in the causes. That the appellant's fourth and fifth exceptions ought to have been allowed, as the charges of schooling and education cannot be understood to be included by the bare remission of maintenance in a legacy; not only because the term does not import or signify schooling, but because it was proved, that the testator did not mean to comprehend the charges of such schooling and education. That the sums mentioned in the seventh, eighth, and ninth exceptions ought to have been allowed, as being part of the income of the respondent's estate, while it was under the appellant's care and management. That the respondent's bad state of health, and the means used for her recovery, were both admitted and proved; and it was apprehended, that money laid out for infants labouring under sickness, towards their preservation

and recovery, ought in Equity to be allowed beyond all ordinary expences; and frequently are so allowed, although they may exceed the income of the infant's fortune.

On the other side, it was said (D. Ryder, N. Fazakerley) to be the known rule of the Court of Chancery, to limit the allowance for the maintenance of infants within the bounds of their annual income. That the appellant was not entitled to any allowance for maintenance of the respondent during his father's life, because it appeared by his answer, not only that the respondent and her sister were sent by his father to the appellant's house, but also that his father undertook the payment of their maintenance; and as he was his father's executor and had assets, it was his business to pay himself; nor was it to be doubted that he did so. That the appellant himself having proved a stated account between his father and the respondent's mother, by which all accounts were liquidated and brought to a balance on the 28th of May 1706, and which was allowed to the appellant by the Master; that was both in Law and Equity, a bar to any new account of matters previous thereto: But if not, it appeared in proof, that the rents and profits of the estate received by Mr. Anstis the father, were more than sufficient to answer for the maintenance of the respondent's mother and brother, who boarded with him at his house in Cornwall. It was therefore hoped, that the appeal would be dismissed with costs.

[319] Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree and order therein complained of, affirmed: and it was further ORDERED, that the appellant should pay to the respondents £50 for their costs in respect of this appeal. (Jour. vol. 24. p. 507.)

## HEIR-LOOMS.

CASE 1.—ANDREW FOLEY and another,—*Appellants*; JOHN BURNELL and others,—*Respondents* [27th April 1785].

[Mew's Dig. vi. 1147; x. 1007; xii. 927, 935 (Romilly's Notes of Cases 1). Followed *Martelli v. Holoway*, 1872, L.R. 5 H.L. 532.]

[Chattels devised as Heir-Looms to a certain house, are removed by the tenant for life of that house to another, and are there taken in execution for a debt of the Tenant for life. On a question whether these chattels were liable to be so taken, it was held they were. But this was so held, under the particular words of the testator's will.]

\*\* The above seems not to be an accurate state of the case, and in Mr. Brown's original MSS. it was said, that it was held the chattels were *not* liable to be taken.—That this was a mistake, and that the following is a true statement of the point determined in this case, the reader will easily perceive.

Lord F. left plate, etc. to be enjoyed as Heir-Looms by the persons who should be in possession of his respective houses. A son being born who was tenant in tail (subject to his father's life estate), the chattels so left vested absolutely in him; and he dying, vested in his father as his representative; and were liable to be taken and sold for his (the father's) debt.\*\*

1 Bro. Chan. Rep. 274.

The late Thomas Lord Foley, the appellant Andrew Foley's father, being in his lifetime, and at the time of his death, seised in fee-simple of a very considerable real estate, and possessed of a considerable personal estate, did in his lifetime duly make and publish his last will and testament in writing, bearing date the 19th of June 1777, and thereby (among other things) he gave and devised all that his capital messuage or mansion house, parks, and hereditaments, called Stoke Court; and all the manors, messuages, lands, tenements, and hereditaments situate, lying, and being in the parishes of Stoke Edith, Ashpurton, Stretton, Tarrington otherwise Taddington, Yarkhill, Weston Beggar, Woolhope, Dormington, Mordiford Stretton.

Bishops Froome, Pixley, Munsley, Much Cowarne, and Westhide; and also all the manors of Showle, Donnington, Monkhide otherwise Taddington, Yarkhill, and Weston Beggar; and also all the perpetual advowsons and donations of the parish churches of Stoke Edith, Tarrington, St. Peter's in Hereford, Donnington, and Mor-diford, and all other the manors, messuages, farms, lands, rents, and hereditaments, whereof or wherein his late father Thomas Foley Esquire, was seised or possessed, or had [320] any estate of inheritance; and all other his manors, messuages, lands, tenements, and hereditaments of what nature or kind soever the same respectively were lying and being in the parish of Stoke Edith, or in all or any of the last mentioned parishes in the county of Hereford, with their and every of their rights, members, and appurtenances; and also all his manor of Malvern, and all capital and other messuages, lands, tenements, and hereditaments of what nature or kind soever the same respectively were, together with its rights, members, and appurtenances, to his brother Robert Foley, Doctor of Divinity, and Abraham Turner, since deceased, their executors, administrators, and assigns, for the term of 101 years, to commence from his decease, without impeachment of waste, upon the trusts therein after-mentioned; and after the end or determination of that term, to the use of the Honourable Edward Foley, the testator's second son, and his assigns for life, remainder to trustees to preserve; and from and after his decease, to the use of John Hodgetts Esquire, and Robert Foley Clerk, their executors, administrators, and assigns, for the term of 102 years from the decease of the said Edward Foley, without impeachment of waste, in trust for providing a jointure or jointures for any wife or wives the said Edward Foley should happen to marry as therein-mentioned; and after the determination of the said term of 102 years, and subject thereto, to the use of Rowland Berkeley Esquire, and Thomas Wickens Clerk, their executors, administrators, and assigns, for the term of 500 years from the decease of the said Edward Foley, in trust to raise portions for younger children as therein-mentioned; and after the determination of the said term of 500 years, and subject thereto, to the use of the first, second, third, and all and every other the son and sons of the body of the said Edward Foley, lawfully to be begotten, successively in tail male, and in default of such issue, to the use of the appellant Andrew Foley and his assigns for life, with the like powers for making jointures and raising portions as are therein-before given to the said Edward Foley; remainder to trustees to preserve, and remainder to the use of the first, second, third, and all and every other the son and sons of the body of the said appellant Andrew Foley lawfully to be begotten, successively in tail male, with divers remainders over.

The testator devised certain other capital messuages or mansion houses and premises, called Great Witley and Foley House, for the benefit of his other children as therein-mentioned, and he thereby gave and bequeathed all the standards, fixtures, household goods, implements of household and furniture, pictures, tapestry, gold and silver plate, china, porcelaine, glass, statues, busts, library, and books, which should be in his capital messuages or mansion houses, called Stoke, Great Witley, and Foley House, to be held and enjoyed by the several persons who from time to time should successively be entitled to the use and possession of the same houses respectively, as and in the nature of heir-looms, to be annexed to and go along with such houses respectively for ever: but it was [321] his will and intention that one of the services of table plate, belonging to Thomas late Lord Foley therein-named, should go to and be enjoyed by the possessor of Witley, and the other to the possessor of Stoke for the time being.

And as concerning the said several terms of 99 and 101 years, respectively limited to the said Robert Foley and Abraham Turner, it was thereby declared, that the same terms were so respectively limited upon this special trust and confidence, and to the intent and purpose that they the said Robert Foley and Abraham Turner, and the survivor of them, and the executors, administrators, and assigns of such survivor, should yearly and every year receive and take the rents, issues, and profits of all and every the manors, messuages, lands, tenements, and hereditaments comprized in the said several terms respectively; and also should from time to time fall and cut down, or cause to be fallen and cut down, so much and such parts of the timber, wood, and underwood growing upon or within the manors, lands, and hereditaments comprized in the same terms, as they or the survivor of them, or

the executors, administrators, or assigns of such survivor, should in his or their judgment and discretion think proper to be fallen, not exceeding in any one year the clear sum of £3000 (without defacing or disfiguring the ornamental plantations in or near his several parks or capital mansion houses of Great Witley and Stoke aforesaid), and to pay, apply, and dispose of so much of the money arising from those funds as would be sufficient (with the rents and arrears of rent of the premises comprized in the same terms, that should be due at his decease, which he also gave and bequeathed to them his said trustees as aforesaid) in manner following, that is to say, In the first place, according to their will and pleasure and no otherwise, to allow yearly and every year, or oftener, to or for the use or benefit of his said two sons Thomas Foley and Edward Foley, any sum or sums of money not exceeding in the whole in any one year the sum of £6000 until such the debts of the said Thomas Foley and Edward Foley as were therein provided for and should be due at his decease were first paid and discharged; but so as his said two sons, or either of them, should have no estate, right, title, claim, or interest in the rents, issues, and profits of his said manors, messuages, lands, tenements, and hereditaments comprized in the said terms for and during the respective lives of his said two eldest sons, and the life of the survivor of them, other than such as the said Robert Foley and Abraham Turner, and the survivor of them, and the executors, administrators, and assigns of such survivor, should in their absolute, free, and uncontrolled power, discretion, and inclination think proper and expedient: and in the next place thereout to pay so much and such part of the principal sum and interest due upon a mortgage by him and his said eldest son made unto Robert Child Esquire, bearing date the 2d day of July 1773, as should be unsatisfied at his decease. *And in the next place thereout to pay and discharge all such the debts of his said two eldest sons Thomas Foley and Edward Foley, and the interest due [322] thereon respectively, as in any schedule or schedules thereunto annexed, or any other schedule or schedules by him thereafter to be made and subscribed, should be contained, or as they his said trustees in their judgment and discretion should think fit and expedient; but so as no one of the creditors of his said sons Thomas Foley and Edward Foley, other than such whose debts should be so scheduled, should have any lien upon or power over any of the manors, messuages, lands, tenements, and hereditaments comprized in the said several terms, or either of them, or on the timber growing thereon, or on the money arising or to arise thereby in any manner whatsoever; and after the decease of the survivor of his said two eldest sons, the payment of the said mortgage money, and of all the said scheduled and other debts therein before mentioned, and also the costs, charges, and expences of the said Robert Foley and Abraham Turner, and the survivor of them, and the executors, administrators, and assigns of such survivor; his will was, that the said terms should wait upon and attend the inheritance of the said manors, messuages, lands, tenements, and hereditaments comprized therein. And the testator appointed the appellant Andrew Foley, Grace Lady Clanbrassil, Mary Foley, and Ann Winnington the wife of Edward Winnington Esq. and his brother the said Robert Foley, and the said Abraham Turner, executors and executrixes of his will.*

The said testator afterwards duly made and published a codicil to his will, bearing date the 17th of September 1777, reciting, that since the execution of his will the said Abraham Turner had departed this life, and that thereby the two terms of 99 years and 101 years, devised to his brother the said Robert Foley and the said Abraham Turner by his said will, would on his decease become vested solely in his brother the said Robert Foley; and that his intent then was, that the appellant Andrew Foley should be substituted as a trustee in the room and place of the said Abraham Turner: the testator did by his said codicil, and which he desired might be taken as part of his will, give and devise all those manors, messuages, lands, tenements, and hereditaments, therein mentioned to be by his said will given and devised to and to the use of his brother the said Robert Foley and Abraham Turner, their executors, administrators, and assigns, for the said terms of 99 years and 101 years, with their rights, members, and appurtenances, unto and to the use of his brother the said Robert Foley and the appellant Andrew Foley, for the terms of 99 years and 101 years respectively, to commence from his decease, upon the same trusts, and to and for the same uses, intents, and purposes,

as in his said will were mentioned and declared of and concerning the said terms thereby devised to his brother the said Robert Foley and Abraham Turner.

The testator died soon after making his said will and codicil, without having revoked his will or codicil, or altered his will, otherwise than by the codicil; and the said Robert Foley (the testator's brother, since deceased) and the appellant Andrew Foley [323] duly proved the will and codicil in the Prerogative Court of Canterbury, and took upon themselves the execution thereof.

The said Robert Foley and the appellant Andrew Foley, as acting executors, some time after the death of the testator, permitted the respondent Edward Foley to take possession of one of the services of plate left by the testator's will, as an heir-loom for the use of the several persons who from time to time should be entitled to the use and possession of the said house at Stoke, the respondent Edward Foley being the first tenant for life of the said house, subject to the term of 101 years.

The respondent Edward Foley having caused a considerable part of the said service of plate which was so devised as an heir-loom with the said house at Stoke, to be removed from thence to a house he then occupied in Portland-Place, in the county of Middlesex, without the consent or knowledge of the appellant Andrew Foley or the said Robert Foley; John Grant and John Battye, two of the respondents, and who severally claimed to be creditors by judgment of the respondent Edward Foley for considerable sums of money, caused writs of *feri facias* to be issued, directed to the sheriff of Middlesex, in order to have the two several sums of £1174 and £401 with the expences levied on the goods and chattels of the respondent Edward Foley; and on the 15th of March 1779, John Burnell and Henry Kitchen, Esqrs. the sheriff of Middlesex, the other respondents, under the authority of the said writs, took in execution all the said plate so removed by the respondent Edward Foley; and on the same day the appellant Andrew Foley gave the respondents Burnell and Kitchen notice that the said plate was not Edward Foley's, but was part of the testator's plate, and had been left by him as an heir-loom.

The respondent Edward Foley hath not at present any issue male of his body, and the appellant Andrew Foley is the next tenant for life of the house at Stoke, in case the respondent Edward Foley should die without issue male; and the appellant Thomas Foley is the first tenant in tail thereof now in being under the limitations in the will.

In Hilary Term 1779, the appellants exhibited their bill in the Court of Chancery against the respondents Burnell, Kitchen, Grant, Battye, Edward Foley, and Robert Foley since deceased; which bill was afterwards amended, and the respondent Robert Dallas made party defendant thereto: and the appellants in such bill stated the particulars above mentioned, and thereby prayed, that the respondents Burnell and Kitchen might be decreed to deliver up all the plate which had been taken by them in execution, and that the same might be replaced in the house at Stoke, there to remain as an heir-loom for the benefit of the several parties interested therein under the will of the testator Thomas Lord Foley; and that in the mean time they might be restrained by the order or injunction of that Court from making any sale of the said plate or any part thereof; and that the respondents Grant and Battye might in like manner be restrained from calling on the Sheriff for [324] returns of the writs of *feri facias*, and from all proceedings against them for not making returns thereof; but in case it should appear that the sheriff had sold the plate or any part thereof, that Grant and Battye might be decreed to replace and make good the same; and for further relief. And the appellants annexed to their bill a schedule of the plate which had been so taken in execution.

To this bill the respondents appeared and put in their answers; and the respondent Grant, after stating in his answer that he had agreed to become the purchaser of two annuities of Thomas, now Lord Foley, the eldest son of the testator, and the respondent Edward Foley, for their lives and the life of the survivor of them, of £100 each, to be paid quarterly, for the sum of £700 each; and that the same were secured by the bonds of the said Thomas, now Lord Foley, and Edward Foley, and warrants of attorney to confess judgments thereon; and that judgments had been duly entered up in his Majesty's Court of Common Pleas at Westminster on the same: and also stating two indentures, each dated May 4th, 1776, and made between the respondent John Grant of the one part, and the respondent Robert

Dallas of the other part; the respondent John Grant, in consideration of the sums of money in the said indentures mentioned to have been paid to him by the respondent Robert Dallas, assigned, transferred, and set over unto the said Robert Dallas, his executors, administrators, and assigns, the said bonds and the judgments obtained thereon; and said, that since the execution of the assignments, he had not any interest in the said annuities, or the securities for the same, or either of them; but the same annuities and securities were the property of the respondent Dallas, who sued out the writs of *feri facias* in the name of the respondent Grant. And the respondent Robert Dallas by his answer admitted, that he caused two writs of *feri facias* to be issued out in the name of John Grant upon the two judgments, by virtue of which sundry pieces of plate were seized at the house of the respondent Edward Foley; and annexed a schedule of the plate to his said answer, and believed part of it to have been the property of the testator; but insisted that the whole of the plate mentioned in his schedule could not be called or included under the appellation or description of a table-service of plate; and also, that nothing found or seized in the house of the respondent Edward Foley, in Portland-Place, could be looked upon or protected as an heir-loom belonging to the house at Stoke; and submitted to the judgment of the Court, whether the appellants had any right to resort to that Court for relief. And the respondent Battye by his answer, after admitting that he caused a writ of execution to be issued and delivered to the sheriff of Middlesex, in order to have the sum of £401 the arrears of an annuity secured by judgment, levied of the goods of the respondent Edward Foley, but that the same was delivered after the writs issued out by the respondent Dallas, and that a quantity of plate was taken by virtue of those writs; submitted to the judgment of the Court, in case the plate was part of the testator Lord Foley's plate by his will devised as an [325] heir-loom to the house at Stoke, whether, as the same was found in the respondent Edward Foley's house in Portland-Place, and appeared to be his property, the same ought not to be sold under the said executions. The respondents Burnell and Kitchen in their answer admitted, that two of their officers, by virtue of their warrants, took a quantity of plate in execution to satisfy the judgments in the dwelling-house of the respondent Edward Foley, and that the same was in the custody of their officers. And the respondent Edward Foley, and Robert Foley, (who died before the decree was pronounced,) in their several answers alleged nothing against the interests of the appellants or their relief in the premises.

To which several answers, except the answer of the defendant Robert Foley, replications were filed, and the cause being at issue, divers witnesses were examined on behalf of the appellants, and the same came on to be heard before the Lord Chancellor Thurlow, on the 1st and 4th of February 1780, when his Lordship was pleased to order the same to stand over for consideration; and the same came on again for judgment the 21st of March 1783, when his Lordship was pleased to order the appellants bill to be dismissed as against the respondents Burnell and Kitchen and Robert Foley, with costs to be taxed by the Master, and as against the other respondents without costs.

But the Lord Chancellor was pleased to determine the cause on the fact of the birth of a son of the respondent Edward Foley, who died 14 days after he was born, in the year 1779, which was not in issue between the parties, and was not alleged in any of the answers, nor observed upon at the hearing of the cause, but was mentioned in the deposition of one of the witnesses.

The appellants apprehending their bill was dismissed on the ground that the absolute property of the plate so devised as an heir-loom vested in such son on his birth, subject to the prior interests therein, and on his death became vested in the respondent Mr. Edward Foley, as his father and sole next of kin; and being advised that no interest vested in such son on his birth, presented a petition to his Lordship for a re-hearing of the cause, which being granted, the same came on to be re-heard before the Lords Commissioners for the custody of the great seal, on the 17th of May last, when the cause being in part heard, was adjourned to the 24th day of the same month, on which day their Lordships were pleased to confirm the decretal order.

The appellants conceiving themselves aggrieved by the said decretal orders of dismissal of the 21st of March and 24th of May, appealed therefrom; and on



their behalf it was argued (G. Pryce, Ll. Kenyon, J. Poole), that the rules of law permit personal property to remain in contingency, and not absolutely to vest till a future event shall happen, provided it be not to take place at too remote a period. That the event in this instance was, when any son of Mr. Edward Foley should become entitled under the limitations in the will to the possession of the mansion-house at Stoke; an event which must [326] take place, if ever, on the death of Mr. Edward Foley, and within the time allowed for bequests of that sort to vest. That the plate and furniture were so bequeathed by the testator appeared by the will; for the bequest was, "To the several persons who from time to time should respectively and successively be entitled to the use and possession of the house at Stoke." There were no other words descriptive of the persons to take. It was therefore submitted, that to make the plate and furniture vest in a child of Mr. Edward Foley, *who never was in possession or entitled to the possession of the house at Stoke*, and who died in a few days after his birth, *was a construction directly contrary to the express words of the will*. That the construction put on this clause of the will by the decree was contrary to the intention of the testator, which in a question of construction is the most material consideration. The will appeared to have been planned for the purpose of securing his large property to his family against those creditors of his two eldest sons, of whose demands he did not approve; viz. *those who had supplied them with money for annuities purchased at inadequate prices*: in that number were the respondents Grant and Battye. *The payment of their other debts was provided for by the will*. With this view he left the bulk of his real property to trustees for the terms of 99 and 101 years, and it could not be doubted that he inserted the clause in question still further to effectuate that purpose, that his mansion-houses might not be stripped of the plate and furniture by those creditors. It must surely be deemed inconsistent with the intention of a testator, making his will on such a plan, to have the plate belonging to one of his mansion-houses liable to be taken in execution for the debts of one of his sons, on an event which at the time of making the will was not improbable, whereby all the limitations of such plate to his other children would be defeated; it was to suppose he intended that which he appeared anxious to guard against.

On the other side it was contended (J. Mansfield, J. Scott), that the general intent of the testator was to annex the personal property in question to the real estate in the nature of heir-looms. The infant son of Edward Foley upon his birth acquired an estate in tail in the real property, to which these heir-looms were annexed: the extent of his interest in the heir-looms therefore was such as a tenant in tail of personal property has in consideration of law: that interest by the law is considered as absolute, and of course this infant son became upon his birth the absolute owner of the property in question, subject only to the interest his father had in it for his life; the consequence of which is, that upon the death of the son the property vested in Edward Foley his father, and was therefore liable to be taken in execution for his debts. But it had been contended by the appellants, that the testator intended that no son should be entitled to the heir-looms in question till he attained the age of 21 years, or till he was entitled to the possession of the estate to which they were annexed; and it could not be denied, that the testator by law might have limited this property to serve either [327] of these purposes. The appellants were not able to determine for themselves whether the testator meant to express an intention to restrain the vesting of an absolute interest in the property till a son should attain 21 years of age, or a purpose to postpone it till a son should become entitled to the possession of the estate. Whether the former or the latter intention should be imputed to the testator, the respondents contended that both were implied intentions, and that neither was manifest or clear of doubt. If the appellants insist that the absolute interest in the property was to vest in a son at his age of 21 years, the respondents insisted that no mention was made in the testator's will of that period; and if the infant's father should be living when he attained his age of 21 years, the son would not answer the description of an owner of the plate contained in the will, which gives it only to *persons entitled to the use and enjoyment of the houses to which it is annexed*. On the other hand, if it is contended that the testator meant that the interest in the plate should not become absolute till a son tenant in tail became entitled to the possession of the

estate, it follows, that although if the son attained his age of 21 years in the lifetime of his father, and they together might have suffered a recovery of the real estate, and have sold or pulled down the house to which this plate is annexed by the will, yet they could not have disposed of the plate, because during the life of the father the son could not be entitled to the possession of the house. It could not be the testator's intention to preserve the plate longer than it was in his power to restrain the alienation of the house to which he annexed it. That it was probable the testator would have provided for this case if it had been suggested to him that it might happen. But it was unnecessary to state the danger of construing wills with reference to what a testator would have done in every possible case that might have been stated to him, but which does not appear from the words of his will to have occurred to his mind. If Edward Foley had died, leaving an infant son of the age of a week or a day, and that son had survived him but an hour, in which case he would have been for that hour tenant in tail of the real estate and entitled to the possession of it, this personal property would undoubtedly have belonged absolutely to the personal representative of the infant; the testator's anxiety to preserve the plate was certainly not more disappointed by the case which had actually happened, than it would have been in the case here supposed. That the reported cases, in which it has been held that the interest of a tenant in tail in heir-looms did not vest till he attained 21 years, or till he became entitled to the possession of the real estate, prove only that by clear unambiguous words personal property may be so limited, but could not be considered as authorities against the two determinations which had been made in the present case, in which it had been held, that the testator had not expressed, or had not sufficiently expressed, an intention to limit it in that manner. And that if this property was protected against executions for the debts of Edward Foley while [328] it continued in the house to which it was annexed, the respondents contended that the protection ceased when he was suffered to remove it from that house; and they also disputed the power of a testator to exempt personal estate from the legal demands of the creditors of a person to whom he thought proper to give the possession of such property.

After hearing counsel on this appeal on the 12th and 13th days of July last, the following question was put to the Judges: "Whether Edward Foley had such interest in the plate in question in this cause as rendered the same liable to an execution at the suit of the creditor, or whether the plaintiff had any such interest therein as barred such execution?" And the Judges having differed in opinion, were heard *seriatim*; whereupon it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree therein complained of, affirmed. (MS. Jour. *sub anno* 1785, p. 381.)

## INCUMBRANCES.

CASE 1.—RICHARD SYMMES and others,—*Appellants*; ANN SYMONDS, widow, and others,—*Respondents* [26th February 1703].

[Mortgages are not to be preferred to other real incumbrances, but they shall all take place according to their priority, and as they severally stand in order of time.]

\*\* DECREE of the Master of the Rolls REVERSED in part.

In Mr. Fonblanque's notes to Treatise of Equity, c. 4. sec. 25, this case is cited as determining that where the legal estate is standing out, *equitable incumbrances* must be paid according to their priority in time. To the same point also are cited *Brace v. Marlborough* (Duchess), 2 P. Wms. 495: *Pomfret (E.) v. Windsor (Ld.)*, 2 Vez. 486: *Wortley v. Birkhead*, 2 Vez. 571., 3 Atk. 809. But the rule is only applicable to mere equities, *Blake v. Hungerford*, Pra. Ch. 159. If therefore a subsequent incumbrancer, in order to protect himself against mesne incumbrances, obtains a conveyance of the legal estate, Equity will not deprive him of his *legal* advantage, unless at the

time he lent his money he had notice of the mesne incumbrance, or obtained the conveyance of the legal estate after the decree: for though the second or mesne incumbrance be prior to the subsequent incumbrance in point of time, yet it furnishes a merely equal equity with the subsequent incumbrancer, who having by greater diligence obtained the legal estate, shall be allowed to retain his advantage, *Turner v. Richmond*, 2 Vern. 81: *Hawkins v. Taylor*, 2 Vern. 29: *Morrett v. Paske*, 2 Atk. 52: *Matthews v. Cartwright*, 2 Atk. 347: *Robinson v. Davison*, 1 Bro. C. R. 63; which last was a case where the third mortgagee bought in the first mortgage *pendente lite*. See also *Belchier v. Renforth*, *post* title Mortgages, Ca. 20. But if the second or mesne incumbrancer has obtained a decree for an account, a subsequent incumbrancer cannot, by bringing in the first incumbrance, defeat the effect of such decree. *Wortley v. Birkhead*, 3 Atk. 809.\*\*

2 Vern. 524. 1 Eq. Ca. Ab. 142. ca. 5. by the name of *Bristol (E.) v. Hungerford*.

Sir William Bassett, being seised in fee of several real estates in the county of Somerset, and indebted to several persons by mortgages, judgments, and otherwise, made his will, dated the [329] 20th of September 1693, and thereby devised all his estate to Sir Edward Hungerford Knight, and John Hill Esq. in trust, to be sold for the payment of his debts and legacies; and, if there should remain any surplus, he declared it was to be deemed part of his personal estate.

After the testator's death, several controversies arose among his creditors, concerning the priority of their respective securities; and, in consequence of these disputes, two several suits were instituted in the Court of Chancery by different classes of the creditors; in one of them the Earl and Countess of Bristol were plaintiffs, against Sir Edward Hungerford and others, defendants; and in the other, Christopher Sparke and others were plaintiffs, against the Earl and Countess of Bristol and others, defendants.

On the 3d of July 1697, both these causes were heard at the Rolls; when it was, *inter alia*, decreed, that the Master should take an account of what was due to the several mortgagees, for principal, interest, and costs, discounting what they had received; and that Sir William Bassett's real estate should be sold to the best purchaser; and that the monies arising by such sale, together with what should be remaining of his personal estate, should be in the first place applied to *pay the Earl and Countess of Bristol, and then the other creditors by mortgage, their principal, interest, and costs; and in the next place, the judgment and statute creditors; then the bond creditors; after that, the simple-contract creditors; and, last of all, the legatees*. And the Master was to ascertain what was due to such creditors respectively, who were to come in before him and prove their debts, and be examined upon interrogatories touching the same.

Under this decree, the appellants and other judgment creditors came in before the Master and proved their debts; the amount whereof was ascertained by his report of the 19th of April 1703. The real estate was also sold for £21,300 but turned out insufficient to satisfy all the mortgage and judgment creditors.

The appellants therefore, *whose judgments were prior to several of the mortgages*, apprehending themselves injured by the decree, in respect to the preference thereby given to the creditors on mortgage, appealed; insisting (J. Brockett), that they ought to be paid their several debts according to the due course of law and equity; and that their securities by judgment did, in law, affect the real estate, and the trust thereof, from the several days on which such judgments were signed, without the aid of the will; and therefore ought to take place according to their respective priorities, as well on equities of redemption as on legal estates; and more especially in preference to mortgages *which were not in being when those judgments were signed*, and which could not therefore take from the appellants any security that was before legally or equitably vested in them, or render their judgments in any degree [330] less effectual than they were at the respective times of signing the same.

On the other side it was said (T. Swinburne), that the equity of redemption of the testator's estate was actually mortgaged without notice of the judgments, and before the same were extended; and that therefore those mortgages ought to be

satisfied before them. That, in a Court of Equity, judgment creditors could only compel the sale of an estate of inheritance for their satisfaction; and if that estate happened to be in mortgage, it was not reasonable that the mortgagees should be decreed to convey to a purchaser, without first receiving their money. That the decree had been acquiesced in above six years, and was in a great measure performed, the real estate having been sold, and the greatest part of the purchase money paid to several of the mortgage creditors. And that if this decree should now be reversed, the present respondents, through the remissness of the appellants in not appealing sooner, and by the growing interest of the prior incumbrances since the decree, might be in danger of losing their just debts.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the said decree, so far as it had been executed, should not be set aside or opened; but as to the monies remaining undivided pursuant to the decree, the appellants should be let in to a satisfaction of their debts, according to the priority of their several securities; and also, that the respondents should be at liberty to contest the appellants, or any other of the creditors debts, in Chancery, before the Master, by whom the account was directed to be taken, if they should think fit; and so far the said decree was to be reversed and opened. (Jour. vol. 17. p. 460.)

CASE 2.—HENRY CHAMPERNOWNE,—*Appellant*; URSULA HILLERSDON,—*Respondent* [11th March 1708].

[Mew's Dig. i. 291.]

[Lands are sold to A. subject to an annuity of £15 a year to the sister of the vendor; the lands are afterwards mortgaged and otherwise charged by A. and, thus charged, descend to his heir at law. A Court of Equity will make a personal decree against the heir, for the arrears and growing payments of this annuity.]

\*\* DECREE of Lord Chancellor Cowper AFFIRMED.\*\*

Richard Hillersdon Esq. being seised in fee of the manor of Lambside, and certain messuages in Membland, Caulstone, and Poole Mills, in the county of Devon. mortgaged the lands of Mebland for £1000; and afterwards, by articles dated 31st January 1692, in consideration of a marriage between his daughter and Arthur Champernowne, the appellant's brother, he covenanted to convey the said manor and premises to the said [331] Arthur Champernowne, in fee; but no notice was taken in these articles of any annuity payable out of the premises to the respondent.

Pursuant to the articles, the said Richard Hillersdon, by lease and release dated the 29th and 30th of August 1695, in consideration of the said marriage, and of £6000 to him paid by Champernowne, conveyed all the premises to the said Arthur Champernowne and his heirs for ever; with a covenant for quiet enjoyment free from incumbrances, except the leases mentioned in a schedule annexed to the release, and the £1000 mortgage; *but in this schedule mention was made of a certain annuity or yearly rent of £15 payable to Ursula Hillersdon his sister, out of the premises, for her life, if she should so long continue unmarried.*

Some time afterwards, Arthur Champernowne sold the manor of Lambside and Poole Mills to Nicholas Trist Esq. for a valuable consideration; and upon his marriage with Mary his second wife, he settled the lands of Caulstone upon the said Mary for life, for her jointure; and limited a long term of years to trustees, after her death, to raise £1500 for the said Mary, or as she should direct.

In November 1700, Arthur died, leaving Mary his widow, and the appellant his brother and heir at law; who thereupon became entitled to the reversion of Caulstone, and to the equity of redemption of Membland.

At the time of Arthur's death, the respondent's annuity of £15 was three years and a half in arrear; and therefore, in Easter Term 1703, she exhibited her bill in Chancery against the appellant as the brother and heir of Arthur, in order to recover the arrears and growing payments of this annuity. The defendant by his

answer stated, that the inheritance of Lambside and Poole Mills had been sold; that Membland was still in mortgage for £1000; and that Mary, the widow of Arthur, claimed Caulstone for her life, and for a long term after her death, for raising £1500; and that therefore nothing had descended to him on the death of his brother but the reversion of Caulstone, and the equity of redemption of Membland, the clear yearly profits whereof did not exceed the interest of the mortgage-money.

On the 20th of June 1707, the cause was heard before the Lord Chancellor Cowper, who decreed the defendant to pay the plaintiff the arrears of the said annuity of £15 per ann. and to continue the growing payments thereof for the future as it became due, and to pay her the costs of suit; and it was referred to a Master to compute the arrears and tax the costs.

The Master accordingly reported the arrears of the annuity to amount to £153 15s. and taxed the costs at £58 18s. 8d. making together £212 13s. 8d.; which report being confirmed absolutely, the defendant was served with a writ of execution of the decree.

[332] But, instead of obeying this decree, the defendant appealed from it; contending (S. Dodd, J. Belfield), that he was charged in his own person to pay this £212 13s. 8d. and the growing annuity for the future, whereas the lands alone ought to be subject to such payment. That he was only charged by the bill as heir at law of his late brother Arthur, and yet by the decree he was personally charged with the arrears of the annuity which had incurred due in his brother's life-time, before he had received one penny of the profits of the lands descended, and although such profits did not exceed the yearly interest of the mortgage-money charged thereon. And that the exception in the schedule, of the respondent's annuity, ought not to charge the premises in the hands of a purchaser for a valuable consideration, as Arthur Champernowne was, because that annuity was merely voluntary and without consideration.

On the other side it was insisted (P. King), that the annuity in question was a good charge on the premises in the hands of the appellant; and that he having admitted himself to be in the possession of Membland, and entitled to the reversion of Caulstone, was the only person of whom the respondent could demand the payment of her said annuity, and which was the whole of her subsistence.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed; and that the appellant should pay the respondent £10 for her costs. (Jour. vol. 16. p. 662.)

## INDICTMENT.

GEORGE LOOKUP,—*Plaintiff*; The KING,—*Defendant* (in Error)

[5th May 1766].

[This case is obsolete. See 14 & 15 Vict. c. 100, s. 24, and *Castro v. Reg.* 6 A.C. 229.]

[In an indictment for perjury, the crime was alleged to be committed in the time of the *late* king; but was charged to be against the peace of the *now* king. This error is fatal, and renders the indictment totally insufficient.]

\*\* Judgment of the Court of K. B. reversed. See 2 Hawk. P. C. c. 25. s. 92.\*\*

3 Burr. 1901.

Sir Thomas Frederick, on the death of Sir John his brother in 1757, becoming possessed of a very considerable fortune, the plaintiff Lookup, and one James Hamilton, persons well known to be very conversant in the arts of play, found means to introduce themselves into his company; and in the months of October and [333] November 1757, they contrived to be almost every evening with him, and

taking every advantage, they and their associates, within the compass of a few months, won a very considerable sum of money of him.

In November 1757, Lookup and Hamilton contrived to get themselves invited to Sir Thomas Frederick's house, at Hampton in Middlesex; and James Plunkett Esq. (a gentleman who had been frequently of the company) was likewise invited to be of the party, and accordingly came with him.

On Saturday the 12th of November 1757, Sir Thomas Frederick having drank freely at dinner, retired at about seven in the evening with Lookup, Hamilton, and Mr. Plunkett, into a private room; when cards being proposed and called for, Sir Thomas Frederick and Hamilton sat down to play at a game called all fours; and Hamilton alleging, that he was tied up from playing for more than one guinea a game, they played only for that sum; but Sir Thomas Frederick was prevailed upon to bet with Lookup £30 and with Mr. Plunkett £20 on each game.

In the course of this sitting, which lasted till the next day, Sir Thomas Frederick lost many more games than he won, and upon the whole was a great sufferer, being stripped of all his ready money to a very considerable amount; insomuch that he was obliged to send his servant to town the next morning (although Sunday) to his banker for £300, and in the evening of that day, Sir Thomas Frederick, Lookup, Hamilton, and Mr. Plunkett retired into a private room, when Sir Thomas played again at all fours with Hamilton for one guinea a game, and continued so playing until about one o'clock the next morning, during which time Lookup and Plunkett, as before, made the same bets with Sir Thomas of £30 and £20 each game, and during the course of this sitting, Sir Thomas Frederick lost all the ready money he had so sent for from his banker's, and likewise a further sum of £1035, which he paid to Lookup, Hamilton, and Plunkett, by drafts on his banker to that amount, dated the same 13th of November 1757, the greatest part of which was won by Lookup.

Sir Thomas being stripped at these two sittings of so large a sum of money, and at a subsequent meeting in the same month, of another large sum by the same persons, and conceiving he had been unfairly dealt with, was advised to bring actions against the persons who had won it, not as an informer, but upon the clause in the statute of the 9th Ann. chap. 14. which enables the loser to recover back the money won. And accordingly, on the 5th of December 1757, Lookup was served with process at the suit of Sir Thomas Frederick, returnable in the Court of King's Bench in Hilary Term following; and having appeared, a declaration in Hilary Term 1758 was delivered, wherein Sir Thomas Frederick declared, that Lookup was indebted to him on the said statute in £1500.

To this action Lookup pleaded *nil debet*; and issue being joined thereon, notice was given for trial in Trinity Term 1758; but [334] Mr. Plunkett and Hamilton interposing on the part of Lookup, and desiring matters might be referred to arbitration, the notice of trial was thereupon, at their instance, countermanded; and the matter rested in this state until Michaelmas Term following, when the parties differing concerning the terms of arbitration, the treaty broke off.

Sir Thomas Frederick not being capable of proving the precise sum won by Lookup, (as in an action brought by himself he could not be admitted an evidence,) was advised, agreeable to the provision in the statute, to prefer a bill of discovery in the Court of Chancery against Lookup, to obtain of him an account of the money he had so won of Sir Thomas; and in Hilary Term 1759, such bill was accordingly filed.

Lookup, to gain time, at first both pleaded and demurred to the discovery; but the plea and demurrer being upon argument overruled, and the bill being afterwards amended in a few particulars, Lookup, on the 19th of July 1759, put in his first answer to the effect following: viz. He admitted the play at Hampton, both on the Saturday and Sunday evenings; but with respect to the play on Saturday, he swore the game first played at was whist, and that Sir Thomas Frederick at that game won a considerable sum of Lookup; that Sir Thomas and Lookup afterwards played at all fours; and that Lookup then lost 300 guineas to Sir Thomas, by playing with him at that game, and in express terms denied that Sir Thomas and Hamilton did play that evening at all fours, or that Lookup then won of Sir Thomas any sum of money. But in regard to the play on the Sunday evening, Lookup admitted it was between Sir Thomas Frederick and Hamilton, and that Lookup

betted with Sir Thomas on the side of Hamilton; but he expressly denied that he won any money of Sir Thomas that evening; on the contrary he swore, that he lost so considerably that evening to Sir Thomas, that he was obliged to leave off betting.

Although this answer was not sworn until the 19th of July 1759, yet the action at law, whereby the transactions of the 12th and 13th of November 1757 were immediately called in question, was commenced so long before as the 5th of December 1757; so that it was impossible for Lookup to have forgot what passed at the times of play, especially in two such essential matters, as the game played at, and his being a winner or loser. The real fact was, that Sir Thomas Frederick was then in such a seeming decline of health, that it was thought impossible for him to live; and therefore Lookup was totally regardless of what he swore, and determined at all events to confess nothing that could be made use of against him.

This answer being in many instances evasive, exceptions were taken to it, and being reported insufficient, two others were afterwards put in by Lookup; but he still persisted in his first story of not being a winner, but a loser.

As no discovery could be obtained from Lookup, Sir Thomas Frederick, in Hilary Term 1762, proceeded to trial in his action, [335] relying chiefly upon the evidence of Mr. Chandler and Mr. Bristow, who were both in the room during a considerable part of the play, and particularly at the breaking up of the Sunday night's play; Mr. Plunkett and Hamilton were likewise both subpoenaed, and Hamilton attending was examined; but notwithstanding he confessed he was informed of the action being brought, immediately after the commencement of it, and that he knew it was grounded on the transactions which passed on the 12th and 13th of November 1757, at Hampton, and (as may be reasonably supposed) must have recollected every thing material that happened on those evenings, or at least so essential a fact as Lookup's being a winner; yet so great a tenderness had Hamilton for his friend Lookup, that he could not be prevailed upon to remember any thing of the transaction; however, upon the evidence of Mr. Chandler and Mr. Bristow, it was proved to the satisfaction of the court and jury, that Sir Thomas Frederick did play at all fours with Hamilton, both on the 12th and 13th of November, and that, Sir Thomas, at those two sittings, did lose and pay to Lookup, in money and by drafts on his banker, to the amount of £750, instead of Sir Thomas Frederick's winning and receiving from Lookup 300 guineas, as he had expressly sworn by his answer; a verdict was therefore given for £750 in favour of Sir Thomas Frederick.

It fully appearing in the course of this trial, that Lookup had sworn false by his answer, in the several instances above stated, and that it could not be by mistake, but was manifestly wilful and corrupt, and done in order to evade the discovery Sir Thomas Frederick sought by his bill in Chancery; Sir Thomas on the 30th of June 1762, preferred a bill of indictment against Lookup for perjury, which was found and presented by the jury; stating the substance of Sir Thomas Frederick's bill, and of Lookup's answer, and assigned the perjuries charged to have been by him committed in the several passages before mentioned, on the 19th of July 1759, 33 George II. and the indictment concluded as follows, viz. "And so the jurors aforesaid, upon their oath aforesaid, do say, that the said George Lookup, on the said 19th day of July, in the year of our Lord 1759 aforesaid, at the said parish of St. Dunstan in the West, in the said county of Middlesex, before the said Richard Edwards, then being one of the said Masters of the said Court of Chancery, and then and there so having such sufficient power and authority to administer the aforesaid oath to the said George Lookup as aforesaid, did knowingly, falsely, wickedly, maliciously, wilfully, and corruptly, in manner and form aforesaid, on his oath aforesaid, in and by his aforesaid answer to the said amended bill of complaint, commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil example of all others in the like case offending, and against the peace of our said now Lord the King, his crown and dignity, etc."

[336] Alarmed at this indictment, Lookup's first effort was to intimidate Sir Thomas Frederick from prosecuting it, and with that view, he set up his brother as a common informer, to bring four several *qui tam* actions against Sir Thomas Frederick, in the Court of Common Pleas, one of which he thought proper to bring on to trial in Michaelmas Term 1762, and, by his own and his friend Hamilton's evidence, procured a verdict for his brother the nominal plaintiff, for no less than

£3150 under a pretence that he Lookup had lost and paid to Sir Thomas Frederick a large sum of money on the 11th of March 1757, almost six years before the commencement of the action, and that Hamilton likewise had lost and paid to him another large sum of money on the 3d of December 1761.

But though a verdict was thus obtained, the scheme failed of the effect principally intended by it, namely that of stopping the indictment; which being about this time at issue, it was found necessary to have recourse to some other contrivance, to delay at least the justice of the Court in which that indictment was depending, if it could not be finally eluded; and with that view Lookup, who was known to have an absolute controul over Hamilton, is supposed to have sent him abroad, in order to have a pretence for postponing the trial; for a notice being given by Sir Thomas Frederick, for the trial of the indictment at the sittings after Hilary Term 1763, Lookup applied to the Court to have the trial put off until the then next term, on the absence of Hamilton; and which, on Lookup's swearing that Hamilton was then in France, and that he was so material an evidence for him, that he could not safely proceed to trial without his testimony, the Court was pleased to grant.

Hamilton returning to England, as soon as the purpose of sending him abroad was answered, notice of trial was given for the sittings after Easter Term 1763; but the multiplicity of other business prevented the cause from coming on within those short sittings, and it therefore stood over until the next term.

In Trinity Term 1763, notice of trial was again given by Sir Thomas Frederick; but now Mr. Plunkett was abroad, which gave a fresh handle to Lookup for an application to the Court, to have the trial again postponed by reason of his absence; which upon Lookup's swearing to the fact, and that Mr. Plunkett was so material a witness for him, that he could not safely proceed to trial without his evidence, the Court was pleased again to grant.

Sir Thomas Frederick, hearing that Mr. Plunkett and Hamilton were both in England, caused notice of trial to be given for the sittings after Michaelmas Term 1763, and had both of them subpoenaed the same day, whereby any further shifts by Lookup were prevented; and accordingly, on the 3d of December 1763, the indictment was tried, when the two essential assignments of perjury, namely, the game played at being all fours, and not whist, and Sir Thomas Frederick being a considerable loser to Lookup, were [337] clearly proved by five witnesses, who, although the Court had taken the precaution to have the evidence examined apart, all agreed in their testimony. The only persons attempted to be produced on the behalf of Lookup, were Plunkett and Hamilton, who, notwithstanding Lookup had put off the trial twice, on allegations upon oath that they were material witnesses for him, did not contradict any of the facts sworn to by the witnesses on the other side, or say any thing material in Lookup's behalf. Whereupon the jury, to the entire satisfaction of the Court, found Lookup guilty of wilful and corrupt perjury.

Lookup immediately afterwards fled, and the proper steps were taken towards an outlawry; to avoid which, he surrendered on the day before the outlawry would have taken place. And the Court having taken time to consider of their judgment, and having heard every thing that Lookup had to say in his excuse, he, on the 19th of November 1765, was brought into Court, when the following judgment was pronounced against him: viz. "That the said George Lookup, for the trespasses, contempts, and perjuries aforesaid, be set in and upon the pillory at Charing Cross, in the county of Middlesex, for the space of one hour; and that the said George Lookup be afterwards transported to some of his Majesty's Colonies or Plantations in America, for the space of seven years; and also that the said George Lookup be now remanded to the custody of the Marshal, to be by him kept in safe custody, in execution of the judgment aforesaid, and until he shall be transported as aforesaid."

To obtain a reversal of this judgment, Lookup brought a writ of error in Parliament (J. Morton, J. Eyre), and therein assigned the following errors: I. That the indictment was insufficient. II. That the offence in the indictment specified, was *not* charged to have been done against the peace of his *late Majesty*, in whose reign it was alleged to have been committed. III. That the offence was charged to have been done against the peace of his *present Majesty*, in whose reign it appeared *not* to have been committed. IV. That no *certain day or time* was fixed, appointed, or



limited by the judgment, for setting the plaintiff in error in and upon the pillory. V. That no *certain day* was fixed, appointed, or limited by the judgment, for the transportation of the plaintiff in error. And VI. That the Court of King's Bench had not any power or authority, by law, to adjudge or order, that the plaintiff should be transported to some of his Majesty's Colonies or Plantations in America, for the space of seven years.

In support of these assigned errors it was contended, that the indictment was substantially defective, and therefore no judgment could be pronounced upon it against the defendant. It did not charge the offence to have been committed *against the peace of the King*, and this omission was a defect in substance; crimes being the object of the jurisdiction of courts of criminal justice, only as they are offences *against the peace of the King*, against the order of the King's government established by law. In a common action of trespass *vi et armis*, which partakes of the nature of a criminal [338] proceeding in the slightest degree only, the omission of *contra pacem* was at the common law a substantial objection, to be taken advantage of by writ of error; *à fortiori* in an indictment, wherein the greatest accuracy is required, and where the charge must be fully and completely made, both in substance and in form. In fact, indictments have been quashed, and judgments reversed, in a variety of instances, upon this objection. If the omission of *contra pacem* be a defect, it cannot be supplied by intendment, even after verdict or judgment; nor will the charging the offence to be committed, as in the present case, against the peace of his *present Majesty*, which is absurd and impossible, help it. Lord Chief Justice Hale, in his *Pleas of the Crown*, Vol. II. p. 188. puts a case precisely similar to the present. "If A. says he be indicted for an offence supposed to be committed in the time of a *former King*, and concludes *contra pacem Domini Regis nunc*, it is insufficient; for it must be supposed to be done *contra pacem* of *that King*, in whose time it was committed." The single authority of that great judge, so eminently learned in the criminal laws of his country, was sufficient to decide this point; however others were not wanting; and it was apprehended, that there was no adjudged case, or even a *dictum* of any judge, to be found in the law books to the contrary.

But this judgment was not only substantially defective, it was also erroneous. For the Court had fixed no time within which the plaintiff was to be set in the pillory, or transported; consequently, they in effect left the plaintiff to the mercy of the officer who was intrusted with the execution of the sentence; and though imprisonment was not a substantive part of the punishment intended to be inflicted, yet the judgment had the effect of an adjudication, that the plaintiff should be imprisoned for an uncertain time, *at the discretion of the officer*, which was conceived to be utterly against law. Another objection to this judgment was, that the power of courts to transport, in cases of perjury, is founded upon the statute 2 Geo. II. c. 25. whereby courts are authorized to transport offenders "to some of his Majesty's Plantations beyond the seas, for a term not exceeding seven years." It was conceived, that the judgment of transportation ought strictly to pursue the direction and words of the statute; whereas, in the present case, the Court of King's Bench had ordered the plaintiff in error to be transported to some of his Majesty's Colonies or Plantations in America, which was not agreeable to the letter of the statute, and therefore not warranted by it. It was therefore hoped, that the judgment would be reversed.

On behalf of the prosecutor it was argued (F. Norton, J. Dunning), that the supposed error in the indictment, was nothing more than a misprision of the clerk, in a point which had no relation to the guilt or innocence of the party indicted, nor did in any manner alter or affect the nature of the charge; it was not in the allegation of any fact, to be proved or disproved by evidence, but in the stating a mere legal conclusion from the facts before alleged; the truth of which being ascertained beyond controversy by the verdict, that conclu-[339]-sion must necessarily result from them, whether it was so expressed or not. But this objection, if it was of any weight, might have been taken advantage of in the Court below, by demurrer, by motion to quash the indictment, or in arrest of judgment; and though it is true, that Courts of Justice do not ordinarily exercise the same liberality of intendment in support of indictments, as in other cases after verdict, it is no less true, that an

objection of form, thus kept in reserve to defeat a judgment, and elude a punishment so well merited, usually meets with, as it deserves, all possible discountenance. Besides, the word *now*, in which the whole of this supposed error consists, might and ought to be rejected as mere surplusage, the sense being complete without it; and the idea it is supposed to convey, being repugnant to every other part of the indictment, and not only in fact false, but in its nature impossible to be true. The rejecting this single word would put an end to the objection, and leave the indictment perfect, consistent, formal and legal; and in indictments, as in all other cases, where words of this sort occur, nobody knows how or why, which have either no meaning at all, or such as tends to involve the whole in absurdity and nonsense, Courts of Justice not only may, but frequently do and ought to reject them.

As to the supposed errors in the form of the judgment itself, it was the form usually observed in similar cases; and was warranted by all the precedents to be found in the Court by which it was pronounced. If the objection drawn from the want of specifying the precise days for the execution of the different parts of the sentence was to prevail, it would overturn almost every judgment of that and every other Court of Criminal Jurisdiction, by which the day of execution (except where it is otherwise directed by act of parliament, as in the case of murder) is usually left to the discretion of the sheriff, or other officer to whom the execution belongs, and who it is to be presumed will execute it at the most convenient time; since it is his duty to do so, and he is punishable if he does otherwise. And as to the error last assigned, which was understood to be founded in a supposed distinction between *Colonies* and *Plantations*, that distinction remained to be made out, and, as applied to this subject, was conceived to have no foundation. It was therefore hoped, that the judgment would be affirmed.

After hearing Counsel on this Writ of Error, the Judges were directed to deliver their opinions upon the following question; viz. "Whether the perjury being alleged in the indictment to have been committed in the time of the late King, and charged to be against the peace of the now King, is fatal, and renders the indictment insufficient?" And the Lord Chief Baron of the Court of Exchequer, having conferred with the rest of the Judges present, acquainted the House, "That they all agreed in their opinion in the affirmative." Whereupon, it was ORDERED and ADJUDGED, that the judgment of the Court of King's Bench should be reversed. (Jour. vol. 31. p. 376.)

## [340]

## INFANT.

CASE 1.—Dowager Lady EFFINGHAM,—*Appellant*; Sir JOHN NAPIER and others,—*Respondents* [1st May 1727].

[Mew's Dig. vii. 1463. See Seton on *Judgments*, 5th ed. 830.]

[An infant is not bound by the decree of a Court of Equity, but must have a reasonable time after he comes of age to shew cause against it.]

\*\*The report in 2 P. Wms. 401, is thus abridged in the margin: "Upon a decree against an infant, unless cause within six months after he comes to age, the infant may answer, make a defence, and examine witnesses anew." See also *Fountain v. Cain & al.* 1 P. Wms. 504, that where there is a decree, *nisi causa*, against an infant; on such infant's coming of age, and before the decree is made absolute, he may put in a new answer; *Bennett v. Lee*, 2 Atk. 531, *acc.* And exceptions cannot be taken to an infant's answer; *Strudwick v. Pargiter*. Bunb. 338. The infant at his full age may (as the right way is) apply to the Court, and set forth how he is grieved by the decree, and may have leave to amend or alter his answer, or any part of it, or put in a new one; but if he does not do so, it shall be presumed that he abides by it, and so it shall be read against him. Gilb. Rep. Eq. 3, 4.\*\*

2 P. Wms. 401. Viner, vol. 4. p. 448. ca. 12.

After the determination of the former appeal in this cause,\* viz. on the 14th

\* See title Mortgage, ca. 11.

of July 1725, Thomas Lord Effingham died; having made his will, and thereof appointed the now appellant, his widow, executrix.

On the 28th of July 1726, the respondent Sir John Napier attained his age of 21, and was served with a subpoena to shew cause against the former decree. But instead of setting down the causes again for hearing, or shewing cause against the decree, he thought fit, when the six months were very near expired, to prefer a petition to the Lord Chancellor King, praying liberty to amend his bill, or exhibit a new one, as also to amend his answer to the appellant's cross bill; and that in order thereto, the appellant might produce all the deeds and writings in her custody and power relating to the premises, to the end that he might inspect and take copies of such of them as he should have occasion for.

On the 27th of January 1726, this petition was heard before the Lord Chancellor, assisted by the Master of the Rolls; when his Lordship was pleased to order, that Sir John Napier should be at liberty to amend his answer, or put in a new answer to the appellant's cross bill, and that he should have time till the first day of the then next Term for that purpose. But as to the amending his original bill, his Lordship declared, that there did not appear to be any precedent in the Court for amending a bill, in any points wherein the same had been dismissed upon the merits; but it was ordered, that Sir John Napier should be at [341] liberty to rehear the causes; and to that end, that the original cause should stand over till after the time given for amending his answer, or putting in a new answer to the cross bill, was expired: and it was further ordered, that the respondent Sir John should be at liberty to see the deeds, writings, and exhibits, which were made use of by the appellant at the hearing of the causes; and to that end, the appellant was to leave the same with her clerk in Court, to be inspected by the said respondent or his agents.

From this order the present appeal was brought, and on behalf of the appellant it was insisted (P. Yorke, T. Reeves), that the respondent Sir John having first brought his original bill to impeach the settlement of the 16th of July 1718; and the appellant having by her answer to that bill insisted, that the deed was fairly and deliberately executed, and not obtained by any fraud, circumvention, or surprise; the proper and only heads of equity on which the respondent could hope for any relief against the deed, were fully in issue in that cause: and as the appellant's cross bill was to establish the deed, and to have a legal estate in the premises therein comprised conveyed to her, and as both those causes had been heard together, the respondent Sir John ought not now to be at liberty to put in any new answer, or amend his former one; because it might occasion an examination of witnesses *de novo* to the same matters as were in issue in the original cause, after publication had passed in that cause, and the same had been heard; which was apprehended to be contrary to the known and established rules of the Court of Chancery, and might be a means of introducing perjury. That no precedent could be produced of leave being given to one who was an infant at the time of putting in his answer to a cross bill, either to amend that answer, or put in a new one, after he came of age, and after both the original and cross causes had been heard. That this case differed from the case of an original bill being brought *against* an infant; and it was apprehended, that the rule in Courts of Equity for infants to have a day to shew cause against a decree, does not hold in cases where trusts are carried into execution against infants; for in such cases it hath not been the practice of Courts of Equity to give an infant a day to shew cause. That the declaration of the Court in the order now appealed from, "That there did not appear any precedent in the Court for amending a bill in any points wherein the same had been dismissed upon the merits," might very properly be used as an argument against the respondent Sir John's amending his answer, or putting in a new answer to the appellant's cross bill; for if he was at liberty to do so, and thereby bring new matter in issue, or make another defence in the cross cause, and then be permitted to rehear both causes, it might tend to reverse or vary the decree already pronounced in the original cause; and might be productive of the same inconveniencies as if he had liberty to amend the original bill. That it was apprehended, the order of the House upon the former appeal could not properly be carried any farther than that the respondent Sir John [342] might, when he came

of age, be at liberty, if he thought fit, to apply to the Court of Chancery, to have the causes reheard upon the pleadings and proofs as they then stood: for when the House had absolutely reversed that part of the original decree which related to what the appellant was entitled to by virtue of the settlement of July 1718, and the inquiry directed concerning the value of the lands intended to be comprised in that settlement; it could not be meant that any farther examination should be had as to those matters. And therefore it was hoped, that the order complained of would be reversed; and that as the respondent Sir John Napier had not shewn any cause against the decree, the same should now be made absolute.

On the other side it was contended (C. Talbot, T. Lutwyche), that the order was warranted, as well by the reason of the case, as by the constant and ancient practice of the Court. For that Courts both of law and equity protect an infant from suffering by his inability to manage or defend any suit in relation to his inheritance: at law, in all such suits the parol should demur, and in many cases where an infant is plaintiff, the proceedings shall be stayed until after he comes of age; and though Courts of Equity allow of proceedings against an infant as far as a decree, yet at the same time they always allow an infant time, after his coming of age, to shew cause against such decree; which privilege would be vain and of no use, unless he should be allowed an opportunity of amending that defence, which he is presumed incapable of making properly during his minority. That the present case was still much stronger, because it appeared, that through the neglect of the respondent's former solicitor, his cause had been mismanaged, and several proceedings taken therein to his great prejudice. That the House having taken the former decree to be defective, in not giving the respondent time to shew cause against it after his coming of age, did in great justice supply that omission, and give him time to shew cause according to the course of the Court; and this course allowing the respondent to put in a further answer and amend his defence, it could not be the intention of the House to deprive him of the benefit of any defence which he could justly make against the appellant's claims; without which, these causes would come to a hearing upon an imperfect defence made on behalf of the respondent, when he himself, by reason of his infancy, was not capable of making any defence, and when his former solicitor failed to make a proper one for him.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed.\* (Jour. vol. 23. p. 122.)

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[343] CASE 2.—FRANCES LUCY, widow,—*Appellant*; ROBERT MOORE and others,—*Respondents* [21st April 1730].

[Mew's Dig. vii. 1391; viii. 492; xii. 813; xiv. 1747. See *Druce v. Denison*, 1801, 6 ves. 395.]

[By articles made previous to the marriage of a female infant, it was agreed, that in consideration of a suitable jointure to be made by the husband after the wife should come of age, the whole of her real estate should be limited to the husband in fee. The jointure was accordingly settled, and the wife being of age, was a party to the deed; but it was held, *that she was not bound by the articles, and that her acceptance of the jointure did not amount to a confirmation of them*†.]

\*\*\*†See the succeeding note, by which it appears that this was by no means the express point determined.

The following, it is thought, is a more full and accurate statement of this Case:

One by articles, previous to his marriage, covenants, in consideration of £3500 portion, and on his intended wife's conveying her lands to him and

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\* The parties afterwards compromised all matters in difference, and their agreement for that purpose was, on the 10th of August 1728, made an order of the Court of Chancery. (Register 1727. Lib. B. p. 488.)

his heirs when she came of age, to settle certain lands of his own in jointure. Neither the wife nor her trustees executed the articles. After marriage, the husband settles his lands mentioned in the articles, and recites the settlement to be in performance of the articles, and in consideration of the marriage, and for a provision for the wife (to bar her of dower) and their issue; but never requires her to convey her lands to him. The wife is a party to, and executes this settlement. After the husband's death, she enters on the settled lands.—This settlement is a waiver by the husband of the proposed conveyance by the wife; and she shall hold as well her own estate as also the lands settled.

DECREE of Lord Chancellor King was AFFIRMED.

The question, Whether a jointure on an infant before marriage may be waived, was not quite settled till the case of *Drury v. Drury*; reported by the name of *Buckingham (E.) v. Drury*, ante, vol. 3. p. 492. title Dower, ca. 4. That case was heard before Lord Northington, C. Hil. 1 Geo. 3. The points determined by Lord Northington in that case were, 1st, That the statute 27 H. 8. c. 10, which introduced jointures, extends to adult women only, infants not being particularly named; and therefore, that notwithstanding a jointure on an infant, she may waive the jointure and elect to take dower. 2dly, That a covenant by the husband, that his heirs, executors, or administrators, shall pay the wife an annuity for her life, in full for her jointure and in bar of Dower, without expressing that it shall be charged on any particular lands, or be secured out of lands generally, is not a good equitable jointure within the statute. 3dly, That a woman, being an infant, cannot, by any contract previous to her marriage, bar herself of a distributive share of her husband's personalty in case of his dying intestate.—From that decree there was an appeal to the House of Lords, and after hearing the Judges *seriatim* on the question, Whether a jointure on an infant could be waived? on which they were divided in opinion, the Decree was reversed as to all the above points, and it was by the decree of the Lords “DECLARED, That the respondent (the widow) was bound by the agreement entered into in consideration of, and previous to, her marriage; and that the same ought to be performed and carried into execution; and that she was thereby barred of her dower, and of any share of her husband's personal estate under the statute of distributions.”

Before the above decision, the only direct opinions as to the effect of a jointure on an infant, were Sir J. Jekyll's, in *Cray v. Willis*, 2 Eq. Ab. 389. c. 17: Vin. tit. Dower, Q. 3. pl. 18; against its barring: and Ld. Hardwicke's, in *Price v. Seys*, Barn. c. 117; and *Harvey v. Ashley*, 3 Atk. 607, to the contrary.\*\*

Grounds and Rudiments of Law and Equity, p. 122. ca. 24. \*\* Mosely 59. c. 38.\*\*

George Bohun Esq. being possessed of a leasehold estate near Spitalfields, in the county of Middlesex, and other lands and hereditaments, and of a considerable personal estate; and having [344] issue only four daughters, made his will, dated the 17th of July 1705, and thereby devised to Dr. Ralph Bohun, Mr. Humphry Barker, and the respondents Rowland Berkley, George Guy, Charles Newburgh, and Thomas Burgh, and their heirs, certain messuages and lands in the county of the city of Coventry, and in the county of Warwick, upon trust, to permit his daughter Susan to receive the rents and profits thereof until she should marry or die; and in case she married with the consent of the said Newburgh and Burgh, and of her mother, that then they should convey the said estate in such manner as his said daughter Susan, with the consent of her husband, should appoint; and in default of such appointment, to his said daughter Susan, her heirs and assigns, for ever. And in case his said daughter Susan should die before her marriage, or should marry without such consent, then, that his trustees should dispose of his estates so devised, in such manner as touching the rest of his real estate was by his said will directed; and then his daughter Susan should only have an equal share with her other sisters of the residue of his estate, after payment of his debts and legacies. The testator further devised to the said trustees and their heirs, all

his real estate in or near Spitalfields, which he willed should be by them sold after his death, and the money thereby arising to be subject to the intents of his said will declared concerning the residue of his estate. He then devised to his daughter Jane £3500 to be paid at her age of 21, or marriage; and after several other specific legacies and bequests, he gave the residue of his real and personal estate to his three daughters Mary, Elizabeth, and Jane, (and also to his daughter Susan, in case she should marry without such consent as aforesaid, and forfeit the estate intended for her, and not otherwise,) to be equally divided amongst them share and share alike; and made his said trustees, together with Mary his wife, executors.

Susan afterwards intermarried with Gilbert Clerk Esq. with such consent as by the will was required, and thereby became entitled to what was particularly devised to her, but excluded from any share of the residuary estate. And her sister Jane became entitled under the said will to the £3500 and to one third part of her father's real and personal estate equally with her other sisters, Mary the wife of the respondent Rowland Berkley, and Elizabeth the wife of Packington Tomkins, who were entitled to the other two thirds thereof.

Jane, in 1712, when under age, was married to George Lucy Esq. and thereupon, by articles dated the 23d of December 1712, between George Lucy of the first part, Mary Bohun relict of the said George Bohun, and the said Jane, of the second part, and Allen Lord Bathurst and Gilbert Clerk of the third part; reciting, that a marriage was intended between the said George Lucy and Jane, with the consent of the said Mary Bohun her mother; and that the said Jane, by virtue of the said George Bohun's will, would be entitled to £3500 at her age of 21, or marriage; and that she was entitled to divers lands in the will mentioned, or to a third [345] part of the monies arising thereout, in such manner as by the said will was directed; and that the said Jane was willing to bestow on the said George Lucy, in consideration of the said marriage, as well the said £3500 as also her interest in the real and personal estate of her said father, devised, or which might descend to her, or in trust for her, as one of his co-heirs or legatees, as soon as she should attain the age of 21, to hold to the said George Lucy, his heirs and assigns, for ever: the said George Lucy, in consideration of such marriage and marriage portion, and of such conveyances to be made to him, and for securing to the said Jane a provision in case she should survive him, covenanted with Lord Bathurst and Gilbert Clerk, that he would, upon such conveyances made to him upon the said Jane's attaining her age of 21, settle upon her a jointure of certain lands therein mentioned of the yearly value of £800 and that the reversion thereof, after the said Jane's death, should be further settled, together with other lands of the yearly value of £700 to the use of the said George Lucy for life; remainder to his first and other sons by the said Jane, in tail male; and the reversion in fee to the said George Lucy and his heirs.

These articles were not executed by Jane, as being under age, nor did any of the other parties thereto, except the said George Lucy, execute the same, nor were Jane's trustees consenting that she should part with her inheritance in the premises, nor was she ever asked to execute or sign the articles after she attained her age.

The marriage however was had, and afterwards Jane, in order to raise the £3500 was desired to join in a fine with her husband, and her sisters and their husbands, for selling some part of her father's estate, which she accordingly did, and the £3500 was paid to the said George Lucy her husband; but he never insisted, or desired that she should join in a fine for conveying the estate of her said father, belonging to her as one of his co-heirs.

After payment of the £3500 which was the money portion expressed in the articles, and after Jane had for about six years attained her age of 21; the said George Lucy, without requiring any conveyance of the estate belonging to her, by indentures of lease and release dated the 4th and 5th of March 1719, made between himself and the said Jane of the one part, and Allen Lord Bathurst and Gilbert Clerk of the other part, in consideration of the marriage, and in pursuance of the articles made previous thereto, and for making a jointure for the said Jane and provision for their issue, Lucy did grant and convey to Lord Bathurst and Gilbert Clerk, divers messuages and lands in the county of Warwick, to the use of the said George Lucy for life; and after his death, as to several lands therein mentioned, to the use of the said Jane for her life, for a jointure: and as concerning the said premises after her death, and the other premises after the said George Lucy's death.

to the use of the first and other sons of their [346] bodies in tail male; remainder to the said George Lucy, his heirs and assigns for ever.

In August 1721, George Lucy died without issue and intestate; and William Lucy his brother, by the consent of Jane his widow, took out administration to him.

This William Lucy, by the death of George, became entitled to his real estate not settled, which was very considerable, and to the reversion of the said Jane's jointure lands after her death, as brother and heir at law of George Lucy.

About the latter end of the year 1722, the said Jane intermarried with the respondent Moor; and she being entitled to one third part of her father's real estate, devised by his will to the trustees; and being minded to settle the same, by indentures of lease and release dated the 17th and 18th of June 1723, between the respondent Moor and the said Jane his wife of the one part, and Dr. Henry Moor and Sir Gustavus Hume Bart. of the other part, and by fine levied, the said Robert Moor and Jane his wife did bargain and sell to the said Henry Moor and Sir Gustavus Hume the said Jane's third part of her said father's estate, to the use of the respondent Robert Moor for life; remainder to the said Jane for life; remainder to the said respondent in fee.

After the death of George Lucy, the said William Lucy his brother pretended to be entitled, as his heir at law, to the said Jane's third part of her father's estate; and therefore, after the respondent Moor's intermarriage, exhibited his bill in the Court of Chancery against the said respondent and the said Jane his wife, pretending a right to her share of her said father's estate under the aforesaid articles, and to have a conveyance thereof to him and his heirs.

To this bill the said respondent and Jane put in their answer; and the said Jane stated her case in the manner above mentioned, and swore that George Lucy her late husband, as they lived happily together and had no issue, made the aforesaid settlement on her, and often told her he would leave her own estate to come to her. And the said William Lucy, though he lived six months after the answer was put in, proceeded no further in the suit.

In December 1723, Jane died without issue, and administration of her goods and chattels was granted to the respondent Robert Moor her husband; who by virtue thereof, and of the last-mentioned conveyance and fine, became entitled to her share of the estates, real and personal, of the said George Bohun her father, and of the rents and profits thereof which became due and were received by the trustees and executors of his will.

In February 1723, the said William Lucy also died without issue, leaving Foulk Lucy his brother and heir at law; but having before his death made his will, and appointed the appellant, his widow, executrix; who thereupon, and under the will of the said Wil-[347]-liam Lucy, pretended to be entitled to all the right and share belonging to the said Jane, in the estate real and personal of the said George Bohun.

In Michaelmas Term 1724, the appellant exhibited her bill in the Court of Chancery against the respondent Moor and others, to the same effect with William Lucy's bill: and therein set forth, that the said William Lucy, by his will, had charged his whole estate with the payment of his debts and legacies, and gave legacies and charities to a considerable value, and made the appellant executrix, and that she had proved his will and taken out administration to the said George Lucy; and she insisted, that, as executrix of William, and administratrix of George Lucy, she was entitled to all right and share belonging to the said Jane, in the estate real and personal of the said George Bohun.

To which bill the said respondent put in his answer, and insisted on his right to the effect above mentioned; and in Michaelmas Term 1725, exhibited his bill in the said Court against the appellant, and against the said Foulk Lucy, George Guy, Charles Newburgh, Thomas Burgh, Rowland Berkley, and Mary his wife, and Packington Trmkins and Elizabeth his wife, to have a conveyance of the said estate made to him, and for an account of the rents and profits thereof.

To this bill, the appellant put in her answer and insisted, as by her bill; and the said Foulk Lucy claimed a right, as heir at law of William Lucy and George Lucy; and the other defendants submitted to the directions of the Court.

On the 12th of November 1728, both causes were heard before the Lord Chancellor King, when his Lordship ordered and decreed, that the plaintiff's bill in the

original cause should be dismissed, except as to her claim, as executrix of William Lucy, to certain tithes in the pleadings mentioned; and on the cross bill it was ordered and decreed, that an account should be taken of the trust estate, under the will of George Bohun, since his decease, on which account all just allowances should be made, and all deeds, rentals, papers, and writings, were to be produced upon oath, and all parties to be examined on interrogatories, as the Master should direct. And one third part of the said rents and profits was to be paid to the respondent Moor, and the other two thirds to the defendants Berkley and Tomkins, and that a commission should issue to divide the said trust estate into thirds; and that after such partition made, the surviving trustees should convey one third to the respondent Moor and his heirs, and the other two thirds to the two other devisees, according to their respective interests therein; and the trustees in the will of the said Mr. Bohun were to have 40s. costs.

To reverse this decree the present appeal was brought; and on behalf of the appellant it was insisted (N. Fazakerley, D. Davenport), that where a suitable jointure is made, (as in this case there was a much greater one than Mrs. Moor's whole fortune required,) it ought to be intended to be in consideration of the fortune, though not so expressed; [348] and ought to entitle the husband to such fortune, though not actually paid. That this jointure was expressed to be made in pursuance of the articles, and the reference to them was the same as if they had been fully recited. That as the lands limited for jointure were the same in the settlement as in the articles, the settlement must therefore be upon the foundation of the articles; and Mrs. Moor's executing the settlement when of age, and her acceptance of the jointure after George Lucy's death, was a full agreement to and confirmation of the articles, though she was under age at the time they were made. That though she might have waived her jointure, and claimed her fortune which remained unpaid; yet, by accepting her jointure she had made her election, and ought therefore to give up her fortune, which was the consideration of her jointure, or otherwise she would have a double satisfaction.

On the other side it was said (P. Yorke, C. Talbot), that though Jane was an infant when married to George Lucy, yet the settlement was made long after the marriage; and therefore she was entitled to her election, either to insist on her dower out of her husband's estate, or claim the lands settled for her jointure; but William Lucy, the brother and heir of George, never called upon her to make such election, well knowing that her dower would have amounted to much more than the jointure. That George Lucy, who was the only person entitled under the articles to require a conveyance of Jane's estate, never demanded one, though she was of age six years before he made the settlement, and though he lived two years after it was made; but, on the contrary, always declared, both before and after making the settlement, that he would leave her estate for her own benefit. That the settlement so made did not exceed the third part of the estate which, by law, Jane would have been entitled to, so that she thereby gained nothing; but George Lucy received £3500 in money as her portion, and she did not live above a year and a half after him to enjoy her jointure. That the respondent Moor claimed under the conveyance made by his wife, who, by her father's will, and as one of his co-heirs, had a right to one third part of his estate, and had done no act to dispose of it to George Lucy, her first husband; but the appellant was only the executrix and devisee of William Lucy, the brother and heir of George, and was no otherwise related to the family of the Lucys, than as being the wife of William, from whom she enjoyed a considerable part of the family estate; and therefore there appeared no reason to make a strained construction to give her any part of the respondent's estate, contrary to the intention both of Jane and her first husband.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, That the same should be dismissed, and the decree therein complained of affirmed. (JOURN. vol. 23. pa. 543.)



[349] CASE 3.—BRETRIDGE BADHAM,—*Appellant*; THOMAS ODELL and another,—*Respondents* [22d June 1742].

[Mew's Dig. ix. 1691.]

[A mortgagor brings a bill to redeem, obtains a decree for an account, etc. in the usual manner, and the account is accordingly taken by the Master. Before any further proceedings, the plaintiff dies, and his infant son and heir revives and carries on the suit. Held that he is bound by the account already taken; but he shall be at liberty to surcharge and falsify it if he can.]

\*\*DECREE of the Court of Exchequer in Ireland REVERSED. See the note to Case 1, of this title.\*\*

Andrew Brandon, by indentures of lease and release, dated the 20th and 21st of September 1671, in consideration of £1000 sterling paid him by John Odell Esq. and of the further sum of £950 16s. sterling to be paid him by eight half-yearly payments, sold and conveyed to the said John Odell, all those his messuages and lands, with the appurtenances therein particularly described, containing in the whole 2506 acres plantation measure, being part of Brandon's *Lot*, situate in the barony of Conolloe and county of Limerick; to hold to the said John Odell, his heirs and assigns for ever. And Odell, for better securing the £950 and interest, made a mortgage of the premises to Brandon for 100 years, by indenture dated the 22d of the same month, redeemable on payment of the money, with interest after the rate of £10 per cent. by the several instalments in the release mentioned.

Default being made in payment of the said several sums of money, by indenture of assignment, dated the 1st of April 1681, the said Andrew Brandon, for the consideration therein mentioned, assigned the said mortgage, and the benefit thereof, to Sir Matthew Deane Bart. who continued to receive the interest, and also received so much of the principal as reduced the money remaining due on the mortgage to £750; and on the death of the said Sir Matthew Deane, Sir Matthew Deane the younger, his grandson, heir and executor, became entitled to the principal and interest then due.

By indenture dated the 1st of May 1714, made between the said Sir Matthew Deane the younger and the appellant, Sir Matthew, in consideration of £750 assigned the said mortgage, and all monies due thereon, to the appellant.

Upon the death of John Odell the mortgagor, the equity of redemption of the mortgaged premises descended to John Odell, his son and heir; and on his death, the said equity of redemption descended to John Odell the younger, his eldest son and heir, who, for several years after his father's death, continued to pay Sir Matthew Deane and the appellant £75 a year for the interest of the said sum of £750 sterling, remaining due on the mortgage.

[350] In Trinity Term 1719, the last-named John Odell exhibited his bill in the Court of Exchequer in Ireland, against the appellant and Sir Matthew Deane, to redeem the premises, and for an account of the money due on the mortgage; and he thereby declared himself ready to pay what should on such account appear to be due; and prayed that the appellant might be decreed to receive the same, and to assign the mortgage to him, or as he should appoint.

The appellant, in June 1720, put in an answer to this bill; and thereby submitted to a redemption, upon payment of what was justly due on the mortgage: and Sir Matthew Deane also put in his answer, and confessed the assignment to the appellant, and that at the time of the making thereof, there remained due £750 of the principal mortgage money.

There being, on the 1st of May 1721, an arrear of £200 sterling due for interest, and the appellant calling on the said John Odell, the respondent's father, for payment thereof; he with the privity of the respondent Fitz-Maurice, who was his father-in-law, proposed to make the same principal, by executing a bond to the appellant for the payment of that sum with legal interest; and the appellant having agreed to advance a sum of £18 10s. for the said John Odell, he, on the 1st of

August 1721, executed a bond to the appellant, conditioned for his payment of the said sum of £218 10s. with interest.

This money and interest not being paid, and there being a further arrear of interest incurred on the mortgage, the said John Odell, on the 5th of August 1723, filed an amended and supplemental bill against the appellant; and therein charged, that on his giving the said bond for £218 10s. the appellant gave an instrument, acknowledging that the bond was perfected for security of so much interest money then due on the mortgage; and further charged, that, at the appellant's request, he procured one Richard Bury Esq. to agree to lend him £1200 at £6 per cent. interest, on the security of the said mortgage being assigned to him; and that the said £1200 had been carried in a bag, some time in Hilary Term 1722, and tendered to the appellant, and that he refused to receive the same, or assign his said mortgage. And therefore this amended and supplemental bill prayed, that the appellant might come to a fair account with Odell, and that upon payment of the remaining principal, and the legal interest thereof, from the time of the assignment to him, to the time of the said tender, he might be decreed to assign over his said mortgage to the said Richard Bury, or such other person as the plaintiff should direct; and might be decreed to deliver up the said bond dated the 1st of August 1721, to be cancelled; and that the appellant might be stayed by injunction from proceeding at law against the said John Odell, in relation to the premises.

The appellant by his answer to this bill insisted, that he had received no interest on the mortgage since the £200 included in [351] the said bond for £218 10s.; and on the 28th of May 1724, the appellant filed his bill in the said Court of Exchequer, against the said John Odell and the respondent Fitz-Maurice, for a discovery; and for an account and foreclosure of the equity of redemption of the mortgage, unless Odell paid what should appear due thereon to the appellant.

The said John Odell put in his answer to this bill; and among other things insisted, that there was no other or greater sum due to the appellant on the mortgage than £750 principal, and the interest thereof from the time of his giving the said bond to the time of the pretended tender; and submitted to account with the appellant, and to pay him what was justly due; but insisted, that the appellant ought to be decreed only £8 per cent. interest on the principal sum of £750, that being the rate of interest of money at the time the mortgage was assigned to the appellant, and that he should assign his mortgage, on being paid what was or should be due to him.

Odell afterwards put in a further answer, and in December 1735, before any further proceedings were had in either of the causes, he died; leaving the respondent Thomas Odell, his eldest son and heir, an infant; who, on the 25th of June 1726, filed his bill of revivor against the appellant; and soon afterwards the appellant duly revived his suit against the said respondent.

On the 20th of June 1729, the original cause was heard; when the Court decreed, that it should be referred to the Chief Remembrancer, or his Deputy, to state and settle an account of what was due to the appellant of the £750 principal money, mentioned in the assignment to him from the defendant Sir Matthew Deane, and for the interest thereof from the time of the said assignment, at the rate of £10 per cent. per ann. and costs; and the respondent Odell was to have credit out of the interest of the said mortgage money, for the £200 bond in the pleadings mentioned, and was to be charged with the said bond, and such interest as was therein mentioned; and if no interest was mentioned therein, then with legal interest, and both parties were to have just allowances: and it was further ordered, that the respondent Odell should, within six months after the report should be made and confirmed, pay to the appellant what should appear by such report to be due to him, or that the said bill should be dismissed.

On the 12th of March 1730, the Deputy Remembrancer made his report; whereby he certified, that there was due to the appellant, on the foot of the said mortgage and the assignment thereof, dated the 1st of May 1714, the sum of £1883 18s. 4d. And there being no objections or exceptions taken to this report, the same was, on the 6th of July 1731, absolutely confirmed. And, on the 13th of the same month, the cause came on to be further heard on the matter of the said report; when it was decreed, that upon the respondent's paying to the appellant the said sum of

£1883 18s. 4d. so reported due, with interest for the same [352] from the said 6th of July 1731, being the time of confirming the report, as also his costs of the said suit; the appellant should reconvey to the respondent the said mortgaged premises, freed from all incumbrances, and should also deliver up to him all bonds and securities entered into for the said debt, or any part thereof; and in case any judgment or judgments were entered up on the said bonds, or any of them, that the appellant should acknowledge satisfaction on the record of such judgment, at the respondent's expence.

The respondent neglecting to pay the money so reported due, or any interest for the same, the appellant, in order to have the benefit of the said decree, by a sale or absolute foreclosure of the mortgaged premises, filed his amended and supplemental bill against the respondents, stating the decrees, report, and proceedings in the former cause, and that no part of the £1883 18s. 4d. or any interest for the same, had been paid; and that in regard the mortgaged premises were not by either of the said decrees directed to be sold, the respondent Odell and his guardian had neglected to raise or pay the said £1883 18s. 4d. or the interest thereof; and that the appellant could not, by the course of proceedings in Ireland, enforce the payment thereof, but by bringing such his amended and supplemental bill for a sale or foreclosure of the mortgaged lands: and in regard the account of what was due on the said mortgage had been stated in the former cause, the appellant prayed to have the benefit thereof, and of all the other proceedings in that cause; and that the account to be taken in his present suit might be taken on the foot of the report, or decree made in the said former suit.

The respondents put in their joint answers to this amended and supplemental bill; and thereby admitted the said report, decrees, and proceedings; but insisted, that the respondent Odell, apprehending that he was much aggrieved by the said decrees and report, chose to have his bill, upon which the said decrees were made, dismissed, rather than submit thereto; and they admitted, that no part of the money so reported to be due had been paid to the appellant.

The appellant replied to this answer, and the respondent rejoined, but no witnesses were examined on either side: and the cause came on to be heard on the pleadings, and on the proofs taken in the former cause in which Odell was plaintiff, on the 6th of December, and 27th of February 1737, and on the 20th of February 1738, when the Court declared they were of opinion, that the defendant Odell, the minor, was not to be concluded by the account taken in the said former cause, but that the plaintiff was entitled to an account as between mortgagor and mortgagee; and therefore decreed, that it should be referred to the Chief Remembrancer, or his Deputy, to audit and state an account between the plaintiff and defendant, on the foot of the mortgage and securities in the pleadings mentioned, in which account both parties were to have all just allowances; and if any thing should appear [353] difficult to the remembrancer in stating of the said accounts, he was desired to report the same specially; when such order should be made as should be just.

From this decree the appellant appealed; insisting (D. Ryder, C. Clarke), that the respondent Odell ought to be concluded by the account taken in the former cause, on a bill originally brought by his father, revived and carried on by himself, confirmed by subsequent orders of the Court, and both the decrees signed and enrolled; and that he ought not now to be permitted to waive or vary the same, especially when neither fraud or error in the account was even suggested. That the Court ought to have directed an account to be taken of what was due to the appellant, in respect of the said sum of £1883 18s. 4d. reported due to him, together with interest for the same from the 6th of July 1731, when that report was confirmed; and in case of the respondent Odell's not paying the same by a time to have been limited, the Court ought to have decreed him to stand absolutely foreclosed; or at least to have decreed a sale of the mortgaged premises, or so much thereof as should be necessary for raising and discharging what remained due to the appellant for principal and interest on his mortgage, and for his costs of this and the former suits. As to the objection, that the respondent Odell was an infant at the time of pronouncing the two former decrees and of making the report, and that therefore he is not bound or concluded by them; it was answered, that the account and report in question having been taken and made in a cause wherein the re-

spondent Odell was plaintiff, nothing is more certain or established than that he, though then a minor, is bound and concluded thereby; and more especially in a case where he has not attempted to shew any fraud or error to his prejudice. Besides, by not having paid the money reported due within six months after confirming the report, he thereby, in strictness, waived and forfeited all benefit of the equity of redemption.

On the other side it was argued (J. Browne, W. Murray), that by the terms of the decree, the respondent was at liberty, if he thought fit, to suffer his bill to be dismissed with costs; and that such dismissal did not entitle the appellant to an absolute decree for a foreclosure or sale, but the equity of redemption was still kept open by the appellant's own bill, upon which he was entitled to the common alternative decree, either that the respondent should redeem, or stand absolutely foreclosed. That as the respondent was entitled to a redemption, so, by the ordinary justice of the Court, he was entitled to it on payment only of what was really due; nor ought he (being still an infant) to be precluded from this right by the proceedings on a bill, originally filed by his father, but revived, carried on, and dismissed during his infancy, and whilst he was utterly incapable of taking care of his own interest. That as these proceedings were now out of Court by the dismissal of the bill, so they ought never to be introduced, and much less made the ground of a decree in the present cause; for if the infant was to [354] be concluded by the account already taken, and to pay the balance, with interest, from the date of the report, or be foreclosed; he would then be for ever prevented from disputing any errors, omissions, or overcharges in the account, and must either lose his estate, or submit to pay the balance of an account, compounded partly of principal, but chiefly of interest, and worked up to a much greater sum than was really due, carrying interest from the date of the report, which was a hardship and injustice that a Court of equity would never inflict upon an infant. That if the appellant should prevail in this attempt, it would be a dangerous precedent to infants in general, whose estates were under mortgage; for if they were to be foreclosed of their estate by the dismissal of a bill brought for a redemption, or to be bound by an account taken during their minority, they would be in danger of being ruined by the injustice, neglect, or misconduct of their guardians; whereas, on the other hand, the appellant could never suffer the least injury from the decree as it now stood, for he must necessarily be paid what is really due for principal, interest, and costs; which is all that in conscience he ought to demand, or the Court in justice ought to allow him. And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, That the decree therein complained of should be reversed: and it was further ORDERED, That the account taken under the decree of the 20th of June 1729, should stand, with liberty for the respondent Odell to surcharge or falsify the same; and that in case any surcharge or falsification should be made to appear, the Remembrancer of the Court of Exchequer should deduct so much as ought to be deducted on account of such surcharge or falsification: and that the said Remembrancer should carry on the account of the subsequent interest, at the rate of £6 per cent. per ann. from the time of the confirmation of the report of the 12th of March 1730, for the sum thereby reported due to the appellant, after such deductions made thereout as aforesaid; and that in taking the said account, the said Remembrancer should make to all parties all just allowances; and that all parties should be examined upon interrogatories, and produce all deeds and writings, books and papers of account, relating to the premises in question, as the Remembrancer should direct; and that the consideration of the costs of this suit, and of all further directions, should be reserved until after the said Remembrancer should have made his report; and if any thing should appear difficult to him, he was to report the same specially to the Court; and after making the said report, such further order should be made as should be just. (Jour. vol. 26. p. 149.)

[355] CASE 4.—LORD WILLIAM GORDON,—*Appellant*; FRANCES VISCOUNTESS IRWIN and others,—*Respondents* [9th February 1781].

[Mew's Dig. vii. 1362, 1497.]

[Under what circumstances the Court of Chancery will controul the consent of a guardian to the marriage of an Infant ward of that Court; and will refuse to confirm a Master's report, approving of proposals for a settlement on the marriage.]

**\*\* ORDER of Chancery AFFIRMED.\*\***

In October 1780, the appellant preferred his petition to the Lord High Chancellor of Great Britain, stating, amongst other things, that the appellant having made his addresses to Miss Frances Ingram Shephard, and she having approved of a proposal for the appellant's marriage with her, he was desirous that the same might be accomplished. But being informed, that the respondent Frances was a ward of the Court of Chancery, and that the respondents Frances Viscountess Irwin and Albany Wallis were guardians of her person; the appellant had informed them of the proposal, to which they had no objection: that the appellant being willing and desirous that a proper settlement might be made previous to such marriage, with the approbation of the Court, he prayed that it might be referred, and it was accordingly referred, to Mr. Bicknell, one of the Masters of the said court, to enquire and state what estate and fortune the said Frances Ingram Shephard was entitled to, and particularly what stocks, and shares of stocks, standing in the name of the Accountant General; and also what share in the sum of £20,000 due on mortgage, from the late Lord Irwin, the said Frances Ingram Shephard was entitled to: and that the appellant should be at liberty to lay proposals before the said Master, for a settlement to be made on his intended marriage with the said Frances Ingram Shephard; and that the Master should enquire and certify, whether the said proposal was reasonable and proper, and fit to be carried into execution.

In pursuance of this order, the Master made his report on the 23d of November 1780; and after stating the wills of the testators, Samuel Shephard and Lord Irwin, and the several decrees, reports, orders, and other proceedings in the cause, certified, that the said Frances Ingram Shephard was entitled to one-fifth part of the rents and profits of the several freehold, copyhold, and leasehold estates of the testator Samuel Shephard, the gross rentals whereof amounted together to £4790 9s. 6½d. per annum; to one-fifth part of the interest and dividends of £4939 6s. 2d. Bank stock, and £13,590 12s. 2d. old South Sea annuities, standing in the Accountant General's name; and to one-fifth part of the interest of £15,167 0s. 3d. part of the said £20,000 mortgage, subject [356] to a deduction of a proportionable part of several annuities charged on the said estates and funds, amounting in the whole to £575, which said several estates and funds, subject as aforesaid, the Master certified the said Frances Ingram Shephard was entitled to, over and besides a contingent interest in £8811 9s. 4d. old South Sea annuities, and £1882 7s. 4d. Bank £3 per cent. reduced annuities, also standing in the Accountant General's name, and over and besides a portion or provision of £6666 13s. 4d. which she was entitled to under the settlement made on the marriage of Lord and Lady Irwin; and also over and besides a contingent interest in the estates devised by the will of Lord Irwin. And the Master also certified, that the said Frances Ingram Shephard was then absolutely entitled to £15,603 8s. 11d. old South Sea annuities, and £896 0s. 8d. cash, standing in the Accountant General's name; and also to £2568 4s. 11d. part of the £20,000 mortgage. And the Master further certified, that it did not appear to him that the said Frances Ingram Shephard was entitled to any other real or personal estate, or portion whatever, other than what she was so entitled to under the wills of the said Samuel Shephard and Lord Irwin, and the settlement made on the marriage of Lord and Lady Irwin. And the Master further certified, that a proposal had been laid before him by the appellant, for a settlement to be made on his intended marriage

with the said Frances Ingram Shephard; whereby, in consideration of the intended marriage, and of £10,350 old South Sea annuities, to be transferred to the appellant, he proposed, that all and every the right, title, estate, and interest, which the said Frances Ingram Shephard then was, or which she, or the appellant in her right should, in case such marriage should take effect, become seised, possessed of, interested in, or entitled to, under the respective wills of the said Samuel Shephard and Lord Irwin, and the settlement made on the marriage of Lord and Lady Irwin, should be conveyed, settled, and assured to the uses following; as to all the real estates, to the use of the said Frances Ingram Shephard for her life, for her sole and separate use, with remainder to trustees, for a term of 500 years, in trust to raise portions for younger children of the marriage, with remainder to the use of the first and other sons in tail male, with remainder to all and every the daughters of the marriage, as tenants in common; and for default of such issue, to such uses as the appellant and the said Frances Ingram Shephard should direct or appoint; and for default thereof, to the use of the right heirs of the said Frances Ingram Shephard: and as to the personal estate, that the same should be vested in trustees, in trust to pay the interest and produce thereof for the sole and separate use of the said Frances Ingram Shephard, for her life; and after her decease, in trust to pay and divide the same to and amongst all and every the children of the marriage (except an eldest, or such as might become an eldest son) share and share alike, the shares of sons at 21, and of daughters at 21, or marriage; and in case there should be no such children of the [357] marriage, or if any and all should die before their respective fortunes should become due and payable, in trust to pay the same to such uses as the appellant and the said Frances Ingram Shephard, or the survivor of them, should direct or appoint; and in default thereof, in trust to pay the same to the executors, administrators, or assigns, of the said Frances Ingram Shephard. And the Master certified, that upon due consideration of the matters, and it being admitted, that the appellant was not seised or possessed of any estate or fortune, whereby he could make a greater or more ample settlement on the intended marriage; and it appearing to the Master, by a writing under the hand of the said Frances Viscountess Irwin, at the foot of a copy of the proposal, that she consented to and approved of the proposal, and that Albany Wallis, who with her were, by an order of the said Court of Chancery, appointed guardians of the person and estate of the said Frances, having personally before him declared his approbation of such proposal, the Master was of opinion, that the same was reasonable, and fit to be carried into execution.

The appellant and the said Frances Ingram Shephard afterwards presented their petition to the Lord Chancellor; praying, among other things, That the said report might be confirmed; and that it might be referred back to the Master to settle proper deeds and instruments for making a settlement on the intended marriage, according to the said proposal; and that upon the execution thereof, the said £10,350 old South Sea annuities, might be transferred to the appellant.

That on the 20th of December 1780, the petition came on to be heard; and it being then suggested, that the Master did not mean to state that the appellant had no fortune, but only that he had not a fortune that could be settled; it was referred back to the Master, to review his report as to that particular; and it was ordered, that the appellant should be at liberty to make such other proposals as he should be advised, and that the Master should state the same, with his opinion thereon, to the Court.

On the 13th of January following, the Master made his report; and certified, That he had reviewed his former report, as to that particular part thereof which stated, that it had been admitted before him, that the appellant was not seised or possessed of any estate or fortune whereby he could make a greater or more ample settlement on his intended marriage, than he proposed to do by the proposals stated in his former report; and the Master found, that the appellant was not, at the time of making his said former report, nor was he then, entitled to any estate, fortune, or income whatever, save and except the annual income thereafter stated, which had been verified before him by the affidavit of the appellant, viz. an annual allowance of £500 which the appellant had for many years past

received, and continued to receive, from his brother Alexander Duke of Gordon; the yearly sum of £100 arising from the appellant's office or place of deputy ranger of the Green Park; and the yearly sum of £300 arising from the appel-[358]-lant's commission of lieutenant colonel of his said brother's regiment of northern fencibles, making in the whole an annual sum of £900. And the Master further certified, that the appellant had laid before him other proposals for a settlement on his said intended marriage; whereby he proposed, that in case the marriage should take effect, all and every the real and personal estates whatsoever, whereof the said Frances Ingram Shephard then was, or which the appellant in her right, should become seised, possessed of, or interested in, or entitled unto, in possession, reversion, remainder, or expectancy, under the last will and codicil of the testator Samuel Shephard, and the last will of Lord Irwin, and the settlement made on the marriage of Lord and Lady Irwin, or any or either of those instruments respectively, or otherwise, from and after the solemnization of the marriage, should be conveyed, assigned, transferred, settled, and assured to the several uses, and upon the several trusts following, viz. As to all and every the personal estate, from and after the solemnization of the marriage, in trust to pay the rents, interests, dividends, and produce thereof, to and for the sole and separate use of the said Frances Ingram Shephard, during her life; and after her death, in trust to assign, transfer, and pay the said personal estate unto and among the child and children of the appellant and the said Frances Ingram Shephard, (other than an eldest or only son, who should be entitled to the real estate of the said Frances Ingram Shephard,) the shares of sons to be vested in interest at twenty-one, and of daughters at twenty-one, or marriage, which should first happen; and upon trust, in case there should not be any child, (other than an eldest or only son, entitled to the said real estates,) then to pay, assign, and transfer the same to such persons, and in such manner, as the said Frances Ingram Shephard should direct or appoint; and in default thereof, to pay, assign, and transfer the same to such person or persons as under the statute for distribution of intestates' estates would be entitled thereto, as next of kin to the said Frances Ingram Shephard, in case she died sole and unmarried: and as to all and every the hereditaments and real estate, from and after the solemnization of the marriage, to the use of trustees, upon trust, to pay the clear yearly rents, issues, and profits thereof to the said Frances Ingram Shephard, for her separate use, during her natural life, and after her decease, as to and concerning such of the same hereditaments and real estate as were not of customary or copyhold tenure, and should not determine with her life, to the use of trustees, for 500 years, without impeachment of waste, in trust, to raise such additional portions for the younger children of the marriage as the said Frances Ingram Shephard should direct or appoint: and as to the said freehold and other estates to be comprized in the term of 500 years, immediately after the determination of the said term, and in the mean time subject thereto, and to the trusts thereof; and also as to such others of the said hereditaments and real estates of inheritance as were or should be of customary or copyhold [359] tenure, from and after the decease of the said Frances Ingram Shephard, to the use of the first son of the appellant and the said Frances Ingram Shephard, in tail male, with remainder to the second son in tail male, with remainder to the third, fourth, fifth, and all and every son and sons of the appellant and the said Frances Ingram Shephard, in tail male successively, with remainder to all and every the daughter and daughters of the appellant and the said Frances Ingram Shephard, equally to be divided among them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and in default of such issue, to such uses as the said Frances Ingram Shephard should direct, limit, or appoint; and in default thereof, to the use of the said Frances Ingram Shephard, her heirs and assigns, for ever. And the Master certified, that upon due consideration of the matter, he was of opinion that the said proposals were the most advantageous proposals that the appellant could make, and therefore conceived the same fit and proper to be carried into execution.

The appellant and the said Frances Ingram Shephard, afterwards presented their petition to the Lord Chancellor; praying, that the last-mentioned report might be confirmed; and that it might be referred back to the Master, to settle

proper deeds and instruments for making a settlement on the intended marriage. according to the last-mentioned proposals: and on the 22d day of January 1781, the same came on to be heard; when his Lordship was pleased to order, that the petition should stand dismissed.

The appellant apprehending himself aggrieved by the last-mentioned order, appealed therefrom, and on his behalf it was contended (J. Madocks, J. Dunning), that the appellant's addresses having been accepted by the lady, and both her guardians consenting, one of whom, Lady Irwin, was her mother, whose consent alone satisfied the provisions of the marriage act; no suggestion, that that consent had been improperly obtained; no part of the family, all of whom were before the Court, objecting, and neither the rank, or character of the appellant, admitting a supposition that an alliance with him would be any disparagement of the lady or her family; it was submitted, to be unusual for the Court to controul the consent of the parties and guardians; and that none of the principles on which the discretion of the Court had been usually exercised, required it, in a case so circumstanced. That as to the only objection which had been suggested, a disparity of fortune, it was submitted, to be in no case an objection, unless where it afforded a ground to suspect improper views on the part of the gentleman upon the lady's fortune, and that the proposals, particularly the last, which the Master had approved, sufficiently evinced the appellant's disinterestedness, to acquit him of any such imputation; and though his own income was not of a nature to add to the provision for the lady, in case she survived him, it was no contemptible addition to the means of their living happily together; at least, they would have such an income as the parties, [360] if they were permitted to judge for themselves, would be content with.

No case was printed for the respondents, nor did they appear by counsel on the hearing the appeal; nevertheless, after hearing counsel for the appellant, it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the order therein complained of affirmed. (M. S. Jour. *sub anno* 1781. p. 188.)

## INFORMATION.

CASE 1.—JOHN WILKES,—*Plaintiff*; The KING,—*Defendant* (in Error)  
[16th January 1769].

[Mews' Dig. iv. 1902, v. 122. See *Bradlaugh v. Reg.*, 1878, 3 Q.B.D. 633. *Reg. v. Castro* 1880-81, 5 Q.B.D. 502, 6 A. C. 236.]

[An information for an offence, is a surmise or suggestion upon record, on behalf of the King, to a Court of Criminal Jurisdiction, and is to all intents and purposes the King's suit; and may be filed by the Solicitor General, during a vacancy of the office of Attorney General.—In such a case, it is not necessary in point of law, to aver upon the record, that the Attorney General's office was vacant.]

\*\*JUDGMENT of the Court of King's Bench AFFIRMED.\*\*

See 4 Burr. 2527; 2553; *S. P.*; 2577. [19 St. Tr. 1075.]

In Michaelmas Term 1763, Sir Fletcher Norton Knt. his Majesty's then Solicitor General (the office of Attorney General being vacant) filed an information *ex officio*, in the Court of King's Bench, against the plaintiff in error, stating, that before the printing and publishing the seditious and scandalous libel therein after mentioned, to wit, on the 19th day of April, in the third year of his present Majesty's reign, his Majesty did make and deliver a most gracious speech from his throne, to the purport and effect therein set forth, and that the said John Wilkes most audaciously, wickedly, and seditiously devising and intending to vilify and traduce his Majesty, and his government of this realm, to impeach and disparage his veracity and honour, and to represent and cause it to be believed amongst



his Majesty's subjects, that his said most gracious speech contained falsities and gross imposition upon the public; and that his Majesty had suffered the honour of his Crown to be sunk, debased, and prostituted, and had given his name as a sanction to the most odious measures of government; and also most wickedly, unlawfully, and seditiously devising, intending, and endeavouring, as far as in [361] him the said John Wilkes lay, to excite disobedience and insurrections amongst the subjects of this realm, and to violate and disturb the public tranquillity, good order, and peace of this kingdom; after the making and delivery of the aforesaid speech (that is to say) on the 2d day of August, in the said third year of the reign of our said Lord the King, unlawfully, wickedly, seditiously, and maliciously published, and caused to be printed and published, a certain malignant, seditious, and scandalous book and libel, intituled, "The North Briton," in one part whereof intituled No 45. Saturday, April 23d 1763, were then and there contained (among other things) divers malicious, seditious, and scandalous matters, to the effect in the information set forth. There was another count in the information to the same effect.

To this information Mr. Wilkes pleaded, not guilty; and Sir Fletcher Norton, then being his Majesty's Attorney General, joined issue in that character for his Majesty.

In the sittings after Hilary Term 1764, the cause was tried by a special jury of the county of Middlesex, when Mr. Wilkes, after a full and fair trial, was convicted of the offences charged in the information.

But he having withdrawn himself into parts beyond the seas, proceedings to outlawry were had against him upon this conviction, and on the 1st of November 1764, he was outlawed; but in Easter Term 1768, he was apprehended by the sheriff of Middlesex, by virtue of a writ of *Capias utlagatum*, and being brought into the Court of King's Bench, was committed to the custody of the Marshal of that Court.

In the same Term, Mr. Wilkes obtained a writ of error upon the outlawry, and having assigned errors thereon, the same were argued in that and the following Term, when the Court of King's Bench were pleased to reverse the outlawry, for a defect of form in the return of the sheriff to the writ of exigent.

Mr. Wilkes's counsel having surmised to the Court some matters, which, if available, ought to have been moved in arrest of judgment, and for a new trial, the Court relaxed their general rule, requiring such applications to be made within the first four days of the Term immediately following the conviction; and indulged Mr. Wilkes with leave to move now, as well in arrest of judgment as for a new trial.

Accordingly, the ground of the motion in arrest of judgment, was to the information having been exhibited by the Solicitor General; and it was argued by the counsel for Mr. Wilkes, that the Solicitor General was not the proper officer, nor had any authority to exhibit an information; and if he was vested with such authority, it could only be temporary, during the vacancy of the office of Attorney General, and it did not appear by the proceedings, that the office of Attorney General was at that time vacant.

The application for a new trial was founded upon an objection to an order made by the Lord Chief Justice of the Court of King's [362] Bench, for amending the information after issue had been joined, and the record of the issue made up. But the Court unanimously over-ruled both the objections, and took time to consider of the judgment upon the conviction, till the 17th of June 1768; when Mr. Wilkes being brought into Court to receive judgment, was sentenced to pay a fine of £500 and to be imprisoned ten calendar months in the custody of the Marshal.

There was another information against Mr. Wilkes for publishing an obscene and impious libel entitled "An Essay on Woman," which was filed in the same manner, and tried at the same time with the other; and upon this latter information he was sentenced to pay another fine of £500 and to be imprisoned for 12 calendar months, to be computed from the determination of the first imprisonment.

To reverse these judgments, Mr. Wilkes brought two several writs of error in parliament, and assigned (J. Glynn, T. Davenport,) the following matters for error: I. That it did not appear that Sir Fletcher Norton, by whom the informations were exhibited, had any lawful power, warrant or authority to exhibit them; and there-

fore the judgment was not sufficient in law to convict Mr. Wilkes, and to ground the aforesaid sentences against him. II. That Mr. Wilkes was sentenced to be imprisoned for 12 months, to commence at a future time; whereas such imprisonment ought to have commenced at and from the time of giving the judgment, and not at any future time. III. That there was a variance between the record and the original information, consisting in altering the word *purport* to that of *tenor*.

And in support of these errors it was argued, that the informations were exhibited and filed by Sir Fletcher Norton, as his Majesty's Solicitor General, *ex officio*, when by virtue of such office he had no general authority so to do; nor did it appear that he had any *special* authority. Much doubt was formerly entertained, by those who were most eminently distinguished for their knowledge of the criminal laws of this country, whether any criminal informations were lawful. The constructions of *Magna Charta*, cap. 29, some ancient statutes and books of the law, declare and agree, that no man can be charged but by *indictment* or *presentment*. In the case of the *King v. Birchett* and others, 5 *Mod.* 463. and there called *Prynne's* case, Sir Francis Winnington averred, that Lord Chief Justice Hale had often said, "that if ever informations came in dispute, they could not stand, but must necessarily fall to the ground." It is admitted however, that the Court of King's Bench in that case held, that informations lay at common law. The question therefore in the present case was, who are the officers known to the law, and described in the law books, as the persons with whom only this right of exhibiting informations *ex officio*, rests? It may be clearly collected, from the authority of the Legislature, and the law books, that these officers were only the King's Attorney General, and the King's Coroner, to which latter is always added in such cases, the title [363] of Attorney also. No act of parliament, no law book mentions any other officer as having this power in any case, or under any circumstances. From the King's Coroner this power was taken away, by the statute of 4th and 5th of William and Mary, cap. 18, and was then left in the Attorney General only. And Serjeant Hawkins in his pleas of the Crown, vol. II. p. 268, observing upon that statute's taking away this power from the King's Coroner and Attorney only, says, "from whence it follows, that informations exhibited by the Attorney General, remain as they were at common law." Such informations can only be exhibited in the Court of King's Bench, of which Court the King's Attorney General, and the King's Coroner and Attorney, commonly called the *Master of the Crown Office*, are officers upon record, and have their known seats and places there as such. Sir Bartholomew Shower in his reports, p. 114, in the above case in 5 *Mod.* argues and observes, upon the statute 31 Eliz. cap. 5, and its proviso in sect. 3, providing, *that that act shall not extend to any such OFFICERS OF RECORD as have, in respect of their offices, theretofore lawfully used to exhibit informations*, "that it is the judgment of parliament that there were officers to exhibit them, and those that are meant, must be the Attorney and his deputy the Coroner, for I know of no other." It may be thought that Sir Bartholomew Shower is inaccurate in calling the Coroner *deputy* to the Attorney, because the Coroner has a superior seat in the Court of King's Bench to the Attorney; but he must be understood to speak of the Coroner, as deputy only in this instance, he not having equal power with the Attorney over the information when exhibited: for the Coroner cannot put a stop to it, even though he should have the King's warrant under this sign manual for the purpose; and yet the Attorney General can, by virtue of his office, stop it at once by a *noli prosequi*, which appears by the case of the *King v. Benson*, 1 *Vent.* 33. Sir Bartholomew Shower says further, p. 120, "That in case of malicious prosecution, no action lies against the Attorney or Coroner, any more than against a grand juror or prosecutor; because they are upon their oaths, and so the Attorney and Coroner are here as officers upon record." And p. 122, he says, "the way of apprising the Court is, by *dedit curiae hic intelligi et informari*, before any process, which is done by a sworn officer filed of record." If it be contended, that during the vacancy of the office of Attorney General, his authority, in this respect, devolves upon the Solicitor General; it is answered, that no law book, or judicial determination, warrant that argument. It is admitted, that there are some modern instances in the Rolls of the Crown office, of informations filed by the Solicitor General, *ex officio*, some of which describe the vacancy of the office of Attorney General, as if that was the circum-

stance from which the Solicitor General derived his authority, and raised himself to this power: but as the others are silent about such vacancy, they must prove a general authority, or nothing; because, if a special authority is [364] to give the title, it must, by the rules of law, be set forth in the record; for nothing *out* of the record, can warrant the judgment *upon* the record. There does not however appear to be one instance of a litigation, or judicial opinion, concerning such informations filed by the Solicitor General. In the present case it appeared from the records, that the Attorney General became the prosecutor, before the judgments were given; but no subsequent adoption by the Attorney General of these illegitimate offspring could sanctify their birth: if the informations were bad when filed, no subsequent act whatever could make them good. Wherefore, as the Legislature have not substituted, or meant to substitute the Solicitor General, or any other person or persons, in the room of the Coroner, from whom they took this power, or in the place of the Attorney General, during the vacancy of that office, it being always in the power of the King to supply that vacancy at any moment he pleased: as the Legislature has left the Attorney General the only known officer in law, authorized to exhibit criminal informations *ex officio*; as the Solicitor General is no sworn officer of the Court of King's Bench, either filed of record, or otherwise: as all the law books are consistently silent, about any power lodged with him for that purpose: as this power has of late time only been usurped by the Solicitor General in some modern instances, and those too varying in their form, as if he did not know on what ground he claimed or exercised the power: and as he appeared to have no warrant or authority to act in this instance, as attorney for the Crown; it was submitted by the plaintiff in error, that the informations in question were filed without any lawful authority, and for that reason were fundamentally bad and void, so as not to warrant any judgments upon them against him.

As to the second error, it was said that all judgments in law, as they affect either the property or the persons against whom they are given, ought to contain in them the clearest and most precise certainty, and to take immediate effect; but more especially, such judgments as lay a restraint upon the liberty of the persons of his Majesty's subjects. But the present judgment was deficient in both these points. For, 1st, it did not take immediate effect, but was to commence in future; viz. after the determination of another imprisonment, inflicted upon the plaintiff in error by another judgment, given upon a different record, and totally unconnected with this. And, 2dly, it did not contain any precise certainty, it being uncertain when the first imprisonment would determine, upon the determination of which alone, the imprisonment under this judgment was to commence. If the judgment sentencing him to the first imprisonment should be found erroneous, it was not easy to say upon this record, whether all the first imprisonment, previous to the reversal of the judgment, was to be held for nothing; and the 12 months be computed from the time of the reversal only, or from the commencement of the first imprisonment, all of which would be unlawful. [365] Who was to be the judge of this? Was it to be left to the discretion of the Marshal, how to settle the computation? Or was the prisoner to go through another expensive litigation in the Court of King's Bench, by way of petition or motion, to be discharged? If judgments could lawfully commence in future, they might as well commence at a long, as at a short date, and would in that case be the instrument of great oppression: not by the immediate execution of present and certain punishments, but by holding suspended terrors over the heads of those who were the objects of them.

And as to the third error, the plaintiff having obtained writs of *certiorari* to bring in the original informations, and those writs having been returned; it was admitted, that the records and the original informations were consistent, and that there was no variance between them; and that therefore the plaintiff was precluded from making any objection, with respect to the propriety of the amendments which had been made.

In answer to these several heads of error, and the reasoning in support of them, it was said (W. de Gray, E. Thurlow), I. That an information for an offence, is a surmise, or suggestion upon record, on behalf of the King, to a Court of Criminal Jurisdiction, and is, to all intents and purposes, the suit of the King; and that it would be difficult to assign a reason, why his Majesty should not have equal liberty

with the subject, of commencing and prosecuting his suits, by those persons whom he thinks fit to confide in and employ. That the Attorney and Solicitor General are invested, by their offices, with general authority to commence and prosecute the suits of the Crown: it is true, the Attorney General, as the superior officer, has the direction and controul of his Majesty's prosecutions, in which the Solicitor General seldom interferes; but it is equally true, that during the vacancy of the office of Attorney General, all the suits of the Crown, both criminal and civil, are commenced, prosecuted, and carried on by the Solicitor General. That at the time when these informations were filed against Mr. Wilkes, the office of Attorney General was vacant, and consequently the Solicitor General was the proper officer to exhibit them. But it is said, that the fact of the vacancy ought to appear upon the record: the only pretence for such an averment, is to inform the Court of the vacancy, as an inducement to receive the information from the Solicitor General; but there is no necessity for that intelligence. The Attorney General is, in truth, an officer of and has a place in the Court of King's Bench, and the Court will take notice of the vacancy of the office; and there are multitudes of instances of suits commenced and prosecuted by the Solicitor General on behalf of the Crown, without any averment, or notice taken of the vacancy of the office of Attorney General. But if the circumstance of an information being filed by the Solicitor General, furnished any real ground of objection to the prosecution, yet it was conceived, that the plaintiff in error was now precluded from availing himself of it; it could at most amount [366] only to an irregularity, and the remedy must have been by application to the Court, to have the information taken off the file, or the proceedings stayed. It could never be a cause of demurrer, or of arrest of judgment, or a ground of error; and Mr. Wilkes having pleaded to the offence, had waived any advantage of that irregularity. Besides, the Solicitor General having, during the suit, been appointed Attorney General, adopted the information, joined issue with the plaintiff in error, and prosecuted the suit to a conviction.

II. With regard to the error assigned in the judgment, that the imprisonment was to commence at a future day, it was apprehended that the judgment was given in that manner with the strictest propriety. The Court meant that Mr. Wilkes should undergo twelve months imprisonment for this offence, which could not be inflicted in any other manner. It would have been absurd to have made the imprisonment to commence immediately, Mr. Wilkes being already under another sentence of imprisonment for ten months; and, in that case, would in effect have only suffered an imprisonment of two months; when the Court, on account of the enormity of the offence, intended he should be imprisoned twelve months; and as that space of time was to be the measure of his imprisonment for this offence, it could not effectually have been inflicted in any other manner, unless the Court had sentenced him to be imprisoned twenty-two months, to commence immediately; and then there would have remained twelve months after the end of the ten months imprisonment, which he had before been sentenced to. But that might be attended with hardship and injustice to Mr. Wilkes, by being imprisoned a longer time than the Court meant, for the present offence; for if by the grace of the Crown, or by any means, the ten months imprisonment should be pardoned, avoided, or shortened. Mr. Wilkes under a sentence of twenty-two months imprisonment, would be confined from the moment the former imprisonment should expire, until the end of the twenty-two months; which would exceed twelve months imprisonment, when the Court intended to inflict an imprisonment of twelve months only. Under the circumstances of this case, there was no incongruity in the imprisonment commencing at a future time; and if there was any novelty in it, it was to be attributed to the accumulated guilt of its object.

III. The third and last error assigned, was upon a supposed variance between the record and the original information; but the fact did not warrant that objection. And it was conceived, that this supposed error was so assigned, for the purpose only of introducing into the cause, a matter which Mr. Wilkes had thought proper frequently to allege, as a subject of grievance and complaint. For though there was not the least colour for the complaint, yet as the manner in which it had been urged, seemed to touch upon the honour of the Crown in the administration of justice, and highly to concern the credit and dignity of his Majesty's Court of King's Bench.

it was greatly to be lamented, that it [367] could not be brought judicially before the House on this occasion: the real truth of the case being no more than this, that by the order of the Attorney General, a summons was directed to be applied for, after issue joined and before the trial, from one of the judges of the Court, in the usual course of business; and a summons was accordingly applied for, and obtained from the Right Honourable Lord Mansfield, for an attendance to shew cause why the information should not be amended, by altering the word *purport* to that of *tenor*, throughout the information, except in the first place; which, upon such attendance by the clerks in Court on both sides, was ordered accordingly, and the amendment made. Mr. Wilkes's counsel made no objection to this on the trial, nor in the ensuing Term, as might have been done, nor until Trinity Term 1768, when that amendment was made one ground of a motion in arrest of judgment; but as such an objection could not be regularly made in arrest of judgment, the Court were pleased to give him leave to make it upon a motion for a new trial: the same was accordingly made; when it clearly appearing, that the amendment was made in conformity to a multitude of precedents, and the constant usage of the Court; that it was not nor could be of any prejudice to the defendant, and that he himself, instead of complaining of it, had acquiesced under it; the Court unanimously over-ruled the objection, as a point on which no doubt could be entertained.

After hearing counsel on these writs of error, the following questions were put to the Judges: I. "Whether an information filed by the King's Solicitor General, during the vacancy of the office of the King's Attorney General, is good in law? II. Whether in such a case, it is necessary in point of law, to aver upon the record, that the Attorney General's office was vacant? III. Whether a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law?" And the Lord Chief Justice of the Court of Common Pleas having conferred with the rest of the judges, delivered their unanimous opinion, upon the first and third questions in the affirmative, and upon the second in the negative. Whereupon it was ORDERED and ADJUDGED, that the judgments of the Court of King's Bench should be affirmed; and that the records should be remitted, to the end such proceedings might be had thereupon, as if no such writs of error had been brought into the House. (M.S. Jour. *sub anno* 1768-9, p. 310.)

[368] CASE 2.—JOHN HORNE,—*Plaintiff*; The KING,—*Defendant* (in Error)  
[11th May 1778].

[See *Bradlaugh v. Reg.* 1878, 3 Q.B.D., 631: *R. v. Burdett* 1820, 4 B. and Ald. 95, 316.]

[How far an *innuendo* or averment is, or is not, necessary to support a charge of a libel, consisting in opprobrious words or signs.]

\*\* JUDGMENT of the Court of King's Bench AFFIRMED.\*\*

\* Cowp. 672: 11 St. Tr. 264.\*\* [20 St. Tr. 651.]

In Michaelmas Term 1776, an information was filed in the Court of King's Bench against the plaintiff, by his Majesty's Attorney-General, on behalf of his Majesty, for writing, printing, and publishing two seditious libels.

The first count in the information stated, "That the said John Horne, being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to our said present Sovereign Lord the King, and to his administration of the government of this kingdom, and the dominions thereunto belonging, and wickedly, maliciously, and seditiously intending, devising, and contriving to stir up and excite discontents and seditions amongst his Majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his said Majesty's subjects from his said Majesty, and to insinuate and cause it to be believed, that divers of his Majesty's innocent and deserving subjects had been inhumanly murdered by his said Majesty's troops, in the province, colony, or plantation of the Massachuset's Bay in New England in America, belonging to the crown of Great Britain, and unlawfully

and wickedly to seduce and encourage his said Majesty's subjects in the said province, colony, or plantation, to resist and oppose his Majesty's government, on the 8th day of June in the 15th year of the reign of our present Sovereign Lord George the Third, by the grace of God of Great Britain, France, and Ireland, King, Defender of the Faith, etc. with force and arms, at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, wickedly, maliciously, and seditiously, did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning his said Majesty's government, and the employment of his troops, according to the tenor and effect following:—King's Arms Tavern, Cornhill, June 7th, 1775. At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of £100 to be applied to the relief of the widows, orphans, and aged parents, of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the [369] King's (meaning his said Majesty's) troops, at or near Lexington and Concord, in the province of Massachuset's, (meaning the said province, colony, or plantation of Massachuset's Bay in New England, in America,) on the 19th of last April; which sum being immediately collected, it was thereupon resolved, that Mr. Horne (meaning himself the said John Horne) do pay to-morrow into the hands of Messrs. Brownes and Collinson, on the account of Dr. Franklin, the said sum of £100; and that Dr. Franklin be requested to apply the same to the above-mentioned purpose. John Horne.—(Meaning himself the said John Horne.)—In contempt of our said Lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present Sovereign Lord the King, his crown and dignity." There were other counts in the information, charging the plaintiff with causing the same libel to be printed in the *London Packet* or *New Lloyd's Evening Post*, and the *Morning Chronicle* or *London Advertiser*.

The count on the second libel was as follows; viz. "That the said John Horne being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously intending, devising, and contriving as aforesaid, afterwards, to wit, on the 14th day of July in the 15th year aforesaid, with force and arms, at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously, did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning his said Majesty's government, and the employment of his troops, according to the tenor and effect following:—I (meaning himself the said John Horne) think it proper to give the unknown contributor this notice, that I (again meaning himself the said John Horne) did yesterday pay to Messrs. Brownes and Collinson, on the account of Dr. Franklin, the sum of £50 and that I (again meaning himself the said John Horne) will write to Dr. Franklin, requesting him to apply the same to the relief of the widows, orphans, and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the King's (meaning his said Majesty's) troops, at or near Lexington and Concord in the province of Massachuset's, (meaning the said province, or colony, or plantation of the Massachuset's Bay in New England, in America,) on the 19th of last April. John Horne.—(Again meaning himself the said John Horne.)—In contempt of our said Lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present Sovereign Lord the King, his crown and dignity." And counts were added for causing this last libel to be printed in the public newspapers.

[370] In Easter Term 1777, Mr. Horne pleaded not guilty to this information. And at the sittings after Trinity Term following, the information was tried by a special jury of the city of London, and the defendant found guilty of all the offences therein charged.

In Michaelmas Term 1777, Mr. Horne moved the Court of King's Bench, in arrest of judgment; alleging, that the information was insufficient, inasmuch as it

did not aver that any rebellion had been in the colony of the Massachusetts Bay, or that certain persons who were denominated the King's troops, had been employed by his Majesty and his government to quell that rebellion, or that any engagement had happened between the King's troops and the rebels, or that any of the rebels had been slain in such engagement by the King's troops, or that the advertisements, or the charge of murder therein contained, had any relation to such slaughter of the rebels, or to the action of the King's troops. He argued, that nothing can be intended beyond that which expressly is averred in the record. On the other hand, if by any possible construction or intendment, those expressions which are said to be criminal can receive an innocent sense, consistently with what is expressly averred in the record, the consequence is that no crime is sufficiently alleged. Troops may mean flocks or companies of strollers, or deserters, and if in any supposable circumstance the words complained of might have been said innocently, there was no crime charged in this record.

But these objections were, upon deliberation, unanimously over-ruled by the Court; and judgment pronounced, that the said John Horne should pay a fine to the King of £200 and be imprisoned for the space of twelve months, and until that fine should be paid; and that upon the determination of that imprisonment, he should find sureties for his good behaviour for three years, himself in £400 and two sureties in £200 each.

To reverse this judgment, Mr. Horne brought a writ of error in Parliament, and on his behalf it was argued (J. Dunning, J. Lee), that it is a principle in the law of England, that, in criminal prosecutions, the information, or indictment, must contain in itself a certain and explicit charge of the offence intended to be imputed to the defendant, and no defect of certainty in the charge can be helped or supplied by any proof, and still less by presumption or intendment, either in the jury who give the verdict, or in the Court which pronounces judgment upon it. It is equally true, that all penal charges ought to be taken most favourably for the subject, in every stage of the prosecution; so that if it appears doubtful whether the fact alleged in the information or indictment be necessarily criminal, or may possibly be innocent, the prosecution shall fail; and though the jury find a general verdict, such verdict ought not to be construed by the Court to find any thing beyond the plain and certain allegations in the indictment or information. In this case the jury had found, that the King's troops, [371] mentioned in the advertisement, meant "his Majesty's troops;" for this, and the publication by the defendant, were facts charged, and therefore might be properly said to have been found. If it should be admitted, which was not found, that the troops meant his Majesty's army in America, there was nothing in the information that extended the imputation on those troops to his Majesty or his ministers, unless it was in the introductory words, which had been resorted to as charging the advertisement to be written, "of and concerning his Majesty's government, and the employment of his troops." If the jury were to be understood to have found it to be so written, (though from the company that passage kept with the words *false, wicked, malicious, scandalous, seditious*, it might more properly be considered as a matter of inference than of charge), it would not of necessity follow, that the employment of the troops with which Mr. Horne expressed his dissatisfaction, was an employment by his Majesty, or by any person in authority under him. It was equally consistent with a supposition, that the troops, in the instance complained of, employed themselves in acting without, or even contrary to the orders of those to whose orders they ought to have conformed. Nor did it follow, that because the advertisement was found to have been written concerning his Majesty's government, that it therefore necessarily imported an intention to arraign that government. Armies are properly considered as among the instruments of government, and are properly employed, whenever they are so employed, in the defence of a just government. Whoever writes therefore concerning his Majesty's armies, may be said to write concerning his Majesty's government. But the supposed libel carried no imputation against his Majesty, or his government; unless it should be understood to mean, that the misbehaviour which it was supposed to impute to the troops, was in an instance wherein they were acting in due obedience to legal orders, under an authority derived from his Majesty, but which was no where charged, and consequently not found. In order

to have supported the information in the manner in which probably the prosecutor wished to have it understood, he ought to have shewn by proper averments, that there was at the time a rebellion existing in America; that the troops were sent thither to suppress it; that they were in the act of exerting themselves, in obedience to proper orders, towards this object; and that though the loss of lives was among the consequences of that exertion, it was no murder, nor in any sense a violation of law, but, on the contrary, perfectly justified by the occasion. Why averments to this effect were not to be found in the record, it was not difficult to conjecture, to those at least who understand that averments must be proved; and it might not be thought certain that a jury would be found who would assent to the truth of these propositions. It would be no answer to say that all this was notorious; or that at the trial it was proved; for if it were so, which was by no means admitted, it was perfectly immaterial, if the principle be, as it was conceived [372] to be, that the Judges are to receive or use no other knowledge of the facts essential to constitute a criminal charge, but what they collect from the record.

On the other side it was contended (E. Thurlow, A. Wedderburn), that the crime of a libel consists in opprobrious words or signs, written, made, exhibited, or published, concerning some person, or other subject, which it is criminal so to revile. The accusation must therefore state the opprobrious words or signs, and they must be applied to the person or thing supposed to be reviled; but no technical form of words is necessary for that purpose. If the natural and apparent sense of the words themselves be opprobrious, and require no other medium to fix such meaning upon them, no *innuendo*, or averment to support it, can be necessary to raise an apparent meaning. If the application of such opprobrious words be expressly made in the phrase of the libel, no *innuendo*, or averment to support it, can be wanting to raise an express application. It is a well known rule, that Judges are to understand a libel as others do, without straining to find a loop-hole to palliate the offence, which in some measure would be to encourage scandal. It would be a ridiculous absurdity to say, that a writing, understood by the meanest capacity, cannot possibly be understood by a Judge and jury; therefore Judges will not resort to every possible construction, only to avoid the *natural* one; much less give a different sense to the words, by supposing circumstances which, if they exist, should be proved. The words complained of conveyed, in their natural and apparent meaning, a gross reflection, the imputation of an heinous and hateful crime, upon the employment of the national force, and consequently upon his Majesty's government, of which the employment of that force is an important part. These words, *the King's troops*, in a common and obvious sense, mean that national force which the law takes notice of and authorises. The literal meaning of the words was confirmed by the context, and it was impossible to believe that any English reader had put another interpretation upon them, much less had any such reader mistaken them to mean *flocks* or *companies of strollers*, etc. as the objection idly supposed. The application of these opprobrious words to the King's government, and the employment of his troops, not only appeared in the phrase of the libel itself, but was expressly charged in the information, and proved even by the defendant's witnesses, and found by the jury; that matter therefore was also concluded. The averments suggested in the defendant's argument were by no means necessary to constitute a state of this crime; for supposing there had been no rebellion, or troops employed to suppress it, or engagement by the King's troops, or slaughter made of the rebels, the guilt of this calumny would not have been diminished, by its total want of foundation or colour of truth.

After hearing counsel on this writ of error, the following question was put to the Judges; "Whether the writing contained in the information is, in point of law, sufficiently charged [373] to be a libel upon his Majesty's government?" And the Lord Chief Justice of the Court of Common Pleas having delivered the unanimous opinion of the Judges in the affirmative, it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench should be affirmed; and that the record should be remitted, etc. (MS. Jour. *sub anno* 1777-8. p. 904.)



## INJUNCTION.

CASE 1.—EARL OF BATH and others,—*Appellants*; WILLIAM SHERWIN and others,—*Respondents* [17th January 1709].

[After five several trials at bar, and the verdicts all the same way, the Court of Chancery will grant a perpetual injunction to restrain all further proceedings at law by the litigant parties, or any claiming under them, upon the same title.]

**\*\*DECREE** of Lord Chancellor Cowper **REVERSED**. See *post*. Ca. 3. and the note there.\*\*

Preced. in Chan. 261: Gilb. Rep. 2: Viner, vol. 4. p. 426. ca. 42. *in n*: vol. 14. p. 431. D. ca. 6. *in n*: 2 Eq. Ca. Ab. 171. D. ca. 1: 243. ca. 11: 522. ca. 1. [No notice is taken in any of these reports, of this appeal, which reversed the judgment.]

George Duke of Albemarle, was in his life-time seised in fee of divers manors, lands, and hereditaments, in the several counties of York, Lancaster, Lincoln, Middlesex, Essex, Hertford, and Berks; and, in December 1669, he settled the same, after his own death, to the use of his son Christopher for life; remainder to his first and other sons in tail male; remainder to his own right heirs.

On the 3d of January 1669, Duke George died; whereupon Duke Christopher, his son, by virtue of the settlement, entered and enjoyed during his life; and died in 1687, without issue; after whose death, part of the estate reverted to the crown, other part to one Thomas Pride, as grandson and heir of Thomas Monk, the elder brother of Duke George, who afterwards sold the same to John Earl of Bath, the grandfather of the present appellant the Earl; and as to the residue of the estate, Elizabeth Duchess of Albemarle, the widow of Duke Christopher, who afterwards intermarried with Ralph Duke of Montague, was entitled to great part thereof during her life; and the appellants were severally entitled, under Duke Christopher, to most of the said real estate, part in possession, and the rest in reversion, expectant on the Duchess's death.

Several years after the death of Duke Christopher, a pretence was set up by Thomas Pride, that Ann Duchess of Albemarle, Duke [374] Christopher's mother, who had formerly been married to one Thomas Radford, was never married to Duke George; or if she was, yet that her first husband was then alive, and was also living at the birth of Duke Christopher, on the 14th of August 1653; and consequently, that Duke Christopher was not the lawful issue or heir of Duke George; but that Pride, as the real heir at law of Duke George, was entitled to the whole estate.

On this title Pride caused an ejectment to be brought on his own demise, for part of the estate, against the said John Earl of Bath, Ralph Duke of Montague, and others; and this cause being tried at the bar of the Court of Queen's Bench on the 6th day of February 1694, by a Hertfordshire jury; a verdict, upon full evidence, was given for the defendants.

After Pride's death, Thomas Pride, his son, upon the same title caused another ejectment to be brought on his demise, for other part of the estate, against the same parties; and upon the trial of this cause at the bar of the same Court, by an Essex jury, on the 24th of April 1696, a verdict was again given for the defendants upon full evidence.

Thomas Pride the son afterwards died, leaving three children; who having all died without issue, Elizabeth, the late wife of the respondent Sherwin, became his heir at law; and thereupon she and her said husband, on the same pretence of title, caused an ejectment to be brought on their demise, for a different part of the estate, against Sir Walter Clarges and others; and this ejectment being also tried at the bar of the Court of King's Bench, by a Yorkshire jury, on the 8th day of May 1700, a private verdict on full evidence was given for the then defendants, and Sherwin and his wife being duly called, suffered a nonsuit. But notwithstanding this, they soon afterwards thought proper to bring another ejectment on the same title,

for the same lands, and against the same parties; and this being tried in the same manner, on the 15th of November 1700, a verdict was given for the defendants upon full evidence.

But Sherwin and his wife, still restless and uneasy, made use of various practices and contrivances to prevail upon the tenants of Sir Walter Clarges to attorn to them, and in part succeeded; whereupon Sir Walter Clarges caused an ejectment to be brought against Sherwin and his wife, and their tenants, as well on his own single demise, as on the demise of the executors of Duke Christopher; and this cause being tried at the bar of the same Court, by a Yorkshire jury, on the 4th of May 1703, a verdict was given for the plaintiff.

The single question upon all these trials was, Whether Duke Christopher was the lawful son and heir of Duke George, or not? The jurors upon each of them were gentlemen of quality and character in the said several counties; and the judges who tried the causes took great time and pains in the trials, and expressed themselves well satisfied with the verdicts.

[375] Notwithstanding the uniform event of these five trials, Sherwin and his wife caused other declarations in ejectment to be delivered for different parts of the estate in the possession of the appellants; and they also took upon them to borrow money, and to grant several derivative interests in this estate to the several other respondents; whereupon the appellants, in Michaelmas Term 1703, exhibited their bill in Chancery against the respondents, praying that all questions touching the legitimacy of Duke Christopher, or concerning his being the son and heir of Duke George, might be quieted and extinguished; and to that end, that a perpetual injunction might be awarded to stay all further proceedings at law upon the said pretended title, and to prevent multiplicity of suits and endless vexations.

On the 28th of June 1709, this cause was heard before the Lord Chancellor Cowper; when his Lordship was pleased to decree, that the bill should stand dismissed with costs.

But from this decree the plaintiffs appealed; and on their behalf it was insisted (T. Powys, E. Northey), that a perpetual injunction ought to have been granted, upon the circumstances of the case; and because the matter and only point in question had undergone so many and such strict examinations, and had been so fully settled by no less than *five trials at bar*, all the same way, and in the most solemn manner possible. That such pretence of title ought the rather to be silenced, because Duke Christopher lived near twenty years after the death of his father, and during all that time enjoyed as well the paternal estate of the family, as the honours of it, in the capacity of heir male of the body of Duke George, and could not have enjoyed the same had he not been so: that neither Thomas Pride the father, or Thomas the son, or Elizabeth Sherwin, in all this period, ever set up or pretended to have any title to any part of the paternal or other estate; but, on the contrary, owned Duke Christopher to be (as he really was) the lawful son and heir of Duke George, and so he was also acknowledged by King Charles II. King James II. and King William; was received and sat as such in the House of Peers; and under that title was appointed Lord Lieutenant of several counties in England, and also Generalissimo of the Western Plantations: that there seemed a still higher reason for a Court of Equity, after so many solemn trials, to interpose in this matter, since it was to silence an odious question touching the legitimacy of a noble person, started and prosecuted after his death; and by the present method of proceedings in ejectment, the appellants, unless relievable in equity, would be liable to perpetual suits and vexations upon the same question. As to the objection, that the common law having fixed no bounds to the number of trials in ejectment, persons were at liberty to prosecute in that way as often as they pleased, and therefore a Court of Equity ought not to restrain their right; it was answered, that the method of trying the title to inheritances by *ejectment* was of no very long standing, for the ancient way of trying such rights was in *real actions*; and there, the wisdom of the common law [376] had fixed proper limits to such prosecutions, for preventing vexatious and endless contests: and as so great an inconvenience, and even abuse of the law was practised in this case, it was highly reasonable that a Court of Equity should interpose, and obviate the mischief by granting a perpetual injunction, after the right and the only matter in question had been tried so often and fairly settled by so many solemn

and concurring verdicts. That there were many precedents where Courts of Equity had granted perpetual injunctions for quieting inheritances, after two trials, and where only one of those trials had been directed by such Court; and it was conceived that the reason in this case was full as strong, where the respondents, by their own choice, had tried the single point in question by five several juries, in three different counties.

On the other side it was contended (T. Parker, J. Pratt), that where any person has a right of entry into lands, he may by law enter whenever and as often as he pleases, and, when in possession, may make a lease; and if the lessee be disturbed, an ejectment may be brought in his name. And this right the law had not thought fit to limit or restrain, but looked upon the party's bearing his own charges, and paying his adversary's costs, to be a proper penalty on the one, and a sufficient compensation to the other; so that upon these terms he might bring as many ejectments as he pleased: and, therefore, to reverse the present decree would be directly to make a new law. That the title of the respondents was the title of an heir at law, who is the favourite of the law; but that of the appellants was at best but the title of a volunteer, and therefore not to be protected against the heir. That for some part of the estate no ejectment had yet been tried; and the respondents were in possession of other part of it, which the appellants could not recover without a trial; so that the question could not be considered as closed, while, with respect to any part of the estate, it remained untried. And that the matter in question was purely a matter of fact, triable by a jury, without involving any one point proper to give a Court of Equity jurisdiction; nor was there any one precedent of such a decree as the appellants sought for in this case, where the question was singly a point of fact, between heirs at law on the one side, and persons claiming under a voluntary conveyance on the other.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of dismissal complained of should be reversed: and that the Court of Chancery should forthwith issue a perpetual injunction to stay the proceedings at law of the defendants in Chancery, and all claiming under them, against the now appellants and all claiming under them, upon the pretended title of the said defendants, grounded upon the alleged illegitimacy of Christopher late Duke of Albemarle. (Jour. vol. 19. p. 39.)

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[377] CASE 2.—JAMES WORSLEY,—*Appellant*; SIR SIMEON STUART,—*Respondent* [4th March 1711].

[Mew's Dig. xiv. 1838. See *Coppinger v. Gubbins*, 1846, 9 I. R. Eq. 304.]

[The Court of Chancery will award a perpetual injunction to restrain waste, by ploughing, burning, breaking, or sowing of Down-land.]

\*\* DECREE of the Court of Exchequer AFFIRMED.\*\*

Viner, vol. 22. p. 441. ca. 52.

Dame Mary Stuart, the grandmother of both the appellant and respondent, was seized of a capital messuage, farm, and lands in Dorsetshire, called Tarrant-Hinton; which consisted of 320 acres of poor arable land, a sheep-walk, and about 400 acres of down land: and in June 1699, she by her will devised the same, after the death of Sir Nicholas Stuart, to trustees, in trust for the appellant, for a term of eight years, if he should so long live; remainder to the respondent for his natural life; remainder to his first and other sons in tail male; with other remainders over. The testatrix also left a writing under her hand, whereby she directed her trustees to take security from the appellant, and every other person who should come into the possession of this estate, that they should not commit waste, either by cutting timber, or ploughing such lands as ought not to be ploughed.

Under this will, and after the death of Sir Nicholas Stuart, which happened in February 1709, the appellant entered upon the lands; but neglected to give any

such security as the testatrix had directed: and soon afterwards, without the consent or privity of the surviving trustee, the appellant began to plough up, break, and burn, part of the down lands.

Whereupon the respondent filed his bill in the Court of Exchequer, to restrain the appellant from burning, breaking, or ploughing any more of these lands; and obtained a special injunction for that purpose.

But the defendant contending, that what he had done would ultimately tend to the improvement of the estate, the plaintiff proceeded in the cause; and, after examining witnesses on both sides, it came on to be heard in Michaelmas Term 1711, when the Court decreed, that the defendant should not plough, burn, break, or sow, any more of the said down lands; and awarded a perpetual injunction accordingly.

From this decree the defendant appealed; insisting (S. Dodd), that the testatrix, by the words of her bequest, intended only to restrain waste; but could not be supposed to mean, that no profit should be made by a substantial and lasting improvement of the lands. That this Down was apparently capable of being brought to ten times its present value, by the course of husbandry which the appellant had observed; and therefore the testatrix could never intend that such an improveable part of her estate should lie under [378] moss for ever; or that no person claiming under her should have above 40s. per ann. for lands which might be made worth £20 per ann.

On the other side it was said (H. Stevens), that this burning, breaking, and ploughing of Down-land, was indeed a present advantage to the appellant, for his short term of years; but would be a total destruction of all future benefit to arise from the Down; and, for want of foldage for the sheep, would greatly damage and impoverish the arable part of the farm. That this was the first instance of a tenant for years insisting on a right to plough, burn, and break Down-lands; and should he succeed in it, many other tenants in the counties of Dorset and Wilts would soon follow so pernicious an example, to the destruction of the inheritance of their landlords' estates.

And accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree and proceedings therein complained of, affirmed. (Jour. vol. 19. p. 393.)

CASE 3.—SIR EDWARD LEIGHTON,—*Appellant*; WILLIAM LEIGHTON and others,—*Respondents* [3d March 1720].

[After two trials at bar by direction of the Court of Chancery, and both verdicts the same way; Equity will grant a perpetual injunction, and decree upon the right found by the verdicts.]

\*\* DECREE of Lord Chancellor Parker AFFIRMED.

The following more ample statement of this case will no doubt be satisfactory:

"The defendant's father mortgaged, and afterwards sold, land to B. his brother, the plaintiff (the respondent in the House of Lords): upon his death, the defendant (the appellant) set up an old intail, created about 200 years before, and got into possession. The plaintiff brought an ejectment, and a verdict passed for the defendant. The plaintiff at law brought his bill, setting forth that the writings were all in the defendant's hands; and praying that they might be produced, and that the defendant might not set up a title under any trust-term: and decreed by Lord Cowper, that the trial should be upon the *mere right* in an ejectment; and that no trust-term, mortgage, or lease, should be set up, but that the defendant should make title only under the intail. Upon such trial it was found again for the defendant; but the Judge certifying against the verdict, a third trial was had at the bar of the Exchequer, in which a verdict was found for the respondent, the original plaintiff; and after that, by order of the Court of

Chancery, another trial on a feigned issue was had at the bar of the Court of B. R., upon the ground, that in a case so long litigated, it was hard to conclude the defendant by one verdict. On this trial also a verdict was found for the respondent. On the equity reserved it was prayed, that the plaintiff should have a perpetual injunction, with costs. Lord Chancellor Parker observed, that he did not see what that Court had been doing, in directing trials and ordering writings to be produced, unless it should grant a *perpetual injunction*, which, after so many trials, seemed to be for the benefit of both parties." See 2 Eq. Ab. 523. c. 4.—In the report in *Stra.* the preceding case, No. 1, of *Bath (E.) v. Sherwin*, appears to have been quoted as a precedent

Actions of Ejectment are now become the usual mode of trying titles at the common law: judgments in those actions not being in any degree conclusive, the Courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question: Courts of Equity have there-<sup>[379]</sup>fore assumed a jurisdiction to put an end to the oppression occasioned by the abuse of this privilege; and, by granting perpetual injunctions, to restrain further litigations, have in some degree imposed that restraint in personal, which is the policy of the common law in real, actions. See Mitford's Treatise, p. 127: 2 Eq. Ab. 522. ca. 1. in n.

The reason of an *Ejectment being never final*, is not laid down in the general books on that subject, but is thus ingeniously stated by a very elegant modern writer:—That it is impossible, from the *structure of the record* in that action, to plead a former, in bar of another, Ejectment brought; because, 1. The plaintiff and defendant are nominal, and exist in most cases on record only, and consequently may be changed in a new action; but the identity both of plaintiff and defendant must be averred in pleading a former action in bar.—2. The term demised may be laid many different ways. *Eunomus*, vol. 4. p. 189.\*\*

1 P. Wms. 671: 2 Eq. Ca. Ab. 523. ca. 4: Viner, vol. 14, p. 431. note to ca. 2. 6.

\*\* *Stra.* 404.\*\*

Sir Edward Leighton, the appellant's father, and the respondent's elder brother, by indentures of lease and release, dated the 5th and 6th of December 1692, in consideration of £3000 conveyed the manor of Baulsley and divers lands in the county of Montgomery, to the respondent William Leighton and his heirs; and covenanted to levy a fine. But no fine was levied, it being thought altogether unnecessary, as it was the constant reputation in the family, that Sir Edward and his ancestors had for several generations being seised of the premises in fee.

By virtue of this conveyance, Mr. Leighton entered into possession; and by indentures of lease and release, dated the 2d and 3d of October 1702, he conveyed this estate to trustees and their heirs, to the use of himself for life, without impeachment of waste; and then to the intent, that an annuity of £100 might be raised and paid to Dorothy his wife for her life, pursuant to articles entered into before their marriage; and, subject to this annuity, to the use of his own right heirs.

In April 1711, Sir Edward Leighton the vendor died, leaving the appellant his eldest son and heir; who thereupon claimed to be entitled to this estate under an old entail, said to be made the 12th Charles I. and accordingly brought an ejectment to recover possession; but, upon the trial of this ejectment at the assizes for the county of Salop, in August 1711, the appellant, failing in the proof of such old entail, was nonsuited: however, upon his counsel representing to the Court, that it was a cause between very near relations, and that it was the earnest desire of their client to live for the future at peace with his uncle, the defendant consented to forgive him the costs; accordingly a juror was withdrawn, and the defendant continued in possession as before. But notwithstanding this indulgence, the appellant prevailed upon most of the tenants to attorn to him, which obliged the respondent to bring his ejectment; and, on the trial thereof at the Great Sessions held for the county of Montgomery, in September 1712, the appellant again set up the former entail; but finding the Court of opinion against him on that point, he

set up another entail, said to have been made by John Leighton, one of his ancestors, 15th Henry VIII.; and this being a matter of surprize upon the respondent, who was quite unprepared to give any answer to it, the ancient deeds and writings relating to the pre-[380]-mises being in the appellant's custody, the jury found a verdict for the appellant.

Whereupon the respondent William Leighton found himself under the necessity of praying the aid of a Court of Equity; but, before a bill could be prepared for that purpose, he discovered that some part of the premises was not included in this pretended old entail; wherefore he brought another ejectment against the appellant, in order to recover the same; and on the trial of this ejectment at the Assizes held for the county of Salop, in March 1713, the respondent got a verdict for that part.

In December following, the respondent exhibited his bill in Chancery against the appellant, praying a production of all deeds and writings in his custody or power, which in any wise concerned the premises in question; that the tenants who had attorned to him, might be enjoined from paying him any rent; and that the respondent and the rest of the tenants might be quieted in their several possessions.

The cause being heard on the 5th of May 1715, before the Lord Chancellor Cowper, a mutual production upon oath was ordered of all deeds and writings before the Master; that both parties should be at liberty to see and peruse the same, and try their title at law; and that the defendant Sir Edward should not, on such trial, insist on any title, but under the old entail, 15th Henry VIII.; nor should the plaintiff insist on any old lease, or that the title was in any third person, but only on his deeds of purchase.

In consequence of this decree, another ejectment was brought and tried at the assizes at Shrewsbury, on the 30th of July 1716, when the appellant insisted on the said old entail by his ancestor John Leighton; and the respondent, on the other hand, offered to produce a parchment copy or counterpart, and also a Paper Office copy of an inquisition taken *post mortem Thomæ Leighton*, on the 2d of August, 42d Elizabeth; whereby it was found, that the said Thomas Leighton was seised *in fee* of the said manor of Baulsley, etc.; and that being so seised, he conveyed the same to trustees for ten years, to commence after his death, for the payment of debts and raising childrens portions. But the Judge being of opinion that this was not legal evidence, the respondent suffered himself to be nonsuited, without offering any other evidence, upon the Judge's promising to certify the cause of such nonsuit.

This matter being afterwards disclosed to the Court of Chancery, an order was made, on the 8th of November 1716, that the bill should be retained; and, on the 5th of March following, another order was made for a production of the deeds and writings on the next trial.

Soon after the last trial at Shrewsbury, viz. on the 3d of September 1716, there was a trial at Montgomery, between the appellant and some of the leaseholders of the manor; but upon this [381] trial, the title never came in question: some of them suffered judgment by default, and those who made any defence insisted only, that the appellant had confirmed their leases by his acceptance of rent; but which they not being able to make out, a verdict was obtained against them.

On the 15th of August 1717, the cause came on again to be tried at Shrewsbury; when, *contrary to the direction* of Mr. Baron Price who tried it, a verdict was found for the appellant. But the Court of Exchequer, (in which Court the ejectment was brought,) upon a representation of the whole evidence by Mr. Baron Price, concurred with him in opinion that the verdict was *contrary to evidence*, and therefore set it aside, and directed a trial at the bar of that Court.

Accordingly, on the 11th of November 1718, this trial came on; when the appellant made title under the said old entail, insisting, that John Leighton, one of his lineal ancestors, by deed of feoffment bearing date the 7th of May, 15th Hen. VIII. conveyed to Thomas Dudley, and several other persons, and their heirs, (*inter alia*.) the said manor of Baulsley, etc. to the use of the said John and Joyce his wife, and the heirs of their two bodies: that this entail had never been cut off, and consequently, that he being lineally descended from the said John, was entitled to the premises in question as heir under the said entail.

To this title some material objections were made on the part of the respondent; as, that the said old deed of entail was no otherwise proved, than by the traverse of an inquisition, *post mortem ejusdem Johannis*, taken so long ago as the 24 Hen. VIII. and by an inquisition found *post mortem Edwardi filii ejusdem Johannis*, taken in the 36 Eliz. and that this deed had never been heard of or used on any other occasion, but in those two instances, to defeat the crown of its wardship. It was then proved, that the appellant's ancestors, from the very time of making this pretended entail, had all along acted as tenants in fee of the premises in question; and had from time to time made such conveyances and leases thereof (great numbers of which were produced) as were inconsistent with the power of a tenant in tail; and in particular, that John himself acted as tenant in fee of the manor, after the making of this settlement; and that Thomas, his grandson, by deed dated the 14th of October, 31 Eliz. conveyed this manor to trustees for a term of ten years, to commence after his death; and by his will, dated the 12th of August, 38 Eliz. charged that term with the payment of several legacies and annuities; and was so positive of his power to make such a charge, that having by his will charged several other estates with the payment of other legacies, he added, *that if it should fall out that by law he could not charge them, then the said manor of Baulsley should be charged likewise with the payment of those other legacies*. And it was further proved, that the fines and recoveries for the county of Montgomery, where the said manor lay, had been kept in a damp vault under the church at Wrexham, in so careless a manner that several [382] of them were quite mouldered away; and those that remained (at least till the reign of Queen Elizabeth) were so defaced as not to be legible, and so confused, that it was almost impossible to find out any fine or recovery. Upon this evidence, and after a trial of twenty hours, by a special jury of the county of Salop, a verdict was found for the respondent, agreeable to the opinion of the Court.

But the appellant soon afterwards applied to the Court of Chancery for a new trial; and though nothing was offered to impeach the last verdict, yet insisting, that in a cause which had been so long litigated, he ought not to be concluded by one verdict, the Court, on the 19th of May 1719, thought proper to direct another trial to be had at the bar of the Court of King's Bench, in a feigned issue, and by a special jury of the county of Middlesex; and the issue agreed upon was, *Whether the said Sir Edward, father of the appellant, at the time of making the said conveyances, was seized in fee-simple, or fee-tail, of the premises in question?*

This issue was accordingly tried on the 26th of May 1720; when, the same evidence being given, and the same arguments used on both sides, as at the last trial, another verdict was found for the respondent.

In consequence of this second verdict, the cause in Chancery came on to be heard upon the equity reserved by the decree of the 5th of May 1715, on the 12th of November 1720; when the Lord Chancellor Parker was pleased to decree a perpetual injunction against the defendant Sir Edward Leighton; that he should forthwith deliver possession of the premises in question to the plaintiff, and account with him for the rents and profits thereof, and bring in before the Master, upon oath, all the deeds and writings in his custody or power relating thereto; and that each party should bear his own costs of that suit, but that the defendants should pay the plaintiff the costs of the last trial at law.

From this decree the defendant appealed, praying that the same might be reversed; but before assigning any reasons in support of the appeal, he stated and answered several objections which the respondents had made to some of the verdicts in his favour: as, 1st, That the first and second trials were had, before the respondents had obtained an order of the Court of Chancery for leave to peruse the deeds and writings in the appellant's custody. To this it was answered, that the respondents did not discover any new evidence by the perusal of the appellant's deeds and writings, except a copy of the will of Thomas Leighton, which made more against the respondent William than for him: for the method of keeping the records of fines was a matter of a public nature, and the respondents had always in their custody several leases made by the appellant's ancestors, for a term of years exceeding the power of a tenant in tail: besides, the Lady Leighton, who was really concerned in interest in all these trials, had the custody of all the appellant's deeds and writings on the death of [383] his father, and by that means had an opportunity

of inspecting and concealing such marriage settlements and other deeds as she might think inconsistent with her interest to deliver over to the appellant. 2dly, It had been objected, that two of the ejectments were brought, not against the respondents, but against other tenants of the manor.—To this it was answered, that the same title was in question, the same defence made, and the same attorney and counsel employed, and the appellant was by the decree ordered to account for the profits of the land recovered on such trials; so that it was plainly to be considered as one and the same cause. 3dly, Another objection was, that in the ejectment tried at Salop Assizes, 1716, before Mr. Justice Eyre, the respondent was nonsuited for want of an office copy of an inquisition *post mortem Thomae Leighton*: but to this it was answered, that the respondent had never ventured to give that inquisition in evidence in any trial, although there had been four trials since; which shewed that the want of it at that trial was of no consequence, nor the cause of such nonsuit.—And, 4thly, It was objected, that the last of the verdicts in favour of the appellant was set aside by the Court of Exchequer, upon the certificate of the Judge before whom it was tried.—To this it was answered, that the Judge did not express any dislike to the verdict, when the jury brought it in; that he had approved of a like verdict for the appellant, at a former trial upon the same title; and the appellant conceived he had great reason to complain of the setting aside that verdict, since it was set aside after he had regularly entered up his judgment, contrary to the practice of all the Courts in Westminster Hall\*.

The reasons offered in support of the appeal were, that the appellant was decreed to account for the rents and profits of the estate in question, and deliver up the writings belonging to the same; after so clear a title made out at law, and after having prevailed in no less than seven ejectments, to the satisfaction of the several Judges who tried the same: whereas, the respondent had only prevailed in two trials, neither of them with the concurrence of the Court; and the last, which was conceived to be the foundation of the decree, contrary to the direction of the Court. That it would be a precedent of very dangerous consequence to all such families as enjoyed estates in tail under marriage-settlements, which could only be barred by a fine or recovery, to be defeated by mere presumptions grounded on no facts; and inferences deduced from very weak circumstances. That as the respondent Mr. Leighton had no title at law, so neither had he a better claim in a Court of Equity; for the appellant was a purchaser as well as he, and under a settlement made in consideration of marriage, and (at that time) a considerable portion, paramount the [384] respondent's title, and for a more valuable consideration. That the respondent was a purchaser with notice of this settlement, as fully appeared by his purchase deed, in which there was a special agreement to levy a fine of these lands at the next Grand Sessions to be held for the county of Montgomery. Besides, there was less reason for a Court of Equity to decree the estate to the respondent Mr. Leighton, because the executrix of Sir Edward was very well able to make him amends for the loss of it, and had actually done so. The dispute therefore, in reality, was between the heir in tail and the executrix, as was proved by the respondent's own confession; he having declared, that it was the concern of the executrix, and that he had done with it. That the instances where perpetual injunctions have been granted are very few, and those few instances have been where the title of the person in whose favour such injunction is granted, has been confirmed by many repeated and unexceptionable verdicts; but there was no instance where a perpetual injunction had been granted against an heir in tail, who had supported his title in seven several ejectments, in favour of a person who had never been able to obtain one single verdict in maintenance of his title, with the approbation of the Court which tried the cause. And, that by this perpetual injunction, the appellant would be deprived of the benefit of insisting upon any other title which he might have to the estate, besides the settlement of 15 Hen. VIII. which was the only title that he had

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\* The reason for setting aside this judgment seems to have been, because it was entered up after a motion in the Court of Chancery, and leave obtained to move for a new trial; and therefore the Court of Exchequer were of opinion, that the judgment was unfairly entered.



ever yet insisted upon, and which he thought, and was advised to be sufficient, until it was avoided by proof of a fine, or recovery.

On the other side it was contended, in support of the decree, that the respondent William Leighton was a purchaser for a full and valuable consideration; that the premises had been settled by him on marriage; that his title, after a very long examination, had been established in the most solemn manner; that there had been but one verdict against him since the commencement of the suit in Chancery, which had been set aside as being contrary to evidence; and that there were two concurrent verdicts in his favour, on trials at bar in two different Courts, and by special juries of two different counties.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

And a motion being made, and the question put, "That the appellant do pay, or cause to be paid, to the respondents, the sum of £40 for their costs in respect of the said appeal;" It was resolved in the affirmative. (Jour. vol. 21. pa. 455.)

[385] CASE 4.—LORD VISCOUNT LANESBOROUGH and others,—*Appellants*;  
ELEANOR ELWOOD, Widow,—*Respondent* [28th April 1721].

[Mew's Dig. vii. 1598.]

[An injunction is awarded by a decree, to put the plaintiff into possession of the premises in question, and at the same time the parties are directed to try the title at law; this decree is repugnant and must be reversed, as to the injunction.]

\*\* DECREE of the Irish Chancellor REVERSED in part.\*\*

Viner, vol. 7. p. 399. ca. 18: 2 Eq. Ca. Ab. 281. (C) ca. 2.

Philip Hoare, being seised in fee of a piece of ground in High-street, Dublin, on part whereof stood a building, containing one shop, fit for an haberdasher, mercer, or draper, and two rooms over it; and was meared and bounded in manner following, viz. southward to the High-street, containing in front from east to west 21 feet, and adjoining westwards to the house of Jonathan Clark, eastwards to the house of John Dickinson, and extended in depth northwards to St. Audeon's church wall in length 70 feet and an half or thereabouts.

On the 23d of October 1641, the said Philip Hoare was attainted of high treason, for being concerned in the Irish rebellion.

By virtue of a clause in the act of *explanation*, Sir George Lane Knt. afterwards Lord Viscount Lanesborough, was entitled to hold and enjoy, to him and his heirs for ever, part of the estate of the said Philip Hoare.

In pursuance of this clause, Lord Lanesborough, on the 10th of March 1665, exhibited his claim before the trustees of the Irish forfeitures; and upon the hearing thereof, on the 26th of May 1666, the trustees adjudged and decreed, that the said ground and shop thereon, by the description of one shop or room in High-street, Dublin, under the house wherein Robert Dowling formerly lived, and then held by John Jordan, had been seized and sequestered on account of the said rebellion; and therefore they gave their certificate, and decreed the same to the Lord Lanesborough and his heirs, without any saving.

On the 16th of July following, Lord Lanesborough, according to the directions of the acts of *settlement* and *explanation*, procured letters patents to be passed under the great seal of Ireland, whereby King Charles II. granted the said ground and shop in High-street to his Lordship and his heirs; together with all other the said Philip Hoare's estate and interest, in the city and liberty of Dublin.

Lord Lanesborough having had the possession, and received the rent of these premises from John Jordan, by the hands of Arthur Harvey and John Elwood, the tenants under him, from the year 1662 till 1669, he, on the 16th of December 1669, granted a lease thereof to one James Nicholson, for the term of 21 years, at [386]

the rent of £12 per ann. in which lease, the premises were described by the name of one shop in High-street, in Dublin, formerly belonging to Philip Hoare, and then in the occupation of Arthur Harvey, or his under-tenant John Elwood, haberdasher, and bounding in the front southwards to the said street, northwards to St. Audeon's church wall, westwards to the house of Jonathan Clark, and eastwards to the house of John Dickinson.

But Harvey and his under-tenant Elwood, refusing to deliver the possession to Nicholson, the Lord Lanesborough caused an ejectment to be brought in the Court of Exchequer, in Easter Term 1670, to which Harvey and Elwood were made defendants, and the cause being tried, a verdict was found in favour of Lord Lanesborough's title; and a judgment was thereupon obtained, which was afterwards affirmed on a writ of error in the Exchequer-Chamber.

Soon afterwards, upon the submission and importunity of the said John Elwood, and in consideration of a fine of £20, Lord Lanesborough, on the 1st of February 1677, made a lease of the said premises to him for 31 years, at the rent of £12 per ann. and in this lease, the premises were described by the name of one shop in High-street, in Dublin, formerly belonging to Philip Hoare of Killsalloghan, then in the occupation of Arthur Harvey, or his under-tenant John Elwood; bounding southwards to High-street, northwards to St. Audeon's church wall, westwards to the house of Jonathan Clark, and eastwards to the house of John Dickinson.

The said shop and two rooms over the same, being become ruinous, and Elwood having got in Nicholson's lease, pulled down the shop and built on or near the place, the house now in question, called the *Three Hatts*; in part whereof he made a shop fit for one of the best sort of tradesmen, and also built a back-house on part of the said ground, near to St. Audeon's church wall; and he quietly enjoyed the said premises, and paid the said rent of £12 per ann. to the appellant's father, during his life-time, and afterwards for some years to the appellant, as his son and heir.

But Elwood, suffering the rent to run in arrear, the appellant caused him to be sued at law for the same, and having obtained judgment in the Court of King's Bench, in Hilary Term 1699, Elwood was taken in execution and imprisoned; whereupon his son, David Elwood, representing the poor condition of his father and himself, and requesting that £4 per ann. part of the said £12 per ann. might be abated; the appellant, merely out of compassion, condescended, provided they would pay £8 per ann. punctually.

Accordingly, the said John Elwood and his son David, for some time paid the said rent of £8 per ann. but running again in arrear, they, to avoid payment, set up a pretence, that the Mayor and Corporation of Dublin were the true owners of the premises.

[387] The appellant therefore caused a distress to be made on the premises for the said rent; and the said David Elwood having replevied, the issue tried in that cause, before the Lord Chief Justice Pyne, in the Court of Queen's Bench, in Michaelmas Term 1707, was, whether George Lord Viscount Lanesborough, or the Mayor and Corporation of Dublin, was seised in fee of the premises, at the time of making the said lease to John Elwood; and upon the trial, the jury gave their verdict, that the Lord Lanesborough was seised in fee thereof.

In May 1708, the lease to John Elwood expired; but David Elwood, who claimed under his father, refused to deliver up the possession, pretending a title under the City of Dublin; whereupon the appellant caused an ejectment to be brought, and for avoiding all questions and doubts, touching the description of the premises, the appellant caused the same to be butted, bounded, and described in his declaration, in the same manner as in the above several leases.

To this ejectment, the Mayor and Corporation of Dublin procured themselves to be joined as defendants, with the said David Elwood; and in Trinity Term 1710, the cause was tried at the bar of the Court of Queen's Bench, when the jury, on full evidence, gave a verdict for the title of the appellant, against the City of Dublin and the said David Elwood; and thereupon judgment being obtained, execution was sued out, by which the possession of all the premises, viz. the said house, shop, and back-house, was delivered to the appellant. But the said David Elwood, being dissatisfied, moved the Court to set aside the execution, as to all the premises, except the shop, containing 16 feet in length, and 13 feet and a half in breadth; but the Court being of opinion that there was no reason for it, denied the motion.

The appellant Lord Lanesborough's title being thus established by four several verdicts at law, whereof one was on a trial at bar; he, on the 18th of September 1711, made a lease of the premises to the other appellant Lawrence Eustace, for 31 years, at £32 per ann. rent.

Whereupon David Elwood, on the 23d of April 1712, exhibited his bill in the Court of Chancery in Ireland against the appellants, to set aside all the said verdicts, judgments, and proceedings at law; alleging, that the Mayor and Corporation of Dublin, being seised in fee of the said premises, made a lease thereof, dated in 1675, for a fine of £10 to his father John Elwood, for 99 years, at the rent of £10 per ann. and in which the premises were thus described, viz. all that ground or tenement in High-street, containing in front from east to west 21 feet, and in length from the street in the south, to St. Audeon's church in the north, 70 feet and a half:—That Sir Mark Ransford, executor of Alderman Mee, being a creditor by judgment of the said John Elwood, procured the said city lease for 99 years, to be sold by the Sheriff, upon a *fiery facias* for £136, and afterwards to be assigned to him the said Sir Mark:—That the said Sir Mark made a lease of the [388] premises, except the shop, to the said David Elwood for 70 years, at the rent of £12 per ann.—And that the appellant Lawrence Eustace was only a trustee of the said term of 31 years, for the said David Elwood. The bill therefore prayed, that the said lease from the appellant Lord Lanesborough to his tenant Lawrence Eustace, for 31 years, at the rent of £32 per ann. might be decreed to be so made, in trust for him the said David Elwood; and that he might have an account of the profits, from the time he was turned out of possession, by the execution of the last ejectment.

To this bill the appellants put in their answers; and insisted on their title so often verified by verdicts and judgments at law; and that the pretended title of the city of Dublin, to whom the said John and David Elwood endeavoured to betray the possession, had been sufficiently evicted and defeated.

On the 4th of May 1719, the cause was heard before the Lord Chancellor of Ireland; who was pleased to decree, that the said David Elwood should be at liberty to try his title at law, under the city of Dublin, in the then next Trinity Term, by a jury of that city; at which trial, the appellants should not insist on any temporary bars; and that the said lease, made by the appellant Lord Lanesborough to Lawrence Eustace for 31 years, should be in trust for the said David Elwood, and that he should have the benefit of it.

But, upon the appellant Lawrence Eustace's petition, the cause was re-heard on the 19th of February 1719, when the Lord Chancellor was pleased to decree, that the said lease for 31 years, from the Lord Lanesborough to Lawrence Eustace, as to so much of the ground built or unbuilt upon, of which Rowland Eustace, Christopher Nugent, Henry Plunkett, and Lawrence Eustace were in possession, by virtue of the lease from Sir Mark Ransford, at the time of executing the said judgment in ejectment, was taken by the appellant Lawrence Eustace, in trust for the said David Elwood; that an injunction should be awarded, to put the said David Elwood into possession, and to quiet him in such possession; and that the appellant Lawrence Eustace should account with the said David Elwood, for the profits of the premises.

From both these decrees, the present appeal was brought; but while it depended, David Elwood died, leaving the present respondent his widow and sole executrix.—In support of the appeal it was insisted (R. Raymond, S. Cowper), that the bill ought to have been dismissed, and Elwood left to try his title at law; there appearing to be no impediment to such trial, or that the appellants had any temporary bars, by which it could be avoided. That the decree had established the city of Dublin's lease to John Elwood, and invalidated all the verdicts and judgments at law, without any apparent reason for so doing. That the lease for 31 years was decreed to be in trust for David Elwood; whereas, there was no proof in the cause of any such trust, but on the contrary, direct proof that there was not, nor could be any such trust; inasmuch as Lord Lanesborough [389] had taken care to have a covenant inserted in the said lease, on the part of the appellant Eustace, "That he, or his assigns, should not permit or suffer the said John Elwood, or his son David Elwood, or their or either of their families, or any other person or persons whatsoever, claiming any right or title by, from, or under them, or either of them,

to live or abide in the said premises, or any part thereof: " Which covenant was so inserted, industriously and with intent that the premises, or any part thereof, should never come into the possession of so dangerous an adversary as the said David Elwood; who had done his utmost to defeat the appellant Lord Lanesborough's title thereto, and to give and transfer a title to the city of Dublin. That the latter part of the decree, whereby an injunction was awarded to put and quiet David Elwood in the possession of the premises, and whereby the appellant Eustace was compelled to account with and pay him the profits, without any provision being made to secure to the appellant Lord Lanesborough, the payment of the said yearly rent of £32 or to secure him the possession, at the expiration of the lease, was repugnant to the former decree, whereby the question touching the title was directed to be determined by a trial at law; and this repugnancy was the more apparent, for that Elwood could have no occasion to bring an ejectment to recover the possession, according to the former part of the decree; when the latter part of it had not only decreed him the possession, and an account of the profits, but had secured that possession to him, by directing an injunction to quiet him in it.

On the other side it was contended (T. Lutwyche, S. Mead), that the appellant Lord Lanesborough could not, with any colour, complain of the decree, or pretend that he was thereby in any wise aggrieved; when his counsel had, in open Court, proposed and consented, as a just and equitable measure, that the title should be fairly tried in ejectment, without setting up any temporary bars or impediments, to hinder the merits from being tried. That the appellant Eustace came into possession of the premises under the said David Elwood's title, by colour of a lease made to his brother Rowland Eustace; and of an assignment of a lease from Sir Mark Ransford, for counter-securing him from an engagement; and his said brother, not being in any respect damnified by reason of that engagement, he ought to have acted therein as a trustee for David Elwood; and the appellant Eustace having, in breach of such trust, betrayed the said Elwood's possession, and treated for himself, he ought not to profit by such proceedings; and therefore the Court rightly and equitably decreed, that the lease taken by the appellant Eustace from the appellant Lord Lanesborough, should be deemed in trust for the said David Elwood, the respondent's late husband.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree of the 19th of February 1719, as declared the lease taken by the appellant Lawrence Eustace, to be in trust for David Elwood, the respondent's late hus-[390]-band; and as ordered an injunction to put the said David Elwood into, and quiet him in the possession of all or any part of the premises in question, should be reversed: but that so much of the decree of the 4th of May 1719, as ordered a trial at law, whereby the said David Elwood was at liberty to bring his ejectment, to try his title as lessee under the city of Dublin, against the appellant the Lord Viscount Lanesborough, should be affirmed; and after a trial had, pursuant to the said decree, or upon neglect of the parties to proceed thereon, the Court of Chancery in Ireland was to make such further order and decree as should be just. (Jour. vol. 21. p. 507.)

On the 26th of May 1721, Lord Lanesborough petitioned the House, praying that the above order and judgment might be altered in the following particulars, viz. "That the appellants be restored to their former possession, and to the profits of the premises; and that the trial at law (if any be) may be by a jury of the county of Dublin:" Whereupon it was ORDERED, that the House would hear one counsel of a side, upon the matter of the said petition, on Friday the 16th day of June then next. (Jour. vol. 21. p. 533.)

But this hearing was afterwards adjourned to Wednesday the 28th of June; when counsel being heard accordingly, it was ORDERED, that the appellants should be restored to their former possession, and to the profits of the premises in question; and that the respondent Eleanor Elwood should account to the appellants for the profits received, under the decree of the Court of Chancery in Ireland, reversed by the House, on hearing the appeal; and that so much of the said petition, as prayed that the trial at law (if any) might be by a jury of the county of Dublin, should be dismissed. (*Ibid.* p. 555.)

CASE 5.—MARY SEGRAVE, Widow,—*Appellant*; DOMINICK RYAN,—*Respondent*  
[24th March 1726].

[Noted as *Seymour v. Ryan* in Mew's Dig. vii. 1597.]

[An injunction was awarded to restore and quiet the plaintiff and his tenants in the possession of the premises in question, but it was at the same time ordered, that he should appear to an ejectment to be brought by the defendant, in order to try the title. An ejectment was accordingly brought, and the defendant obtained a verdict, and was afterwards put into possession. But on an appeal by the plaintiff, it was ordered that he should be at liberty to bring an ejectment, to recover possession of the premises, and that no mortgage should be set up in bar of his title.]

\*\* ORDER of the Irish Chancery VARIED. See *ante* Ca. 3,  
and the note there.\*\*

Francis Segrave, being seised in fee of one third part, and possessed for some long term of years of the other two third parts of the dissolved abbey or monastery of St. John, with-[391]-out Newgate in the city of Dublin; by a memorandum in writing, dated the 19th of December 1687, demised all those the brew-house, inward and outward dwelling houses, three malt houses, the castle, cellars, and all other the appurtenances and conveniences, water and water pipes, stables and horse mill, and brewing utensils, (except one room in the back house, over the wainscotted room, and the closet belonging to the same, which the said Francis reserved for himself only to live in,) unto Richard Purcell for ninety-one years, to commence from the 1st of May then next, at the yearly rent of £85 payable half yearly; and the said Francis Segrave did thereby covenant, before the 1st of February then next, to make a good and sufficient lease, according to law, to the said Richard Purcell of the premises, as they were formerly held by William Brook and Thomas Newland; but Henrick's malt-house and Newland's dwelling-house were to be excepted out of the lease.

When Purcell came to take possession of the demised premises, he found some parts thereof had before been let to several persons by prior leases, which were not then expired; and particularly, some rooms in a part of Brook's dwelling-house, known by the name of the Three Kings, wherein one Bryan Callan afterwards lived: but Segrave, on application made to him, agreed that Purcell should have an allowance in his rent for those rooms, and such other parts of the premises as were detained from him, until he should be let into possession thereof; and, to make Purcell the more easy, Segrave agreed to give up the room and closet which he had reserved for his own use.

In the year 1689, Segrave and Purcell came to an account; when Purcell insisted on having an allowance or abatement in his rent, for such part of the demised premises as was so detained from him; and thereupon Mr. Segrave agreed to accept of £70 per ann. in lieu of the £85 per ann. reserved by the demise; and accordingly, on Purcell's paying him £35 he gave him an acquittance in full for half a year's rent, which became due the 1st of November then last. Purcell continued to pay his rent according to this abatement, till about the year 1692, and though Segrave lived till 1709, he never demanded the room or closet reserved for his own use; but in the said year 1692, one Nuttall, who had an incumbrance on the premises, prior to the lease of 1687, insisted, that he was entitled to receive £80 per ann. and threatened to compel payment thereof by distress; whereupon Purcell applied to Mr. Segrave to be indemnified, but without effect, so that Purcell was, for a considerable time, obliged to pay Nuttall £80 yearly, notwithstanding the above agreement for an abatement of £15 per ann.

In 1711, Richard Purcell died; having made his will, and thereof appointed his wife Margaret Purcell sole executrix and residuary legatee; and she having proved the will, died in 1716, having made her will, whereby she devised the benefit of the said [392] lease to the respondent; who, by virtue thereof, became entitled to the premises for the remainder of the ninety-one years term.

That part of the premises called the Three Kings, being in a ruinous condition, the said Bryan Callan the tenant quitted the possession; whereupon the respondent, on the 15th of April 1717, peaceably entered and possessed himself thereof, by virtue of the lease made by Segrave to Purcell, and expended about £30 in repairing the same.

On the 10th of May 1723, the appellant exhibited her bill in the Court of Chancery in Ireland, against the respondent and others; setting forth, that the said Francis Segrave, her late husband, being seised of the said dissolved monastery, whereof the house called the Three Kings was part, did, by indenture of lease, demise all the premises to Thady Mahony for forty-one years; and that Mahony, by indenture dated the 13th of November 1710, Segrave being then dead, declared, that the said lease was made to him in trust for the appellant; that she being so entitled, by deed dated the 24th of April 1714, demised the said house called the Three Kings, to Bryan Callan for three years, at the yearly rent of £14, and that Callan covenanted to deliver the appellant possession thereof at the end of the said term; that Callan, some short time before the expiration of his lease, assigned his interest to the respondent, who entered and kept possession of the said house, on pretence that the same was comprised in the lease made to Purcell by Segrave: and though the appellant by her said bill confessed it was then too late for her to apply to the Court for an injunction to be quieted in the possession, as against a tenant holding over his term; yet she thereby pretended, that she was entitled to a specific execution of the covenants contained in Callan's lease, against the respondent, as assignee of Callan, and ought to have an account and be let into possession; and the rather, for that she had only an equitable title, the legal estate being in Mahony, her trustee; and therefore she prayed to be restored to the possession by the injunction of the Court, and to have an account of the rents of the house. But, though she made Mahony a defendant to her bill, yet she did not think fit to bring him to a hearing.

The respondent, by his answer to this bill insisted, that if any such lease was made to Mahony, the same was void; for that Segrave had no power to make any such lease, the premises having been long before demised by him to Purcell, and also mortgaged by him and the appellant to one Smith, which mortgage was then subsisting; he denied that Callan ever assigned his interest to him, or that he was to give him any consideration for the same, or for quitting the possession; but said, that the house being extremely out of repair, and Callan inclined to quit it, and he having a right thereto under the demise made by Segrave to Purcell in 1687, he, by virtue thereof, and not of Callan's pretended lease, entered peaceably and possessed himself of the house; and insisted [393] he had good right to hold the same against the appellant, till evicted by due course of law.

Issue being joined, witnesses examined, and publication duly passed, the cause was heard on the 30th of April 1724, when the Lord Chancellor of Ireland was pleased to direct the following issue to be tried at law, viz. "Whether the house called the Three Kings was part of the premises demised, or intended to be demised, by the lease made by Francis Segrave to Richard Purcell the 19th of December 1687."

Upon the appellant's petition, the cause was reheard on the 18th of June following; when the appellant's counsel insisted, that she had no legal title to recover at law, she being out of possession; and offered, in case she was restored to the possession, that she would admit the respondent's title under the lease to Purcell, and would set up no temporary bars. Whereupon his Lordship thought fit to vary the former order, and to direct that an injunction should be awarded, to restore the appellant to, and from time to time, quiet her and her under-tenants in the possession of the said house called the Three Kings, to continue till further order: that she should appear to an ejectment, to be brought in the King's Bench by the respondent, and allow his title under the lease made by Segrave to Purcell in 1687, for such houses as were mentioned therein, and not set up any temporary bars, or insist on the length of time; and that the cause should be tried at the sittings of *nisi prius*, after the then next Term, by a jury to be struck by one of the Masters in Chancery.

On the 1st of December 1724, the cause was accordingly tried, after a view,

before the Lord Chief Justice Whitshed; and the respondent having fully proved, by the testimony of several unexceptionable witnesses, that the said house called the Three Kings, was part of the outward dwelling house mentioned in the lease made to Purcell; that it had been built by Brooke, and enjoyed by him and his under-tenants for many years, under a lease made to him by Mr. Segrave, prior to Purcell's lease; and that it was not either of the two houses excepted in Purcell's lease; a verdict was given for the respondent, and he was afterwards put into possession.

The appellant therefore appealed from the decree; insisting (C. Talbot, N. Fazakerley), that she ought not to have been thereby deprived of the legal advantage she had, under the long and quiet possession of the house by the tenants of herself and her late husband; the respondent having no bill, nor any equity to be a foundation for such a direction. That as the Court had allowed the appellant's right to the possession of this house, by ordering it to be restored and continued by injunction; it was improper to direct any trial at law, by which means the appellant had been stripped of her possession. That the appellant, by being enjoined not to insist on any temporary bar, or the length of time, could not give any evidence thereof upon the trial; which it was apprehended would have been very proper evidence, to explain the general words of the lease made [394] in 1687, and to shew that the house in question was never intended to pass by that lease, the possession having ever since gone contrary to it. That the Court had made no reservation of further directions after the trial should be had; which, if it was proper to have directed any trial, ought likewise to have been directed: nor was the respondent decreed to account with the appellant for the profits of the house: and therefore it was prayed, that the decree might be reversed, the verdict set aside, and the appellant restored to the possession.

On the other side it was said (P. Yorke, T. Lutwyche), that the decree was made at the importunity of the appellant's own counsel, and upon the terms proposed by them to the Court; she was, in that respect therefore, greatly indulged, for the respondent having entered on a vacant possession, and under a title still subsisting, he ought to have been continued in such possession, until legally evicted. That the respondent had more reason to complain than the appellant, inasmuch as an injunction had been awarded for restoring her to the possession, when she should have been left to her legal remedy; and the rather, for that the only colour she had for seeking relief in Equity was, that Mahony, her trustee, would not permit his name to be made use of in any action at law; and yet she did not think fit to bring him before the Court at the hearing, though she had made him a defendant to her bill; nor was it pretended, that the mortgage to Smith was prior in point of time to Mahony's lease. That the length of time could not have been of any avail to the appellant, because the respondent had seven years recent possession; and the appellant was not debarred by the decree, from insisting on any thing which could have served to satisfy the jury, that the house called the Three Kings was a distinct, separate holding, and no part of the premises demised by the lease to Purcell; but, by the alteration of the possession, and by the respondent's being made lessor in the ejectment, the whole burthen of proof was put upon him; and yet notwithstanding this difficulty, he fully verified his title and obtained a verdict, after a view and upon full evidence. It was therefore hoped, that the decree would be affirmed, and the appellant's bill dismissed with costs.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of should be affirmed, with this variation, "That whereas the respondent, since the said order, had recovered judgment in ejectment and possession; it is hereby declared, that the appellant is at liberty to bring an ejectment in her own name, or her trustee, in order to recover possession of the premises in question; but the respondent to continue in possession in the mean time; and that the respondent shall not set up any mortgage in bar of the appellant's title." (Jour. vol. 23. p. 86.)

[395] CASE 6.—The City of LONDON,—*Appellants*; EVEN PUGH and others,—*Respondents* [20th March 1727].

[Mew's Dig. vii. 1621. See *Brooke v. Cavanagh*, 1888, 23 L.R. Ir. 86.]

[A lessee covenants not to dig up a particular part of the demised premises for raising sand, gravel, etc. under the penalty of £100 per acre. He breaks this covenant, and thereupon the lessor files a bill for an injunction; on affidavit of the waste committed, the injunction is granted till answer and further order: after the answer put in, a motion is made to dissolve the injunction, and upon shewing cause, the defendant consented to appear and plead to an action of debt or trover, and to take short notice of trial; and thereupon the injunction is dissolved. But on an appeal, this order was discharged, and an injunction granted to continue till the hearing of the cause.]

**\*\* ORDER of Lord Chancellor King DISCHARGED.\*\***

The appellants being seised in fee of several estates, for the benefit and support of the poor sick persons in St. Thomas's hospital, and particularly of a house at Hackney, called the Bowling-Green House, with the buildings, gardens, yards, and appurtenances; and also of a bare and green used for bowling, adjoining to and usually let with the said house; they, by indenture under their common seal, dated the 17th of June 1725, demised the premises to the respondents for a term of twenty-one years, from Michaelmas 1724, at a rent of £30 per ann.

The bowling bare contained one acre, two roods, twenty-nine perches; the green, one acre, two roods, thirty-two perches; the garden, two roods, five perches; and a piece of ground adjoining to the green, one acre, one rood; in all, five acres, twenty-six perches.

In order to preserve the bare and green for bowling, both to keep up the value of the premises, and to accommodate many gentlemen of that neighbourhood, who were either tenants or governors of St. Thomas's hospital, an express covenant was inserted in the lease, that the lessees should, during the term, keep and maintain the said bowling green and bare respectively in good order and condition, and fit for bowling; and from time to time, as occasion should require, amend, supply, and renew the turfing of the green, and maintain the buildings in or near the bare or green, for the entertainment of company; and should leave the said bare, green, and buildings in good order, condition, and repair at the end of the term, or other sooner determination of the lease, which should first happen.

And the respondents further covenanted, that in case any part of the demised premises should, at any time during the term, be plowed, digged, or broken up, or converted into tillage, other than and except such part as was used for gardening, which might be dug or broken up as usual, for that purpose only; or if any part of the premises should be digged or broken up, for the raising or taking away of brick-earth, sand, or gravel; then the lessees should, in every or in any such case, pay to the lessors [396] £100 for every acre which should be so plowed, digged, broken up, or converted into tillage; or which should be so plowed, digged, or broken up, for the raising or taking away of brick-earth, sand, or gravel; and so in proportion for any greater or less quantity than an acre.

The respondents entered and enjoyed the premises; and finding a great demand for gravel, for mending the roads and highways about Hackney, they, in the second year of their lease, thought fit to convert the bare into a gravel-pit, and by a considerable number of workmen, soon got a pit thirteen feet deep, and spread to thirty-four square rods of the bare, out of which they, in a very little time, raised 2600 loads of gravel, and sold part of it at 2s. per load.

The appellants thereupon, in Hilary Term 1726, exhibited their bill in Chancery, setting forth the lease and covenants, and praying, that the respondents might be restrained from breaking up or digging the bare, or any other part of the demised premises, and from committing any waste or spoil thereon, and from removing and disposing of the gravel then dug and lying on the premises: and



upon affidavit of the waste, the appellants obtained an injunction accordingly, until answer and further order.

The injunction being served, the respondents put in their answer; and thereby admitted the lease and covenants to be as in the bill set forth, and also admitted, that the bare had been dug between October and February 1726, to such depth and for such space, and that such quantity of gravel had been raised as above mentioned, and that such gravel as had been sold, was sold for 2s. per load: but insisted, that they ought not to be restrained from digging the bare as they should be advised, and from selling the gravel and sand arising from it; they being willing to pay £100 per acre for what they should so dig, pursuant to the covenant in the lease.

Upon coming in of this answer, the respondents obtained the common order to dissolve the injunction, unless cause should be shown to the contrary: and on the 14th of March 1726, the appellants did shew cause before the Lord Chancellor King; when his Lordship was pleased to disallow such cause, and ordered that the injunction should be dissolved; the respondents consenting, if the appellants should bring an action of debt, or trover, to appear and plead, and try the same the then next Term.

But from this order the appellants appealed; insisting (C. Talbot, W. Hamilton), that the breaking up of ground by tenants for years, by digging pits to raise any earth or mineral whatsoever, was an actual committing of waste; unless a liberty be granted by the owner of the inheritance for that purpose: and that the respondents were tenants for years, not only without any such liberty, but expressly restrained by their own positive covenant, to keep and maintain the bowling green and bare in good order and condition, and fit for bowling. As to the objection, that the appellants had given a licence, amounting to an agreement, to permit the respondents to [397] commit this waste, by annexing a penalty, which they had agreed to accept in consideration of the damage sustained; it was answered, that there was not in the respondents answer the least pretence or suggestion, that any such agreement was intended, or in the contemplation of any of the parties, at the time of making the lease; on the contrary, it manifestly appeared to be the intention of the appellants, to guard their estate from all waste and damage whatsoever. Besides, such an agreement would, on their part, have been highly ridiculous; for it would have been selling the estate itself to the respondents at their own price; and leaving it entirely at their option, to keep a good bargain, or leave a bad one. And it now plainly appeared by the respondents answer, what the consequences would have been; since, in about four months time, and from about a sixth part of the bare, they had raised 2600 loads of gravel, and which at 2s. per load, amounted to £260, so that in a year or two, about 12,000 loads might be gotten from the bare only, which would produce £1200, and if the green and adjacent ground should also yield gravel in like manner, there might in a few years be raised from thence to the amount of £3000 or £4000 more; and the respondents, for every £100 penalty, would have about £1000, and, at the end of the term, leave the appellants the bottoms of the gravel-pits for their estate; which surely could not be imagined to have been any part of the agreement for the lease. And therefore it was hoped, that the order would be reversed; and the injunction continued till the hearing of the cause.

On the other side it was argued (P. Yorke, J. Browne), that the £100 per acre, required to be paid for every acre of the premises which should be dug or broken up, was not intended as a penalty, but as a satisfaction and recompence for such part of the premises, as should be dug or broken up during the term; and therefore such digging or breaking up, ought not to be considered as committing of waste. If, however, the appellants conceived themselves aggrieved by the respondents in this respect, they might have their remedy at law against them, by action of trover or otherwise; and therefore there was no reason for a Court of Equity to interpose, by granting any injunction to restrain the respondents from digging.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of, should be discharged; and that the Court of Chancery should grant an injunction, till the hearing of the cause. (Jour. vol. 23. p. 220.)

[398] CASE 7.—JOHN VERNON and others,—*Appellants* ; The City of DUBLIN,—*Respondents* [4th February 1733].

[Mew's Dig. vii. 1597.]

[It is usual in Ireland, for a lessee who has been three years in possession, and is disturbed, to file his bill in the Court of Chancery there, for an injunction to quiet him in possession, till evicted by due course of law ; and this usage is founded upon the equity of the statutes made against forcible entries. But all bills of this kind must allege, and it must also be proved, that the sole and actual possession is in the plaintiff, and that no ownership or possession is in any other person.]

\*\* ORDERS of the Irish Chancery DISCHARGED.\*\*

The respondents, the Lord Mayor, Sheriffs, Commons, and Citizens of Dublin, being seised in fee of a large tract of ground or strand, called Crablough, situate within the liberties of the city, and containing about 195 acres ; by indenture under their common seal, dated the 18th of July 1718, granted the respondent Alderman French, his executors, administrators, and assigns, absolute power, licence, and authority, from time to time, and at all times, from and after the 25th day of March then next ensuing, for the term of sixty-one years, to lay down and take up oysters on the said piece of ground ; and for which grant or licence Alderman French was to pay £70 per ann.

The respondent Alderman French, by virtue of this grant, entered on the premises, and was at a very considerable expence in making oyster-beds thereon ; and he, and those deriving under him, for several years peaceably and quietly enjoyed the sole property and benefit of laying down and bedding oysters on the said ground, and of taking away and disposing thereof at his and their pleasure : but the appellant Vernon pretending some right or title to the said piece of ground or strand, he, in the month of May 1729, laid down and bedded oysters on some part thereof ; and frequently, within three months before filing the bill after mentioned, caused some of the oysters belonging to the respondent French and his under-tenants, to be carried away and disposed of as he thought fit ; and the respondent French sending to the appellant Vernon, and desiring to know what he meant by so doing, and to forbid him from doing the like again, he returned for answer, that he would take oysters off the premises as often as he pleased, and that he would destroy all the oysters belonging to the respondent French, and those deriving under him : and accordingly, the appellant Vernon, with the other appellants, and several other persons, on the 26th of June 1729, in a forcible and riotous manner, entered on the premises, and carried away large quantities of the respondent's oysters, and caused them to be burned ; the appellant Vernon declaring that he would, from time to time, continue to do so.

[399] In consequence of this conduct, the respondents, on the 1st of July 1729, according to an ancient usage or course of proceeding in Ireland, founded on the equity of the statutes made against forcible entries, exhibited their bill in the Court of Chancery there, against the appellants, praying an injunction to quiet them in the possession of the premises, till evicted by due course of law : and the respondents having petitioned the Lord Chancellor, setting forth the substance of their bill, and praying the usual injunction in cases of force on a triennial possession ; and having annexed proper affidavits to their said petition, to prove the said forcible disturbances, and that the respondents, the corporation of the city of Dublin, and their predecessors, for fifty years past and upwards, by themselves and their under-tenants, and particularly for ten years before the filing of the bill, had been in the actual quiet and peaceable possession of the premises, except the disturbances so given them by the appellants ; it was, on the 2d of July 1729, ordered, that an injunction should issue, directed to the appellants, for quieting the respondents, their under-tenants and assigns, in the actual possession of the premises, till they should be thereout evicted by due course of law, or till further order of the Court to the contrary.

An injunction issued accordingly, and the appellants being served therewith, they all thought fit to appear, as in contempt, on an attachment, and submitted to be examined on personal interrogatories touching the matters alleged in the bill, though none of them needed to have appeared but the appellant Vernon, who only contested the possession of the premises; nor could the other appellants have been prejudiced by their not appearing; however, when they all appeared, it became necessary for the respondents to exhibit personal interrogatories against them; for otherwise the appellants, by the course of the Court, would have been dismissed with costs against the respondents.

Personal interrogatories being accordingly exhibited, the appellants put in their answers thereto; and the appellant Vernon in his answer insisted, that the said strand was part of the manor of Clontarf, and that it lay in the county of Dublin, and was part of the estate of Mary Vernon, under whom he claimed; but admitted, that the corporation of Dublin had of late set up some claim thereto, as being in the liberty of the said city; and believed, that the corporation every third year rode round the franchises or precincts of the city, to preserve the bounds thereof; and that the custom of riding on the north side of the river beyond Ballybough-Bridge (by which all the said strand called Crablough was by them taken in) began about fifty years before; but said, they sometimes met with interruption therein from the lords of the manor of Clontarf: He also insisted, that a part of the said strand, by him called Quire's Island, lying within the bounds described by the bill, and whereon he had laid down oysters, never was in the possession of the city, or used by any other person, except the said Mary Vernon's tenants; and that she, and those deriving [400] under her, for eighteen years past, had salt-pipes laid on the strand below high-water mark, for the use of the salt-works of Clontarf; he admitted, that the city of Dublin granted to the respondent French liberty to bed and feed oysters on the premises for ten or eleven years before, at some yearly rent; that the respondent French, and others by his direction, laid down large quantities of oysters thereon, and made profit thereof; but denied, that the respondent French, or those deriving under him, solely enjoyed the premises; the said Mary Vernon's tenants having, as he insisted, constantly fished thereon for oysters and other shell-fish; and he admitted, that he and the other appellants entered on the premises, but without force; and that he caused four tumbrels of the respondent French's oysters to be roasted and eaten; and that he turned one of the respondent French's servants off the premises, and declared he would use all his servants so; and confessed, that the other appellants entered on the premises by his order, with intent to assert the said Mary Vernon's right.

The appellant Vernon having denied the force and the respondent's quiet possession, it became necessary to examine witnesses touching those points; and accordingly, both parties having proceeded to examine witnesses, the appellant Vernon, on the 22d of October 1729, obtained an order for examining the other appellants as witnesses for him, saving just exceptions; and on the 19th of November following, after several of his witnesses had been examined, he obtained an order for exhibiting additional interrogatories.

On the 28th of the same month, the appellant Vernon moved the Court for liberty to take away and dispose of the oysters he had laid down on that part of the strand called Quire's Island; and which was ordered accordingly, on his giving security by recognizance, to abide by such order or decree as should be made on the hearing of the cause: and it was further ordered, that he should take away all the said oysters before the 25th of March then next ensuing; and that he, or those employed by him in carrying away the said oysters, should not pass or repass over the respondent French's oyster-beds. And it was thereby declared, that the appellant's entering on the premises to carry away the said oysters, was not to prejudice the possession of the respondents, or the injunction issued in the cause; and the appellant Vernon was not to lay down any more oysters than he had already laid down on the premises. In pursuance of this order, the appellant Vernon gave security, and carried away the oysters.

Both parties having examined their witnesses, and publication having passed; the Court, on the 6th of June 1730, referred it to Dr. Stanton, one of the Masters, to inspect the personal interrogatories exhibited by the respondents, the answers of the

appellants thereto, and the depositions of witnesses taken in the cause; and he was to certify to the Court how he should find the matter, and whether the appellants were guilty of the contempt laid to their charge, or not.

[401] Soon afterwards the appellant Vernon moved the Court for liberty to prove, before the Master, copies of several charters, patents, and many other deeds and exhibits; which was ordered accordingly, saving to the respondents all just exceptions. And on the appellant's motion, the Court, on the 10th of November 1730, ordered, that the Master should be armed with a commission to examine such witnesses as should be produced before him, as to the contempt referred to him.

The Master, on the 6th of July 1731, made his report, and therein stated the substance of the proofs on both sides; and though it manifestly appeared, by the depositions of several credible witnesses, that the respondent Alderman French, and those deriving under him, had been, for above nine years before the filing of the respondent's bill, in the quiet and peaceable possession of the said strand called Crablough (except the interruption given them by the appellants); and that he and they, during that time, enjoyed the sole liberty of laying down and feeding oysters thereon, and of carrying away and disposing of them as they thought fit; and, notwithstanding that no sufficient evidence appeared on the part of the appellants to contradict the same; yet the Master was pleased to conclude his report with saying, that the appellants proved and laid before him several patents and other records, to make the appellant's title to the strand in question appear, and to shew the precincts of the city of Dublin: but the respondents' counsel insisting, that the possession for three years before filing the bill was the single question before the Court, and not the title; and the proofs so stated in his report differing in several points, he could not take upon him to certify whether the appellants were guilty of the contempt laid to their charge, or not; but submitted the whole matter to the Court.

To this report each party took five several exceptions; and the cause coming on to be heard upon the report and exceptions, on the 8th, 9th, 10th, and 11th of December, and the 21st and 22d of January 1731, before the Lord Chancellor of Ireland; his Lordship was pleased to allow the appellants' first and second exceptions; and the substance of the appellants' third exception being, for that the Master reported, that the appellants had laid before him several copies of patents and other records, to make his title to the strand in question appear, but did not report what appeared by such patents or records; and the appellants' fourth exception being, for that the Master did not report that there were several positive witnesses who deposed that Crablough lay in the manor and parish of Clontarf and county of Dublin; and his fifth exception being, for that the Master reported, that about eighteen years ago pipes were laid by the said Mary Vernon on the said strand, but not on that part called Crablough, but did not report that the said pipes were laid on part of the ground, in the possession of which the respondents, by their bill, prayed to be quieted; his Lordship was pleased to over-rule the said three last exceptions, and thought fit to allow the respondents' first exception, and to [402] over-rule their second exception: and the substance of the respondents' third exception being, for that the Master stated in his report several depositions taken on the part of the appellants to an additional interrogatory, which was leading in material points; and for that the said interrogatory tended to examine matters contained in the original interrogatories, and that therefore the said depositions ought not to be read; and more particularly the depositions of one Edwards and one Gallagher, who were examined to the original and additional interrogatories at different times: on arguing this exception, his Lordship was pleased to declare, that the witnesses examined on additional interrogatories at a different time from their examination on the original interrogatories, were irregularly examined; no order having been made for that purpose, as there ought to have been, and that grounded on an affidavit that the appellants did not know, at the time of the examination of the said witnesses to the original interrogatories, that they were witnesses proper to be examined to the matters contained in the additional interrogatories; and therefore allowed that part of the exception, but over-ruled the remainder: and the substance of the respondents' fourth exception being, for that the Master received and reported the depositions of Hester Bath and Michael St.

Lawrence, two of the defendants in the cause, though objected to, his Lordship was pleased to allow that exception also; and the respondents' fifth objection being, that the Master did not report the appellants guilty of the contempt laid to their charge, the consideration of that point was reserved to the final determination of the cause; and pursuant to the before-mentioned variations, he proceeded to hear the cause. And on the 3d of March 1731 was pleased to declare, that there seemed to him to be a contrariety in the evidence, and desired to know, from the practicers of the Court not concerned in the cause, whether it was the course of the Court, in such cases, to direct an issue to try the matter of the possession; and being informed it was, his Lordship directed the following issue to be tried the then next Easter Term, by a jury of the county of Dublin; viz. "Whether the respondents, or any deriving under them, were, for three years next before the filing of the bill, in the quiet and peaceable possession (save the disturbance complained of in the bill) of any and what part of the lands called Crablough, mentioned in the lease made to the respondent Alderman French by the city of Dublin, and in which the disturbance complained of was given?" And each party was to be at liberty, on the trial, to give in evidence the depositions of such witnesses taken in the cause, as by reason of death or any other lawful cause, to be made appear by affidavit, could not be present at the said trial; and the Judge was to certify the verdict, and then the Court would make such further order as should be fit; and his Lordship was pleased to declare, that if either party thought fit to move to have another county appointed for the [403] trial, on application, such order should be made as would be fit.

Accordingly, the respondents applied to the Court by petition, praying, that the said issue might be tried by a jury of any indifferent neighbouring county; whereupon, and inasmuch as the appellants did not oppose the changing of the county, it was ordered, that the said issue should be tried by a jury of the county of Kildare, being the next adjoining indifferent county.

From all these orders, the present appeal was brought; and on behalf of the appellants it was said (J. Willes, D. Ryder) to appear, by the respondents own shewing, that there were not proper parties before the Court, they having suggested, by their bill, that the respondent French, and those deriving under him, were in possession of the premises; and those who derived under French, not being parties, the bill ought to have been dismissed; since it thereby appeared, that others, not parties, were equally entitled to have an injunction to be quieted in the possession of the premises: besides, bills of this kind must allege and prove the sole and actual possession to be in the plaintiffs who prefer them, and that no ownership or possession is in any body else. That the practice of the Court of Chancery in Ireland, in granting injunctions on these sort of bills, is founded merely on the equity of the statute of Henry VI. respecting forcible entries; and as the appellants, by their answer, had denied all force, and none had been proved in the cause, the present case was not within the reason of that practice. That the respondents who sought to be quieted on account of three years possession, should at least have proved that they had the sole, quiet, and peaceable possession of the whole *strand* and premises in question, for three years immediately before the disturbance complained of, by a title existing and undetermined; but in all this they had entirely failed. That the respondents sought to be quieted in the whole *strand*, under one single denomination of Crablough, containing in the whole 195 acres, whereas it was fully proved in the cause, that the land within the boundaries described by the bill, and therein called Crablough, consisted of grounds of several different denominations; and that the appellant Vernon, and those from whom he derived, had been in the sole, quiet, and peaceable possession of much the greatest part thereof, and therefore the respondents could not be quieted according to the prayer of their bill, because that would be to turn the appellant out of possession. And as to the residue of the land, viz. what was properly called Crablough, being about six acres, though it appeared that the respondent French and his partners did lay down and take oysters therefrom, it also appeared that the appellant Vernon, and the tenants and servants of Mary Vernon did the same; and that they solely received anchorage, wreck, and salvage, which was the highest evidence both of title and possession; and that they also received payments for every boat landing fish on the soil, and took

cockles, muscles, and oysters off Crablough, and disposed of the same under Mary Vernon's title; so that the respondents had failed [404] in any proof of a sole, quiet, and uninterrupted possession in any part of the lands in question. That it thus appearing, that on this small part of the premises the appellant Vernon and the respondent had a mixed possession, no presumption in law would arise from such a possession, to whom the same belonged; and where two persons are in possession, the law determines the possession in him to whom the real right belongs, and therefore the appellant should have been permitted to have read the deeds and instruments proved in the cause relating to the title, more especially as the respondents themselves had interrogated and examined thereto. That the respondents having, by their bill, charged a special title of a seisin in fee and possession, time out of mind, in them of the premises in question, and described them as lying within the liberties of the county of the city of Dublin; and the appellants having, by their answer, denied any such title, and insisted that the premises lay in the county of Dublin at large, the title of both parties was thereby put in issue; and therefore the appellant Vernon ought to have been permitted to read the evidence of his own title, especially as the respondents were permitted to read the lease granted to French, as evidence of their title. That no issue should have been directed in this case, it appearing clearly in proof, that the respondents were not in the quiet and peaceable possession of the premises, but in a mixed or disputed possession, which could only be determined by a trial of the right; and therefore a Court of Equity ought not to interpose by a bill of this kind, but leave the parties at liberty to dispute the right at law. Besides, it was conceived to be highly unreasonable to direct an issue to be tried only as to the possession for three years, which could not in the least tend to determine the right between the parties; but the respondents ought to have been left to their remedy in the ordinary course of law, either by an ejectment, or by an action grounded on the statute of forcible entries. That the appellants' fourth and fifth exceptions were merely on account of the Master's not having stated the evidence according to the depositions of the witnesses; on reading whereof it would plainly appear, that both these exceptions ought to have been allowed, as they went to very material points of the case; the fourth exception being to shew, that the lands in question lay in a different county from that charged by the bill, and that the appellant Vernon had actual possession thereof in the instance of laying down the salt pipes. That the third exception of the respondents ought to have been over-ruled, because they cross-examined the two witnesses, whose depositions, they insisted by this exception, ought not to have been read; but, besides that, the additional interrogatories were touching different matters from those contained in the original interrogatories, and the appellants had obtained an order for exhibiting them. And the respondents' fourth exception ought likewise to have been over-ruled, it being the constant practice of all Courts of Equity, to read the depositions of such defendants as appear disinterested in the matters in question, pro-[405]-vided an order is first obtained for their examination; and the reason and justice of the case requires it should be so, as otherwise, a plaintiff might deprive a defendant of all his material witnesses, by making them parties to his bill; which was plainly the view of the respondents in the present case, by making the tenants parties, who were able to prove the appellant Vernon's possession, and had no interest in the dispute. It was therefore prayed, that the several orders appealed from might be reversed; that the respondents' bill might be dismissed with costs; and that the recognizance entered into by the appellant Vernon and his sureties, pursuant to the order of the 28th of November 1729, might be vacated.

On the other side it was insisted (T. Lutwyche, N. Fazakerley), that the order of the 28th of November 1729, was made upon the appellant Vernon's own application, and, with his consent, given in open Court; that he submitted to it, and enjoyed the full benefit of it, by carrying off all his oysters within the time thereby limited; and that there was no colour for saying, that the possession was in any sort altered or transferred by this order; for the injunction contended for in this case, was not for restoring or transferring possession, but barely for quieting the respondents in such possession as they had at the time of filing their bill, or for three years before any disturbance given, until the possession should be evicted

by due course of law. That it is the constant and known practice of the Courts of Equity in Ireland, on bills of this nature, not to meddle with the title, that being properly cognizable at common law; but merely to examine whether the plaintiffs have been in quiet possession for three years before the disturbance given, and to inquire into the nature and circumstances of such disturbance, and who the disturbers are; and therefore, in the present case, the patents, charters, and other exhibits, relating to the title set up by the appellant Vernon, were wholly foreign to the matter properly under the consideration of the Court. Besides, he did not set up or prove any title in himself, for by his answer to the personal interrogatories he owned, that he and the other appellants gave the disturbances before mentioned, in order to assert Mrs. Mary Vernon's title, but he had not attempted to shew any authority from her for so doing; and she not being an actual disturber, the respondents could not regularly have made her a party to their bill; nor did they examine to their title, it being improper to do so on bills of this nature. That it appeared fully in proof in the cause, that the respondent French, and those deriving under him, had, for above nine years before the filing of the bill, been in the quiet and peaceable possession of the strand called Crablough, save the disturbance given by the appellants; and had during that time enjoyed the sole liberty of laying down and feeding oysters thereon, by virtue of the grant or lease made by the corporation: and it appeared on the face of the grant, that the respondent French was the only person interested in the liberty, profit, and privilege thereby granted; and therefore the Court ought to have decreed, that the respondents should be [406] quieted in their said possession, till evicted by due course of law. So that, upon the whole matter, the issue directed to be tried was more in favour of the appellants than of the respondents. That the respondents' bill and injunction was not solely for the possession of the soil of the strand called Crablough, but also for the quiet exercise of certain liberties and privileges thereon, without which no profit could be made of the soil; and if it appeared that the appellants disturbed the respondents in the free enjoyment of that liberty, on any part of the strand comprised in the grant or lease, the appellants were to be deemed in contempt for so much, and the respondents were entitled to an injunction to quiet them in the possession of that part; and, by the trial of the issue directed, it would appear what part of the strand called Crablough the respondents were in the quiet possession of for three years before the filing of the bill. That the appellants Michael St. Lawrence and Hester Bath, having been properly made defendants to the suit, there was no colour for reading or reporting their depositions, which was the matter of the respondents' fourth exception. There was as little colour for reading the depositions of Edwards and Gallagher, to the appellants' additional interrogatories, which was the matter of the respondents' third exception; for these witnesses having been first examined to the appellants' original interrogatories, they could not afterwards regularly be examined to the additional interrogatories, without a special order, grounded on an affidavit, that at the time of examining those witnesses to the original interrogatories, the appellants did not know they were proper witnesses to be examined to the original interrogatories; but no such order or affidavit was made. It was therefore hoped, that the orders, so far as they were complained of by the appellants, would be affirmed; and the appeal dismissed with costs.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the orders complained of should be reversed; and that the respondents' bill should be dismissed, and the injunction dissolved; and that the recognizance before mentioned should be vacated. (Jour. vol. 24. p. 338.)

[407] CASE 8.—GREGORE COJAMAUL and another,—*Appellants* ; HARRY VERELST,—*Respondent* [21st June 1774].

[Mews' Dig. vi. 978. As to examination of witnesses abroad, see R.S.C. 1883, Ord. 37, rr. 5 *et seq.* Annual Practice, 1901, 504 *et seq.*]

[Under what circumstances a commission to examine witnesses abroad, and an injunction to restrain proceedings at law in the mean time, ought not to be granted.]

**\*\* ORDERS of the Court of Exchequer REVERSED.** See the succeeding Ca. 9, and the note at the end thereof.\*\*

The appellant Gregore Cojamaul, an Armenian, and a native of Ispahan in Persia, resided for many years in Indostan, particularly in the province of Oud, within that part of the dominions of Sujah ul Dowlah governed by the Rajah Bulwantsing, and was extensively engaged in trade, both upon his own account and by commission. While he was so resident in Oud, and countenanced by the Rajah, as many others of his nation were, a party of armed seapoys in the Rajah's service, commanded by one of his officers, seized him on the 14th of March 1768, at Barah in the province abovementioned, and confined him in a fort; which he believed to have been done by authority from the respondent, as an order was shewn to him at the time of his seizure and imprisonment, to the following purport, *It is the order of the Governor of Calcutta to seize and imprison Cogee Gregore*, meaning the appellant, without specifying any crime, or other cause of his abrupt imprisonment. Having been kept close prisoner for several days, he was carried to Chowsat, where he received letters of approbation and condolence from the Rajah and his minister, and from thence was conducted under a strong guard of armed soldiers to Patna, and delivered to Shitabroy, the then collector of the Company's revenues, and guarded, during his confinement there, by a body of the troops entertained by the Company in the territories assumed by them under the name of Dewannee. Under the same circumstances of confinement and ignominy, he was carried to Muxadavad, and there guarded and confined by troops under the command of Major Fischer, until the 23d of May 1768; at which time, having travelled 600 miles, and sustained the most cruel and ignominious treatment, he was set at liberty, without having been accused or convicted of any crime, or even informed of the cause of such severities. By this sudden seizure, he was stripped of the whole or greatest part of his property, not having had time allowed to furnish himself with common necessities; and during the time of his confinement, he was afflicted with dangerous diseases.

The appellant Cojamaul was at this time deeply interested in trade, concerned in extensive contracts, had very great debts outstanding, and had exceedingly beneficial licences of trade in the articles of saltpetre and opium, each of these advantages worth [408] several thousand pounds. All these were lost to him by the respondent's conduct; most of his papers and books necessarily destroyed or lost, by his sudden seizure; and his misfortunes rendered irreparable by an edict published at Calcutta, threatening with imprisonment, corporal punishment, and confiscation, the appellant, or any in his behalf, who should go into the country to take care of his effects; and also prohibiting all Armenians from going to the territories of the princes abovementioned.

By this treatment, and the expences of seeking redress, the appellant was a loser of £15,000 and upwards; for recovery of which, he, in July 1770, caused an action of assault and imprisonment to be brought in the Court of Common Pleas, against the respondent and one Richard Smith, and declared therein, laying his damages at £20,000.

To this declaration the respondent pleaded not guilty generally, and delivered his plea on the 26th of August 1771; in Michaelmas 1772, issue was joined between the parties; and notice of trial was given to the respondent's attorney on the 28th of May 1773, for the Sittings after the then next Trinity Term, at Guildhall, London.



But after every necessary step preparatory to the trial was thus completed, the respondent filed his bill in the Court of Exchequer, praying, amongst other things, that a commission might issue for the examination of his witnesses in the East Indies; and, in the mean time, that the appellant might be restrained from proceeding at law, until such time as the commission might be executed and returned. For this purpose the bill charged, that by an act of parliament of the 9th and 10th of William III. intituled, "An act for raising a sum not exceeding two millions, upon a fund for payment of annuities after the rate of 8 per cent. per annum, and for settling the trade to the East Indies," his Majesty was authorized and empowered, by letters patent under the great seal of England, to incorporate all such persons, and corporations, who should subscribe towards raising the money directed to be raised in and by the said act, and who should desire the same, by such proper names as his Majesty should think fit, to be one company, with power to manage and carry on their trade to the East Indies, and other the limits in the act mentioned, by a joint stock, and to have perpetual succession, and a common seal, with all powers to grant and take, sue and be sued, and to choose their own managers, directors, and officers from time to time; and such other provisions and clauses as should be necessary or requisite for the carrying on of such trade, as should be reasonable for his Majesty to grant: and that it should be lawful for his Majesty, by his charter of incorporation, to empower such Company and their successors to make reasonable laws, constitutions, orders, and ordinances, from time to time, for the good government of the said trade to the East Indies and other parts in the act mentioned, and of the traders, agents, officers, and others concerned in the same, and to inflict reasonable penalties and punishments, mulcts, [409] fines, and amerciaments, for any breach thereof, and to levy such mulcts, etc. to the use of the Company. And it was further enacted, that such persons and corporations as should, in pursuance of that act, have a right or power to trade to the East Indies, etc. from and after the 29th of September 1689, should use and enjoy the whole and sole trade and traffic, and the only liberty, use, and privilege of trading to and from the East Indies, in the countries and ports of Asia and Africa, and to and from all the islands, ports, havens, cities, towns, and places of Asia, Africa, and America, and any of them, beyond the Cape of Bona Esperanza, to the Streights of Magellan, and that the said East Indies, etc. should not, after the 29th of September 1689, be visited, etc. by any other of his Majesty's subjects, during such time as the benefit of trade thereby given should continue.

The bill then stated, that King William III. by letters patent, dated the 5th of September 1689, under the powers contained in the abovementioned act of Parliament, constituted the subscribers and others therein named, one body politic and corporate, by the name of *The English Company trading to the East Indies*, with the usual privileges of a corporate body. That these letters patent enabled them to choose twenty-four directors, and enabled the members to meet for the purpose of making bye-laws and ordinances, and also granted to the Company the whole and entire liberty of trading and trafficking to and from the East Indies and places in the act mentioned, and the rule and government of all such ports, factories, and plantations, as should be at any time thereafter settled by or under the English Company in the East Indies, or other parts abovementioned; and that they should name and appoint governors and officers for their factories and plantations, and remove and displace them at their will and pleasure; and that such governors and officers might raise such military forces as should be necessary for the defence of their forts and plantations. That the want of sufficient powers in the Company gave occasion to an act of 17th George II. which enacted, that notwithstanding the redemption of the annuities or yearly funds therein mentioned, the united Company of Merchants trading to the East Indies, should continue to have, use, and enjoy the whole exclusive traffic, and the only privilege of trading into and from the East Indies, and other places mentioned in the act of 9th and 10th William III.; and the said letters patent confirmed to them all other privileges and powers therein mentioned; declaring, that the same should continue to be held and enjoyed, and be practised and put in execution by the Company and their successors, for the better and more effectual securing to them and their successors, the whole, sole, and exclusive trade to the East Indies, and

parts aforesaid, and for preventing all other his Majesty's subjects from trading thither, and for securing their possessions and governing their affairs, as fully and effectually as if the same privileges, powers, remedies, etc. were severally repeated and re-enacted in the body of that act.

[410] The bill then charged, that the East India Company, under the powers thus vested in them, on the 31st of May 1764, constituted Lord Clive Governor of their affairs in the Bay of Bengal, and Governor and Commander in Chief of Fort William and its dependencies, to execute all powers and authorities thereunto belonging, subject to orders from the Court of Directors; and also constituted William Brightwell Sumner to be second of their council of Fort William, Brigadier-General Carnac, William Ellis, Charles Stafford Pleydell, William Billers, John Cartier, Warren Hastings, John Johnstone, Francis Sykes, William Hay, Randolph Marriot, etc. the other members of their council; appointing them to govern the Company's affairs according to the powers of the Company, and under such instructions as they should from time to time receive. That the critical situation of the Company's affairs in 1764 making it necessary to appoint a select committee, the Court of Directors, by their general letter, dated the 1st of June 1764, appointed the said committee, consisting of Lord Clive, Mr. Sumner, General Carnac, the respondent, and Francis Sykes, to whom they gave the sole power of final determination, with liberty to consult the council at large. And by letter dated the 17th of May 1766, the Court of Directors continued the select committee, with power to fill up the occasional vacancies from among the council, to correct abuses, to suspend offenders in their service; and directed that all other persons not under covenants, who should offend, might be sent home. And by orders, dated the 24th of December 1765, the Court of Directors wrote to the following effect: "We think it necessary to establish, that all trade to be carried on within the provinces where factories are established, shall be carried on by our servants at such factories and their agents only, who shall transact the business of our other servants, on receiving the established commission; and on any refusal to accept such commission, or any tendency to monopolize, the servants of Calcutta and other parts are at liberty to send their own black gomastahs, who are nevertheless to be accountable for their conduct to the Company's servants within whose jurisdiction they reside; all jurisdictions, not comprehended within the jurisdiction of such subordinate, shall be considered as within the jurisdiction of the board of Calcutta." That in consequence of these instructions from the Court of Directors, the Governor and Council from time to time issued orders for recalling all English, Portuguese, and Armenian agents, and European stragglers; and particularly by an order dated the 20th of May 1766, public advertisements were made for the return of the abovementioned gomastahs or agents employed in different parts of the country, to the presidency by the 1st of August then next, requiring their constituents to give them notice of these orders. That several of such gomastahs still remained and traded in the country, in breach of these advertisements and orders. That in January 1767, the respondent succeeded to the government, and was confirmed in it by a letter [411] from the directors; and that Richard Smith became third in the council and select committee, and commander in chief of the army. That he acted in conformity to the acts of parliament, charters, and orders above recited, but that the appellant brought the action abovementioned against him without any just cause or foundation; stating in his declaration the facts mentioned in the beginning of this case, whereas the respondent charged the contrary to be true; and that in November 1766, and down to March 1768, as well as before that period, the appellant was employed as agent for one William Bolts of Calcutta, who had quitted the service prior to November 1766, and had no longer any right to trade within the limits described in the charter, for himself, or to or for other servants of the Company, within the territories of the Rajah Bulwantsing, or Nabob Sujah Dowlah; that he never was possessed of large property in the East Indies or elsewhere, or if he was, that he had recovered the same. The respondent maintained, that if the appellant was seised and confined as above mentioned, was by the authority of the Rajah or Nabob, and that he acted no otherwise there than as a servant of the Company, who were at amity with the Nabob or Rajah and under the authority of the acts, charters, and orders abovementioned, and n

through any malice: that the truth of these several charges would appear, and could be proved, by the testimony of several persons living in the East Indies, and by several authentic records, documents, orders, letters, and papers, also in the East Indies; and that he could not make a full and complete defence on the trial of the action, without having the benefit of such evidence and testimony, or a discovery and admission of the facts abovementioned. And the bill further charged, that the action was brought at the expence of William Bolts, and upon his instruction and warrant given to the attorney; and then the bill stated the names of the several witnesses material to the respondent's defence, and for whose examination he prayed a commission.

To this bill the appellant Cojamaul put in his answer, in which he denied that the action was brought or prosecuted at the risk or expence of William Bolts, or that he had undertaken to pay the costs, but that they would be paid by himself. He admitted, that before 1766, and till March 1768, he was employed in commissions from William Bolts within the territories of the Rajah and Nabob; and that previous to 1766, Bolts had been in the Company's service, and had then quitted it; but did not know whether he had any right to trade within the limits of the Company's charter; but understood that Bolts had such right, knowing that the Rajah had granted his licences for that purpose. The appellant insisted, that whether Bolts had such right or not, he had a right to act as agent for him there by commission, as well as any other Indian merchant, conforming to the laws of the country where such trade is carried on. He denied any knowledge of the extortion of English agents in the countries of the provinces abovementioned, [412] or whether such resolutions or orders as charged in the bill were made, being in entire stranger thereto, or that he was agent for any Englishman in the dominion of the Nabob or Rajah, except for one Francis Hare in the council of Patna. He also denied that he was seized or confined by order of the Rajah, Nabob, or any other country power within their jurisdiction, for such reason as in the bill mentioned; for that he was at that time actually employed by the Rajah in making saltpetre for him. He denied that he had any notice or admonition, except that about three days before his imprisonment he was informed by Francis Hare abovementioned, that he had received a letter from Governor Verelst, under pain of being dismissed from the Company's service, to cause him to be seized and imprisoned, and sent prisoner down to Muxadavad, in direct violation of the known laws and usage of those territories. He admitted, that the respondent was a servant of the Company, then at amity with the Nabob and Rajah; but denied that what was done to him was done in that capacity, or under the sanction of the acts, charters, and orders stated in the bill, but from self-interest, and malice to William Bolts; and denied that the charges in the bill could be proved from the testimony of several or any persons in the East Indies, or by any authentic records, documents, or papers, or that there were several or any material witnesses in the East Indies, who could prove the truth of most or any of the matters of fact stated in the bill, or that the respondent might not make a complete defence without the benefit of such evidence.

The appellant Johannes Padre Rafael likewise brought an action at law against the respondent for assault and imprisonment, grounded on the same circumstances; and the respondent filed a similar bill in the Court of Exchequer against him, which he put in an answer.

On the 9th of July 1773, the respondent moved the Court of Exchequer in each of the suits brought by him against the appellants respectively, praying that injunctions might forthwith issue under the seal of the Court in each of the causes, to stay the proceedings in the actions until the hearing of the causes, upon the merits confessed by the appellants in their answers. Whereupon, after hearing counsel on both sides, and reading the respective appellants' answers, it was ordered by the Court, that injunctions should forthwith issue as prayed. And, on the 13th of the same month, the respondent obtained an order for a commission to examine his witnesses in the East Indies.

From both these orders the present appeal was brought; and on behalf of the appellants it was said (Ll. Kenyon, A. Macdonald), that they had for many years exercised the profession of merchants in those parts of Hindostan where Armenians

are principally encouraged; were settled in the province of Oud, a territory independent of the East India Company; and were engaged in extensive and lucrative undertakings on their own account. That the appellant Cojamaul was employed in the manufacture of saltpetre for the Rajah of Bul-[413]-wantsing, in whose seignior he resided; that the appellant Rafael was engaged in the service of the Nabob Sujah ul Dowlah, in whose territory he resided; and that both of them were very deeply concerned in executing commissions for Indian merchants, and also for Mr. Hare, a servant of the Company at Patna, and for William Bolts, whilst he was in their service, and after he had quitted it unknown to them. In the midst of these complicated affairs, they were ruined in their business, and (what is still more severely felt by gentlemen of their consideration in the mercantile profession in that part of the world) were ruined in their reputation, by the ignominious and cruel treatment which they had received by order of the respondent. That no redress could be had for such outrages in India, which had induced them to seek it in this country, at this distance from their native soil, and under all the disadvantages which strangers to the English laws, customs, and manners, must be subject to. This redress they had sought in different ways for a long space of time, had hitherto been disappointed in every attempt, and must be for ever disappointed unless they should succeed in their present application. That the matters stated by the respondent in his bill, to shew the necessity of injunctions, and commissions to examine witnesses in India, were evidently calculated for delay. That in cases circumstanced as the present, it was presumed, that the clearest and most satisfactory ground should be set forth, before the appellants were prevented from prosecuting the only remedy which their injuries would admit of. For should any of their witnesses, whom the respondent had suffered them to bring from India and keep in readiness, die; should they themselves die; or should any one of many probable events happen, before the execution and return of the commissions from that very distant country, they might be for ever precluded from obtaining any redress. Every accident which could happen must turn out in favour of the respondent, and against the interest of the appellants; and this was a conclusive reason for the Court's refusing any application which would place the parties in so unequal a situation. And as the respondent had not supported the facts asserted in his bill by any affidavit, he had left them entitled to no greater degree of credit than bare assertions, which in the present instance could not outweigh the pressing exigencies of the appellants' case. That among the witnesses named by the respondent, as necessary for his defence, and proper to be examined under the commissions, some were independent sovereign princes in India, or out of the reach of the process of the Court of Exchequer; others were in England at the time of filing the bills; and if the rest of the witnesses therein named were essentially necessary towards the respondent's defence at law, it must have occurred to him sooner than at the distance of three years from the delivery of the declarations, to make that objection to the appellants' proceeding in their actions. If therefore the suggestion of the necessity of these witnesses, so late in the day, should be held a sufficient ground for suspending [414] the proceedings of the appellants: it was evident, that from the great length of time requisite for executing the commissions, the many obstacles, whether real or fictitious, which might be thrown in the way of it in India, and the variety of accidents which might happen in the mean time; the appellants must despair of obtaining any remedy for the grievous injuries which they had sustained in their fortune and reputation; and with the reasons for which the respondent, though frequently called upon, had never yet thought proper to acquaint them. The facts which the appellants had stated in their declarations, it would be incumbent on them to prove by positive testimony. To these declarations the respondent had pleaded not guilty, *generally*. The several facts charged in his bills not being alleged *specially* by way of plea, must therefore be unnecessary to be proved at the trial; and as they all amounted to no more than this, that the respondent acted under mistaken ideas of his official authority, and not through malice to the appellants; the only effect they could have would be in mitigation of damages, should the appellants be able to establish their cases. And this justification the respondent could never have a better opportunity of proving than the present; as most of those who were in the council at

the time of this transaction, were now in England; and every written document, such as the minutes of the council, etc. were now in the India House; from whence every circumstance of mitigation might be collected which the respondent's case could possibly require. The appellants therefore hoped that it would not be presumed, that the powers of the Court of Law were insufficient to grant all proper relief to the parties; and that the injunctions would be discharged, as the facts on which the motions for them were founded were not supported by affidavit, which is usually expected in cases where delay would be of much less fatal consequence than the present.

On behalf of the respondent it was contended (J. Skynner, J. Hett), that it was not consistent with the rules of justice and equity, that any person should be forced on to a trial at law, without having the benefit of every material evidence in his favour; and as there is no method at law of procuring the testimony of persons who reside in foreign countries, it has long been the custom and frequent practice of Courts of Equity, to grant commissions for the examination of such witnesses, in order that their depositions may be used as evidence upon the trial at law; and to grant an injunction to stay the proceeding to trial in the mean time, as without this latter relief the former would be of no use. That as such depositions cannot be used at law, if taken before the cause in equity is at issue, it is often necessary to apply for the injunction upon the filing of the bill, before the time for answering is out, or even before the defendant has appeared, and which is granted upon an affidavit of the plaintiff in equity, that he has material witnesses abroad; or upon the coming in of the defendant's answer, and before issue is joined; for otherwise the cause might be tried at [415] law, before the Court of Equity could give the relief prayed by the bill, namely, a commission for the examination of witnesses in foreign parts. When such injunction is applied for after the coming in of the defendant's answer, it is granted or refused upon the general nature of the case, and the probability that the plaintiff has material witnesses resident abroad, appearing from the whole of the answer; but it is not necessary that there should be a full and precise admission, that the plaintiff in equity has material evidence for his defence, living in foreign parts; for then no such injunction could ever issue, such an admission amounting to a confession on the part of the defendant in equity, that he has no good cause of action at law: it is however necessary, upon applying for the commission, for the plaintiff to make an affidavit that he has material witnesses abroad. A relief somewhat similar to this is given at law, by putting off the trial on account of the absence of a material witness, who is gone into foreign parts for a short time only and expected soon to return; but that relief does not, nor can in its nature, extend to the case of witnesses who are resident in foreign countries. In the present case it was confessed by the answer, that the cause of action wholly arose in the East Indies; that it was not grounded on a mere personal assault by the respondent upon the appellants, but was at most only a constructive assault and imprisonment, which, as to the fact itself and the matter of the general issue, depended upon a great variety of circumstances; and as to the amount of the damages, which the appellants estimate at a very large and enormous sum, they might be greatly lessened by the grounds, motives, and apparent necessity for the exercise of the authority, even if it should finally appear not to have been strictly legal; by the want of malice or ill will in the actor; by the manner of behaviour, the nature of the treatment, and the situation and actual losses of the parties supposed to be assaulted and imprisoned; all or most of which circumstances could not but be known to many persons now in the East Indies, some of whom were named in the bill, and by the answer admitted to be abroad; and, from their situation and offices, must be supposed to be conversant with, and conversant of those circumstances.

After hearing counsel on these appeals, it was ORDERED and ADJUDGED, that the orders therein respectively complained of, should be reversed.\* (MS. Jour. *sub anno* 1774. p. 1050.)

\*In consequence of this determination, the actions were tried; when the appellant Cojamaul recovered damages to the amount of £3200; and the appellant Rafael to the amount of £4000.

[416] CASE 9.—JAMES NICOL, Esq., and another,—*Appellants*; HENRY VERELST, Esq., and others,—*Respondents* [3d March 1775].

[Mew's Dig. vi. 978. See preceding case and note, *sup.* p. 276.]

[Where the party applying for a Commission to examine witnesses, appears from the nature of his case to be entitled to it, the granting an injunction in the mean time is no more than a necessary consequence of that right.]

The appellant James Nicol went out to Bengal in the sea service of the East India Company in the year 1759, and soon after the Company being involved in a very important war, he engaged as a volunteer in their military service, in which he continued till the year 1776, and rose by regular succession from a cadet to the rank of a captain.

The other appellant Thomas Davie, having been in the Company's sea service for some years, in 1762 obtained a licence from the Court of Directors to go out to India, and settle there for the purpose of trade; in consequence of which, he went first to Madras, and soon after to Bengal, where he entered as a cadet into the Company's military service, in which he afterwards rose to the rank of a lieutenant, and continued in the army till the year 1766.

In the latter end of the year 1765, Lord Clive, then Governor of Bengal, thought proper to make a reduction in the military establishment of that Presidency, by depriving all under the rank of field officers of the allowance called *batta*, which had been usually given, through all India, in addition to the pay of the officers upon service.

By this step the appellants found themselves deprived of every emolument which could give them the least prospect of bettering their fortunes in the army, their pay being no more than sufficient in that country to support their rank and defray their expences in the field. They therefore determined to quit the service, to which resolution the appellant Nicol was further induced by a disgust he had conceived on account of a supercession which he did not think his services had merited. Accordingly, in the months of May and June 1766, both the appellants tendered a resignation of their commissions; and were soon afterwards ordered down to Calcutta, where they found their resignations were accepted.

Being thus entirely out of the service of the Company, it became necessary for them to look round for some other means of advancing their fortune, and obtaining a competency which should enable them to return to their native country. For this purpose a settlement as merchants in the country of Sujah Dowlah, the Nabob of Oud, was the first and most desirable object that presented itself to their view. The appellant Nicol had, not long [417] before, commanded a detachment in the province of Oud, and had made the circuit of the country with the Nabob, to assist him in the collection of his revenues. By his conduct and services on that occasion, he had much recommended himself to the favour of that prince, which he had obtained in a high degree, and had received the strongest assurances of his future friendship and regard. From this circumstance, the appellants, whose intention was to enter into partnership in trade, conceived strong and well founded expectations of Sujah Dowlah's countenance and support, which could not fail of being highly advantageous to any person who should settle for commercial purposes in his dominions. Besides this, the appellant Nicol, in consequence of his former residence in the province of Oud, had effects of considerable value in that country; to collect and make the best advantage of which, his presence was peculiarly necessary. These motives determined them both to attempt a commercial establishment in the dominions of Sujah Dowlah; and accordingly, they set out for that country in the month of November following their resignation.

Their reception from Sujah Dowlah was as favourable as their hopes had promised: that prince not only gave them free permission to trade in his country, with every assurance of favour and protection, but made a present to the appellant Nicol of a house of very considerable value, for his residence at Fyzabad, the capital of the province. They immediately applied themselves to trade, and entered

into contracts in different parts of the country to a very large amount, and of a most profitable nature; and from their situation they had a prospect of advantages equal to their most sanguine expectations. As the East India Company had at that time no factories in the province where they were settled, which was out of the limits of the presidency of Bengal, they did not conceive that the trade they carried on there could in any way affect or interfere with the commerce of that Company; nor did they apprehend, that any umbrage could be taken by the government of Bengal at their conduct; especially, as they had acquainted the governor and council, by letters, of their intentions, to guard against any jealousy or suspicion that might have been entertained, if they had made any secret of their design; they therefore flattered themselves, that they should be permitted to advance their fortunes unmolested, and to reap, undisturbed, the fair and just advantages of their situation.

But in these expectations they found themselves disappointed; for soon after their settlement in Oud, the Nabob received a letter from the respondent Verelst, then governor of Bengal, acquainting him, "That as Mr. Nicol was no servant of the Company, he must be sent home; and desiring leave for the Company's troops to make him a prisoner." Though Sujah Dowlah refused his permission to Captain Hill, the commanding officer of the Company's troops at Fyzabad, to seize the appellant Nicol, yet that officer sent two companies of Seapoys to surround the house [418] where he then was. In this situation, the appellant being unwilling to involve the Nabob in a dispute with the Company on his account, determined to go to Sir Robert Barker at Allahabad, who was at that time commander in chief of the Company's forces in that country, in order to learn the cause of these extraordinary proceedings, and to obtain permission, if possible, to remain unmolested in Sujah Dowlah's dominions. Accordingly, on the 10th of March 1767, he waited on Sir Robert Barker, with the appellant Davie, who accompanied him; but found all expostulation was in vain. Sir Robert said he had received an order from the respondents, the then governor and council of Bengal, to send both the appellants down to Calcutta, with which he should comply in three days. The appellants could not even obtain the indulgence of returning for a short time, to settle their affairs, but were obliged to give their honour that they would not leave the fort without permission. On the 13th of the same month, they were sent from Allahabad, under the guard of a party of Seapoys, who carried them on board a budgerow, (a sort of boat used in the rivers in that country,) where centinels with fixed bayonets were placed over them. In this situation they were conducted to Patna, where their guard was relieved by another, which attended them to Mongheir fort, where they arrived on the 2d of April. Here they were confined under a guard of Seapoys for near five months, although an epidemical distemper raged in the fort during great part of that time, to such a degree, that the garrison was obliged to be marched out, and encamped in separate parties in the country; and the appellants were the only Europeans left in the place, in a state of health which endangered their lives, and in want of every convenience and assistance necessary for such a situation. At length, on the first of September 1767, they were carried on board a budgerow, and conveyed down to Calcutta, as prisoners, under a guard of Seapoys with fixed bayonets. On the 12th of the same month, they were landed at New Fort William, after having been kept three days lying off the fort in the budgerow, at a season of the year when the extraordinary tides in the Ganges, called the Boars or Banns, were at the highest, which makes it extremely dangerous for any boats to lie in the river. In New Fort, the appellants were kept six days in close confinement, in an apartment in the barracks, with such rigour, that they could scarce procure the common necessaries of life. On the 18th of September, they were forced on board a small sloop, destitute of every accommodation necessary to preserve them from the inclemency of the weather. In her they were carried down to Ingelee Road, where the *Lord Holland*, a ship in the Company's service bound for England, then lay, and were kept in that miserable situation till the 12th of October, exposed to the effects both of wind and rain in a very inclement season. On the 12th of October, the officer who commanded their guard, by order of the respondents, carried the appellants on board the *Lord Holland*, to be conveyed in her, as prisoners, to England: [419] but Captain Nairne, who commanded the ship, refusing to receive

them on board as prisoners, they were carried back to Calcutta, and were ordered to be again confined in the New Fort; by this time the illness occasioned by their confinement, and the effects of the weather in the sloop, had reduced both the appellants to the greatest extremity, and their lives were in imminent danger. They had frequently, during the course of their long and severe imprisonment, applied to the respondent Verelst, to be released from their confinement, or to be informed of what they were accused, and brought to a speedy trial, if they were charged with any crime; but all their applications had hitherto proved ineffectual. The state of their health, however, was now such, that the loss of their lives must have been the probable consequence of another close confinement in the fort; they therefore declared, that they would rather die where they were, than be removed to suffer fresh hardships and severities. The officer who commanded their guard, seeing the condition they were in, would not force them, but went immediately to represent their case to the respondents, the governor and council; and at length, upon that representation, they were permitted to go at large in the town of Calcutta, upon giving their parole that they would not leave it without acquainting the governor; the respondents being apprehensive of the consequences, if either of them should die under so severe and unjust a confinement. The appellants having lost their health, and being ruined in their fortunes, by this series of oppression, determined to return to England, and seek redress for the heavy and unmerited injuries they had sustained. They accordingly gave notice to the respondents of that intention; and after drawing up a protest, to be presented to the governor and council, they embarked for England on the 16th of December 1767, in the *Norfolk* East Indiaman.

The respondents Verelst, Smith, and Campbell, arriving in England in the year 1770, the appellant Nicol brought his action against them, for the injuries sustained by so long and severe an imprisonment, and declared in that action, in Michaelmas Term in that year; and the defendants, in Hilary Term following, pleaded the general issue, and also a special justification; and in the same Term, filed a long bill in the Court of Exchequer, praying an injunction, and a commission to examine several witnesses in the East Indies. Soon after this, a negociation was set on foot with a view to a compromise, and the appellant Nicol was amused with hopes, that he should receive a complete recompence and re-establishment of his fortune, without the expence and trouble of proceeding further. Under these hopes he was prevailed on to discontinue his action, it being also agreed, on the part of the respondents Verelst, Smith, and Campbell, that the bill in the Exchequer should be dismissed, which, however, was not done till above two years after; nor till the appellant had been put to the expence and trouble of putting in a full answer, and of other proceedings upon it.

[420] The treaty for a compromise was kept up from time to time without effect, for more than two years, till at length the appellant finding himself amused with fruitless expectations, and believing nothing satisfactory was intended to be done, he determined to proceed again to obtain redress in a Court of Law; but before he could carry this resolution into effect, it was necessary to dissolve the injunction in the Court of Exchequer, which had been issued, of course, till the coming in of an answer. He was therefore obliged to put in an answer to the bill of the respondents Verelst, Smith, and Campbell, in that Court, which he did in Trinity Term 1773. Upon this he obtained an order to dissolve the injunction, unless cause should be shewn for continuing it, upon the merits; this order was afterwards enlarged till the sittings after the Term, when no cause being shewn, the injunction was dissolved.

Having thus got rid of the injunction in the Court of Exchequer, the appellant Nicol brought a fresh action against the respondents, in the Court of Common Pleas, in Hilary Term 1774; in which he declared, that the respondents made an assault upon him, and unlawfully imprisoned him in divers unwholesome places, and detained him so imprisoned for the space of eight months; by means whereof he acquired many grievous complaints, and became sick, weak, and distempered; and continued so sick, weak, and distempered for a long time; and was in great danger of losing his life; and was prevented from following his necessary business and affairs; and was put to great expence in and about procuring his enlargement, and in and about procuring necessary relief, advice, and assistance, in the dis-



tampers with which he was afflicted; for all which he laid his damages at £50,000.

To this declaration, the respondents pleaded not guilty; and also a justification, setting forth the statute of the 9th and 10th of King William III. for incorporating the East India Company, and the Company's charter granted in pursuance of that act; and stating, that the appellant, being a subject of this kingdom, was found in the East Indies, in a country in Asia, beyond the Cape of Good Hope, and on this side the Straights of Magellan, where trade was then used by the Company, to wit, at Allahabad, not being lawfully authorized thereto; and had been there trafficking and trading, not being lawfully authorised thereto, contrary to the statutes in that case made and provided; and that they, the respondents, as servants of the Company, and by their command, did seize the appellant, that he might be sent to England; and for that purpose did conduct him in custody to Calcutta, being the most proper and convenient place for the purpose of sending him to England; and that before any opportunity offered of sending him to England, he was discharged out of custody at his own instance and request, and afterwards took his passage to England, in the *Norfolk* East Indiaman; and on the occasion and for the purpose aforesaid, he was necessarily detained in custody during the time in the declaration mentioned.

[421] To this plea, the appellant replied in the same Term; admitting the acts of parliament and charter, and saying, that the respondents had imprisoned him of their own wrong, without the residue of the cause in the plea alleged: and upon that replication, issue was joined and delivered on the 31st of January 1774, with notice of trial for the sittings after the then Hilary Term.

In this state of the cause, the respondents having dismissed their own bill in the Court of Exchequer, caused another to be filed in the Court of Chancery, to the same effect, and almost exactly in the same words with that in the Exchequer; praying, among other things, that a commission might issue for the examination of several witnesses in the East Indies; and that in the mean time, the appellant might be restrained from proceeding at law till such commission should be executed and returned; and therefore, that a writ of injunction might be granted. For this purpose, the bill stated the act of parliament of King William III. and his charter, which were stated in the respondent's plea of justification; and also several other acts of parliament, granting further powers and privileges to the East India Company. The respondents likewise set forth particularly, their own appointment or succession to the several offices of governor and members of the council in Bengal, and also as president and members of a select committee, established there by the Court of Directors of the East India Company, with extraordinary powers; and stated a number of orders and resolutions of the Court of Directors, and of the governor and council and select committee of the presidency of Bengal, for the regulation of the trade and servants of the Company in that presidency; and also some order of the governor and council, for recalling to Calcutta such servants of the Company, and others, as were trading or resident up the country, without having obtained leave for that purpose. And after stating the action brought by the appellant Nicol, the bill proceeded to charge, that the imprisonment complained of in that action, was only in consequence and by virtue of their authority, as president and members of the council or select committee in Bengal, and by the orders of the East India Company, or their Court of Directors, or as servants of the Company, under and by virtue of the several acts of parliament before stated, and the charter of the East India Company; and that the appellant being a subject of this kingdom, and being found trading in the East Indies, in a country in Asia, beyond the Cape of Good Hope, and on this side the Straights of Magellan, where trade was used by the Company, and within the limits in the several acts of parliament and charter before mentioned, without the licence of the Company; or being found there without such licence, and contrary to their express orders; the respondents, in their respective capacities, as governor or president, and members of the council, together with others of the council and select committee, and as servants of the Company, and by their command, caused the appellant Nicol to be seized, in order to be sent to England by the first ship that should [422] sail; and for that purpose he was conducted, in custody, to Calcutta, which was the most proper and convenient

place from whence to send him to England; and afterwards, and before any opportunity offered of sending him to England, he was discharged at his own instance and request, and did afterwards embark in the *Norfolk* East Indiaman for England; and that they the respondents, as servants of the East India Company and by their command, did lawfully cause the appellant to be imprisoned, and detained in prison in the East Indies, and that during such imprisonment he was used with all possible lenity, consistent with his situation and behaviour; and that they had accordingly pleaded a justification to that effect. The bill among other things, further charged, that the appellant knew of the several orders for recalling to Calcutta, persons trading up that country; and that he was trading at Benares, Garrackpore, and Fyzabad, and other places in Indostan, in the East Indies, within the jurisdiction and limits of the subaship of Bengal, and within the limits mentioned in the several acts of parliament and charter of incorporation in the bill stated, and in countries and places where the East India Company had forts or factories, and in which they carried on trade; and that he remained and traded there, from the month of May 1766 till March 1767, when the Nabob Sujah Dowlah brought the appellant with him to Allahabad, and delivered him to Sir Robert Barker, in compliance with the several letters written by the governor and council, requesting him to be delivered up. That the appellant being and trading in the country of Sujah Dowlah, was not only without the permission of the governor and council, which they refused to give him, but also contrary to the express orders before stated. The bill further charged, that on the 26th of January 1767, the appellant wrote a letter to the governor and council of Fort William, at Fort William, acquainting them, that the Nabob Sujah al Dowlah had some time before made him, the appellant, a promise of settling in his country as a merchant, and therefore desiring their acquiescence to his residing there in that capacity; and by another letter to Mr. Verelst, the appellant declared, that his sole intention of going up the country was to collect in his fortune, then in the hands of people whom nothing but his presence could oblige to pay, and to employ it in trade to the best advantage, under the countenance of the Nabob Sujah Dowlah, who had given him liberty in his country for that purpose; and which he made no doubt the Nabob would attest, if required. And by another letter, dated the 4th of March 1767, to Colonel Barker, he wrote, that it was never his intention to enter into the service of any Indostan powers, but that his coming into that country was only embracing an offer which he had some time before from the Sujah there, of settling as a merchant. The bill then stated, that the last ship which was to sail for Europe in that season, was the *Nottingham* (except the *Mercury*, which was only a packet); which ship, on the 9th of March 1767, lay at Ingelee, which is 7 or 800 miles distant from [423] Allahabad; and being ready to sail, and the appellant not being delivered up to Sir Robert Barker till the same 9th of March, it was impossible to reach that ship before her departure. And the bill charged, that the governor and council at Fort William, found by experience, that it was impossible to allow the liberty of the town of Calcutta, to persons who were under orders to repair to Europe, without their having an opportunity of absconding. The bill further alleged, that the several resolutions, letters, and orders therein mentioned, were then in India, and also several material witnesses, without whose evidence the respondents could not make out their defence to the appellants action; and the names of the witnesses alleged to be in India, to examine whom a commission was prayed, were Nabob Sujah al Dowlah, Monsieur Gentie, Sir Robert Barker, Shah Boorawn Linguist, Colan Nica Harcarrah, Coa Bill Harcarrah, Boany Sing Subadar, Buck Ter Cawn Seapoy, Philip Delafield Esq. Captain Harper, Captain James Skinner, Captain George Eyres, Anseylme Beaumont Esq. Simeon Droz Esq. Lieutenant Gwinett, William Cooke, Serjeant Pew, Lieutenant John Brown, and Dr. Ellis. The bill therefore prayed, that one or more commissions might issue for the examination of the respondents witnesses in the East Indies; and that they might be at liberty to examine their witnesses there, as they should be advised, under the order and authority of the Court; and that in the meantime, the appellant Nicol might be restrained, by injunction, from proceeding at law against the respondents in his said action.

The appellant Nicol by his answer to this bill, admitted the several acts of

parliament, the charter of incorporation, the appointment of the select committee, and the respective appointments and succession of the respondents therein stated. He likewise admitted the several orders and resolutions of the Court of Directors of the East India Company, and of the governor and council, and select committee in Bengal, so far as the same had come to his knowledge; and as to such of them as he was not acquainted with, he referred to the consultations, from time to time transmitted to the Court of Directors, and preserved at the India House, and to the other books of general letters and orders at the India House, in which copies of all such proceedings must necessarily appear, and which he agreed to admit as evidence upon the trial of the cause. He denied, that the imprisonment complained of, in his action against the respondents, was only by virtue of their authority as president and members of the council or select committee, and by order of the East India Company, under their charter and the several acts of parliament; for he contended, that neither the authority of the respondents, or any of them, as president or members of the council or select committee, or as servants of the East India Company, could authorize or justify such an imprisonment and cruel usage as he had experienced; and therefore the same was not, nor could be by virtue of such authority; nor did he believe that the Court of Directors ever issued [424] any order or command for such unjust purposes: but if they did, the same could not be warranted by their charter, or any of the acts of parliament. He admitted, that he was a subject of this kingdom, and that he was trading in the East Indies, in an inland country in Asia, which, if reckoned eastward, is beyond the Cape of Good Hope, and on this side of the Streights of Magellan, without the licence of the East India Company; but he denied, that, to his knowledge or belief, trade was then carried on by the Company therein, or that the same was within the limits mentioned in the charter or acts of parliament, or any of them, according to their true construction: and he stated, that the country in which he was then settled for the purposes of trade, was in the dominions of Sujah Dowlah, a sovereign prince, independent of the East India Company; and therefore he did not apprehend, that any licence from the East India Company was necessary for the purpose of trading there. The appellant further admitted, that the respondents, in their respective capacities as governor and members of the council, and as servants of the Company, but not as he believed by their command, caused him to be seized and conducted in custody to Calcutta, which was the most proper and convenient place from whence to send him to England; but he did not believe that he was so seized and conducted thither for the purpose of sending him to England by the first ship that should sail; for he said, that he was not sent to England by the first ship, which he might easily have been, if the respondents had thought fit to do it: and he conceived, if their intention had been such, he would have been brought down immediately to Calcutta, and not imprisoned for near six months in Monghier fort, and other places. The appellant also denied, that he was discharged before any opportunity offered of sending him to England, or, as he believed, at his own instance and request; for he said, that he had made many ineffectual applications, during his imprisonment, to procure his release; and he believed, that his discharge at length was owing to the representations of the officer in whose custody he was, of the danger his life was in, and to some apprehensions which the respondents might entertain on that account. And he insisted, that at least two opportunities offered of sending him to England, while he was in confinement, one by the *Mercury* packet, and another by the *Lord Holland* Indiaman; but he admitted, that after his discharge, and when his health was in some degree restored, he did embark for England, on board the *Norfolk*, as stated in the bill. The appellant denied that the respondents as servants of the East India Company, and by their command or otherwise, did lawfully cause him to be imprisoned and detained in prison in the East Indies; for he insisted, that not being resident within the limits in the several acts of parliament and letters patent mentioned, and not having in any wise interfered with the trade or commerce of the East India Company carried on under their charters, or in any manner whatsoever offended against the laws of England, or the provisions of any of [425] the several acts of parliament or letters patent; the imprisonment and detainer in prison of the appellant were altogether illegal and unjust, and not authorized or warranted by any of the powers vested by the several

acts of parliament or letters patent, or any or either of them, in the East India Company, or by that Company in the respondents as their servants. And he positively denied, that during such imprisonment as aforesaid, he was used with all possible lenity consistent with his situation and behaviour; but, on the contrary, said, that he was, during the whole time of such imprisonment, used with very great severity and cruelty, not required by his situation, or merited by his behaviour in any respect. He admitted, that he had heard, but knew not of his own knowledge, of the several orders in the bill stated, and that he was trading at Benares, Garrackpore, Fyzabad, and other places in Indostan, during the time in the bill mentioned from May 1766 till March 1767, without the permission of the governor and council, and he believed contrary to some of the orders in the bill stated; but he said, that those orders were not at that time known to him: and he denied that those places were within the jurisdiction or limits of the subaship of Bengal, or within the provinces or kingdoms of Bengal, Bahar, and Orissa, or that the East India Company had any forts or factories there at that time, to his knowledge or belief; and he also denied, that the Nabob Sujah Dowlah ever delivered him up to Sir Robert Barker, or any other person; but said that he was made a prisoner against the inclination of that prince, as he believed. He admitted the three several letters to the governor and council, to the respondent Verelst, and to Colonel Sir Robert Barker, as stated in the bill: and that the last ship of that season 1767, which was to sail for Europe, except the *Mercury* packet, was the *Nottingham*, and that she lay at Ingelee ready to sail on the 9th of March, so that it was impossible for him to reach that ship before her departure. But he insisted, that passengers often go from India to Europe in packets; and as they belong to the Company, he believed the president and council had more authority to enforce their orders on board them, than in the ships taken up on charter party. And he said, that he had been informed, and believed, that the *Mercury* did not sail till after the 10th of April following, before which time he might easily have been conveyed on board, if the intention of the respondents had been to send him to England by the first ship. As to the several witnesses named in the bill, the appellant said, that Samuel Pew was long since dead, and was known to be so by the respondents at the time of filing their bill, and that Lieutenant Gwinett or Garnett, James Skinner, and George Eyres, were in England long after the appellant's first action was commenced, and after the bill filed in the Exchequer; and that William Cook was then in England: that Shah Boorawn, Colan Nica, Coa Bill, Boany Sing, and Buck Ter Cawn, were all with Captain Douglas Hill, and in his service, at the time of the transactions in question, and did not, as the appellant believed [426] and was well assured, know any thing relative to them, but what was likewise known and could be proved by Captain Hill himself, who was then in England. And he further said, that Anseylme Beaumont Esq. left India long before any of the transactions respecting the said arrest and imprisonment, and before the appellant resigned his commission: and therefore could not, as the appellant conceived and submitted to the Court, depose any thing material upon the trial of the cause; and he too was in England, as the appellant had been informed and believed, from the time of commencing the first action, till after the present action was commenced; and was then, as the appellant had been informed and believed, in Italy with Lord Clive. And that Sujah Dowlah and Monsieur Gentill were neither of them subjects of his Majesty, or living under his protection, or that of the East India Company, and therefore he submitted to the Court, that the commission prayed by the bill could, with regard to them, have no effect. That the appellant did not believe, that the other witnesses in the bill named could depose any thing material for the defence of the respondents; and said, that he was well assured, that authentic minutes, entries, or copies of all such orders, resolutions, commissions, and other documents in the bill mentioned, as were in fact made, granted, or entered into by the governor and council of Bengal, the select committee, or any or either of them, did appear and were preserved in the consultations, or other papers or documents at the East India House in Leadenhall-street, and might be had and obtained by the respondents; and that the appellant was ready and willing to consent, that such consultations, minutes, entries, or other documents at the East India House, or copies of them authenticated by the secretary, or other proper officer in whose custody the same

were usually kept, or such parts of them as should appear any ways material, should and might be read at the trial of the action, in the same manner as the originals in the East Indies might be, if they were produced. And he further said, he was also ready and willing to make all further just and reasonable admissions which he could consistent with the truth; and particularly, if the respondents would state the facts, to prove which they were desirous of examining all or any of the witnesses who were out of the kingdom, the appellant, if the said facts were truly stated, was ready and willing to enter into any rule or agreement the Court should direct, to admit such facts upon the trial of the action; and therefore hoped, he should not be prevented any longer, by the injunction, from proceeding by the laws of his country, to obtain a compensation for the injuries he had sustained.

The other appellant Thomas Davie stood exactly in the same situation with the appellant Nicol; he was seized at the same time, and accompanied him in all his sufferings; to obtain redress for which he brought first one action, and afterwards a second, at the same times, and under the same circumstances respectively as the appellant Nicol. The proceedings, both at law and in [427] equity, were the same, except that the fortune which he lost by the imprisonment, being less than that of the appellant Nicol, he laid his damages at only £20,000. His answer to the bill in Chancery differed in no material from that of the other appellant already stated.

On the 23d of February 1774, the respondents moved the Court of Chancery in both the suits, praying that injunctions might issue in each of the causes, to stay the proceedings at law; and that such injunctions might extend to stay trial; which was ordered accordingly, on hearing counsel, and reading the appellants answers.

The appellants apprehending themselves aggrieved by these orders, appealed from them; insisting (J. Adair, A. Macdonald), that from the whole of the respondents proceedings in the Courts of Equity, it appeared, that the applications for injunctions, and commissions to examine witnesses, were calculated merely for vexation and delay. The appellants were suffered to proceed in their actions, even to the giving notice of trial, before the bills in Chancery were filed. Most of the Company's ships had then sailed for India. From the great length of those bills, it was hoped the appellants would not be able to prepare full answers to them, within the time limited by the rules of the Court; and in that case, if the appellants had either moved for further time, or put in insufficient answers, injunctions would have issued of course, and there would have been the greatest probability that all the later ships would have sailed; by which an additional delay of near a year would have been occasioned. The facts stated by the respondents in their bills, not being supported by affidavits, stood as mere assertions, and entitled to no degree of credit, except so far as they were admitted in the answers. And in cases circumstanced like the present, it was conceived that the clearest ground should be laid, and verified in the most satisfactory manner, before the plaintiffs at law were prevented from the only means they could have, to obtain redress for the severe oppressions and injuries which they had sustained. Should any of the material witnesses for the plaintiffs at law die, or should they themselves die, they might by that means, or by many other events which might probably happen before the execution and return of a commission from so very distant a country, be for ever precluded from obtaining any redress. Every contingency must necessarily turn out in favour of the respondents, and against the appellants; and this ought to have been a conclusive reason against the interposition of a Court of Equity, which placed the parties in so very unequal a situation. That there were few cases of this nature, where the principal allegation of the bill, *that there were in India witnesses material and necessary for the defence*, could receive so full an answer as it had done in the present case; or where the conduct of the parties applying to a Court of Equity, less entitled them to favour or assistance. For as to most of the witnesses, a direct answer was given to the allegations of the bill; and therefore what credit could be given to [428] those, respecting the very few that remained? Besides, the stating so many witnesses to be in India, who were well known to the respondents either to be dead, or in England at the time, was an attempt to impose on the Court, and ought to have been a decisive reason against any interposition on the respondents behalf.

But further; the respondents while in India, and so long ago as the year 1767, were fully informed of the intentions of the appellants, to seek redress for the injuries they had sustained, and of the particular circumstances on which they grounded their complaint: they had therefore had near eight years to prepare for their defence, with all the advantages arising from their own authority in India, and the assistance of the East India Company, both there and in England. But if they neglected to make use of these opportunities and advantages, it would be highly unjust to permit them to avail themselves of their own negligence, and thereby to delay the appellants in obtaining redress. Most of the material facts in the respondents pleas of justification, were admitted by the appellants in their answers; the inferences and conclusions only being denied. As to those facts which were not admitted, they would be all found upon examination to be such, as, if true, could be most easily and certainly proved by written evidence at the India House, or by witnesses now in England; and the respondents could never have a better opportunity of proving their justification than at present, when so many gentlemen who were in India at the time of these transactions, and so many of the witnesses by themselves stated to be material, were in England.

On the other side it was contended (E. Thurlow, J. Madocks), that the orders appealed from proceeded upon a fundamental maxim in the administration of justice, namely, *that both sides are to be heard*; and as the parties were to be heard by their evidence and witnesses as to matters of fact, the end of the orders in question, was to give the respondents an opportunity of bringing over their evidence from a foreign country, to maintain the truth of the justification which they had pleaded. That Courts of Law pay an attention to *audi alteram partem*, so far as Courts of Law could go; and therefore would put off a trial on an affidavit made by the defendant, that he had material witnesses abroad, who were expected to return home in a reasonable time; it not being the fault but the misfortune of the party, that his witnesses were not within the reach of the Court's process, whereby their attendance on the trial might be compelled. But where witnesses reside abroad, and cannot or will not attend personally in England, the power of the Courts of Law was at an end, as they had no means of examining witnesses abroad: but the Court of Chancery having an authority to issue commissions under the Great Seal for various purposes, and, amongst others, for examining witnesses in causes depending in that Court, the suitors there, who were defendants in a Court of Law, had availed themselves of the power of the [429] Court of Chancery to come in aid and supply a failure of justice, by preferring their bills there; stating their case and the proceedings at law, with their misfortune of having their witnesses resident abroad, and not compellable to appear at the trial, so that the benefit of their testimony could not be had; and therefore praying, that the Court would relieve against this accident, and grant them a commission for the examination of their witnesses, to the end that their depositions might be read at law; and as it would be nugatory to try the cause without evidence, praying also, that the plaintiff at law might be restrained by injunction from proceeding in the mean time, till the return of the commission. Both the Court of Chancery and the Exchequer, as Courts of Equity, have always entertained these bills, as belonging to one of their great sources of jurisdiction, the relief against such accidents as are beyond the power of Courts of Law to aid. As such applications, however, occasion a delay to the plaintiff at law, the Courts of Equity have regulated the practice of issuing injunctions in such cases, with great care and caution. The injunction issues, if the plaintiff at law delays appearing to or answering the bill, beyond the periods allowed by the Court; because it is unjust, that he should take advantage of his own contumacy or delay, to distress the defendant. But the injunction in Chancery only stays execution, and not trial, without the special order of the Court; and therefore it must be specially moved, that the injunction may extend to stay trial, which motion must be founded on an affidavit verifying the equity of the bill. But if the appearance be entered, and the answer filed in due time, the plaintiff in Equity is excluded from making any affidavit in his own case, after the defendant has answered upon oath, and the obtaining the injunction must then depend upon the confessions in the defendant's answer alone; and in that case, the injunction, and its being extended to stay trial, must be moved for on the merits confessed in the

answer. Policies of insurance have afforded numerous occasions for the exercise of this jurisdiction in Courts of Equity, where the underwriter being sued on a policy made upon a ship in foreign parts, has discovered a fraud in the policy, by misrepresentation of the true state of the ship at the time, but cannot shew the fraud in proof, because his witnesses are abroad. Many other foreign transactions have afforded like occasions; so that the use of such bills has been long established, and the increase of commerce has augmented their use. To the justice and expediency of these proceedings, the legislature itself, in the statute 13 Geo. III. c. 63. s. 44. has given testimony, by authorizing any of the Courts at Westminster, to award writs in the nature of commissions, for the examination of witnesses in India, in suits which arise in India, and are within that act of parliament; upon which it must necessarily follow, that the trials of such suits must be stayed till the depositions are returned.

[430] In strict conformity to these rules, the injunction in the present case was granted. The action was brought. The defendants pleaded a justification, and then filed bills in Chancery for a commission, and in the mean time an injunction. The defendants answers came in in time, and an injunction was moved for upon the merits to extend to stay trial. The material points of the justification at law were, 1st, That the appellants were found in the East Indies, beyond the Cape of Good Hope, where trade was used by the East India Company, and not being lawfully authorised. 2d, That they were trading and trafficking, not being lawfully authorised. 3d, That the respondents, as servants of the Company, seized the appellants, in order to their being sent to England. 4th, That they were conducted in custody to Calcutta, being the most convenient place for sending them home to England. 5th, That before any opportunity offered, they were discharged at their own request. 6th, That they afterwards took their passage in the *Norfolk* East Indiaman to England.—The bill stated, that the cause of action arose in India; that many of the witnesses of the several transactions were resident there; and pointed out several by name, whose evidence was material in support of these facts. The defendants answers admitted, that the cause of action was an arrest and imprisonment in India; the nature of the transactions was such, that many persons, resident in India, must have been privy to and witnesses of the whole; it was impossible to be otherwise; and the answers did not deny, or make any doubt of it; the justification was such as could be proved only by eye-witnesses, and many of those witnesses were admitted to be in India. Under these circumstances, the respondents claimed the benefit of a commission as a matter of right, and essential to the defence of their property, £70,000 of which was demanded by the appellants as a satisfaction for supposed injuries, which by law did not entitle them to recover any satisfaction; for the justification not being demurred to, was admitted by the appellants to be a good defence in law, and it only remained to be proved true in fact; which it behoved the respondents to be careful to do, and not risque a trial without a full complement of evidence. Being therefore well entitled to a commission for the examination of their witnesses in India, the order in question granting an injunction in the mean time, was no more than a necessary consequence of that right. Besides, the appellants were not in danger of losing any of their evidence by the delay; for under the respondents bills, they had examined their witnesses *de bene esse*. Add to this, that an order for a commission had been pronounced, which the appellants not only acquiesced in, but had also joined in the commission, and named their own commissioners; by which they had admitted the expediency of a commission in the present case; and their pressing to try the causes before the evidence arrived, was not reconcileable with a case really meritorious.

[431] After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the orders therein complained of, affirmed\*. (M. S. Jour. *sub anno* 1774-5, p. 308.)

\* The attorney for the respondents informed the Reporter, (Mr. Brown,) that upon the trial of the action brought by the appellant Nicol, there was a special verdict, which being argued, the Court of Common Pleas gave judgment for the defendants. In consequence of which, the appellant Davie did not try his action.

\*\* See 2 Blackst. 1277, where the point determined appears to have been, that no

## INSURANCE.

CASE 1.—ROGER LYNCH and another,—*Appellants*; ROBERT DALZELL and others,—*Respondents* [13th March 1729].

[Mew's Dig. viii. 109. See Jud. Act 1873, s. 25 (6): *Rayner v. Preston*, 1881, 18 Ch. D. 1, 10.]

[Policies of insurance against loss or damage by fire, are not in their nature assignable; nor can the interest in them be transferred from one person to another, without the express consent of the office.—A. purchases a house which was insured against fire, and an assignment is accordingly executed. The house is afterwards burnt down, and, *subsequent* to that accident, A. assigns the policy of insurance. Held that the purchaser was not entitled to recover.]

\*\* DECREE of Lord Chancellor King AFFIRMED.

This case was cited with approbation by Lord Hardwicke, and relied upon by him as the ground of his opinion in *The Sadlers' Company v. Badcock and al.* 2 Atk. 554.

There is one event in which, by the proposals of the Insurance-office, these policies against fire are allowed to be transferred; and that is, when any person dies, the policy and interest therein shall continue to the heir, executor, or administrator respectively, to whom the property insured shall belong; provided, before any new payment be made, such heir, executor, or administrator, do procure his or her right to be indorsed on the policy at the said office, or the premium be paid in the name of the said heir, executor, or administrator. But in all other cases, there can be no assignment; and the party claiming the indemnity must have an interest in the thing insured at the time of the loss. These points were decided in the present case, and that cited above, from 2 Atk. 554. Parke, c. 23.\*\*

\*\* Parke on Insurance, §50.\*\*

About the year 1709, some persons observing that great benefit accrued to the public by insurances made in the cities of London and Westminster against losses of houses by fire, but that such insurances did not extend to other parts of England. nor were there any insurances against losses of goods by fire, they formed a society for that purpose, which was called the Sun Fire-office; and the undertaking was from that time so successfully [432] carried on, that hundreds of families have been thereby saved from ruin.

The society being sensible that such an extensive undertaking might give great opportunities for frauds, took all possible precaution for preventing them; and therefore their policies for insurance were so framed, as to be contracts only between the office and the persons insuring; the loss secured against being thereby restrained and confined to the contracting persons only; and the policies referred to certain printed proposals, containing the essential terms and conditions between the insurers and the insured; copies of which proposals were always delivered with the policies.

By these proposals, the office insured houses, warehouses, goods, wares, and merchandize, except some particular things therein specified. And although it is essential to insurances that the persons insuring should have a property in the

action of false imprisonment will lie against the servants of the East India Company, for seizing, in order to send to England, one who had been a military officer in the Company's service, but had resigned, and was found trading in the territories of a foreign prince, in the East Indies, at the time of such seizure.\*\* [See Ilbert. *Government of India*, pp. 172-8, and note by Sir Courtenay Ilbert on "Act of State as applied to the Government of India," in 1 Rul. Cas. at p. 821.]



things lost, yet to prevent all disputes, as goods and merchandize are fleeting commodities, and frequently changed from one hand to another, there is an express exception in the proposals, of goods and merchandize not being the property of the persons insured: and that the property may more fully appear to be at the time of the loss in the person insured, it is prescribed and stipulated as a fundamental condition of every insurance, that the person insured, in case of loss, shall make affidavit of his loss, and procure a certificate from the minister, churchwardens, and substantial neighbouring inhabitants, that they know or verily believe that the sufferer has really sustained such loss; and on producing such affidavit and certificate, the insured is to receive satisfaction according to the proposals; but if any fraud or perjury should appear, the sufferer is to be excluded from all benefit of the policy. And as the contract was plainly restrained to the person insured, it was provided by a particular article, that the policy and interest of the person insured should continue to his executors and administrators, upon the terms therein mentioned.

On the 28th of July 1721, one Richard Ireland took out from the office a policy of insurance, whereby it was witnessed, that whereas the said Ireland had agreed to pay, or cause to be paid to the said office, the sum of 5s. within fifteen days after every quarter day, for the insurance of his house, being the Angel Inn at Gravesend, with his goods and merchandize, as thereafter expressed only, and not elsewhere; viz. the dwelling-house, not exceeding £400, and for the goods in the same only, not exceeding £500, and for the stable only, not exceeding £100, all then occupied by James Peck, from loss and damage by fire; then so long as the said Richard Ireland should duly pay or cause to be paid 5s. a quarter, as therein mentioned, the said society did bind themselves, their heirs, executors, administrators, and assigns, to pay and satisfy the said Ireland, his executors, administrators, and assigns, within fifteen days after every quarter day in which he should suffer by fire, his loss, not exceeding £1000, according [433] to the exact tenor of their printed proposals. Which policy was dated the 28th of July 1721, and subscribed and sealed by three of the trustees for the society.

Some considerable time afterwards Richard Ireland died, having made his will, and Anthony his son sole executor; who brought the policy to the office, and had an endorsement made thereon, that the same then belonged to him; and afterwards, viz. at or about Christmas 1726, he the said Anthony paid the office a premium of 20s. for one year's insurance, from Christmas 1726 to Christmas 1727, as by an article in the proposals he was at liberty to do.

On the 24th of August 1727, a fire happened at Gravesend, which (among many others) destroyed the house mentioned in the policy; and some time afterwards the appellants applied to the office, and alleged, that they had purchased the house and goods of Anthony Ireland; that the same were their property at the time of the fire, and that they had an assignment of the policy made to them at the same time that the house and goods were assigned; and they produced an affidavit made by the appellant Roger Lynch, wherein he swore, that his loss and damage by burning the said house amounted at a moderate computation to £500 and upwards: and upon this affidavit was endorsed a certificate of the minister, churchwardens, and other inhabitants of Gravesend, that they verily believed, according to the best of their information, the appellants Roger and John Lynch had sustained a loss of £500 and upwards. But neither in the affidavit or certificate was any mention made of any loss being sustained by the appellants, by the burning of any *goods* in the said house; nor was any affidavit made by Anthony Ireland, in whom the property of the policy was, that he had suffered any loss.

The appellants however insisted, that the office should pay them £1000 for their loss sustained by the burning of the said house and goods; but the managers and trustees of the office, not thinking themselves liable to pay any thing on that account, and the appellants alleging that the policy was lost, the three respondents were, for the ease of the appellants and at their desire, appointed to defend any suit which should be prosecuted against the office on this occasion.

The appellants therefore, in Easter Term 1728, exhibited their bill in Chancery, setting forth, that Anthony Ireland agreed to sell and assign to the appellants the house, stables, and goods, and also at the same time agreed to assign the policy; and

that by indenture of the 24th of June 1727, for £250, Ireland did assign to the appellants a lease he had of the house and stables for the residue of a term of seventy years, which commenced at Midsummer 16 Car. II. but the goods for which the appellants, as they alleged, were to pay £500 being intended for one Thomas Church, who was to hold the inn under the appellants, Ireland, by deed poll of the same date, sold the same to Church for his own use. The bill also stated, that by another writing of equal date, Ireland [434] assigned the policy, and all money and benefit thereof, to the appellants. That although the bill of sale of the household goods was made made to Church, yet, as the appellants paid the purchase money for the same, Church assigned his bill of sale to them for securing the money they had paid for the goods; and afterwards, by another writing, released to the appellants his benefit and interest in the policy. That the appellants had applied to the office for the £1000 loss, which was refused; and therefore the bill prayed to have a satisfaction for the loss they had sustained, according to the policy.

The respondents put in their answer, and then the appellants amended their bill, and the respondents put in another answer.—By these answers the respondents set forth the nature and method of the insurances made by the office, and admitted the policy in question, and the appellants' application for the £1000 loss; but said, that the affidavit produced was not agreeable to the proposals, and that they had been informed and believed, that no assignment of the policy was made to the appellants, nor any assignment of goods made to them by Church, till after the fire. They insisted, that the policies issued by the office were not in their nature assignable, the same being only contracts to make good the loss which the contracting person himself should sustain; and that the policy in question was at first made with Richard Ireland, to pay *his* loss, not exceeding £1000, and was afterwards declared, by endorsement, to belong to Anthony Ireland; and that no other person was entitled to the benefit of it.

The cause proceeded to issue, and witnesses were examined on both sides; and upon the appellants own evidence it appeared, that the first discourse between the appellants and Mr. Ireland about the policy, was after the execution of the assignment of the house; and that the agreement (if there was any) about the policy, was not at the time when the appellants agreed to purchase Ireland's term in the house. It appeared further, that the assignment of the policy, though bearing date *before*, was not made and executed till some time *after* the fire; so that the agreement for assigning the policy was a voluntary concession of Ireland, without any consideration, and independent of the bargain for the house, and never made till after Ireland's interest in the policy, as to the house, was determined by his selling his interest in the thing insured, and not carried into execution till the thing itself was lost. And as to the appellants' property in the goods, they proved an assignment from Church to them as a security for £300, but omitted in their interrogatories the material question to their witnesses, viz. *When that assignment was made?* Though the respondents, by their answer, put the time plainly in issue, by insisting that it was after the fire; and it did not appear that the appellants ever had any property in the goods.

The respondents on their part proved, that the office did not insure any persons longer than they continued their property in the [435] things insured; and that persons dealing with them might not be mistaken, such notice was usually given.

On the 24th of November 1729, the cause was heard before the Lord Chancellor King; when, upon a full debate, and hearing the evidence on both sides, his Lordship was pleased to dismiss the bill: and the respondents, being willing to be easy with the appellants, did not insist on costs; and therefore the dismissal was ordered without costs.

But, notwithstanding this lenity, the appellants thought proper to appeal from the decree; insisting (P. Yorke, C. Talbot), that the quarterly payments were made by Anthony Ireland, and accepted by the Company, for the insurance of the said house and stables to Christmas 1727; that the appellants were *bona fide* purchasers thereof, together with the benefit of the policy, before Christmas 1727, and that by taking an assignment of the lease, they became liable to rebuild the premises, and which had cost them above £1000. That the policy was actually delivered, and agreed to be assigned to the appellants by Ireland, on the 24th of June 1727, upon

their paying him the whole purchase money; and therefore the appellants from that time became entitled to the benefit of the policy, although the assignment thereof was not in fact executed until after the fire happened. That the appellants never saw any printed proposals, mentioning that the insurance was not to be extended where the property was altered, without the consent of the office; and what was urged by the respondents as to persons removing their habitations, could relate only to an insurance upon goods, which the appellants did not now insist upon, because the goods were not assigned to them. But the house and stables being described and specifically insured by the policy, and the appellants becoming the proprietors thereof, before the expiration of the time for which the quarterly payments were made, they were entitled to have a satisfaction for the loss which they had sustained by the fire, to the full extent of the policy, viz. £400 for the house, and £100 for the stables.

On the other side it was argued (J. Willes, W. Hamilton), that these policies were not insurances of the specific things mentioned to be insured, for nobody could warrant against accidents; nor did such insurances attach on the realty, or in any manner go with the same as incident thereto, by any conveyance or assignment; but they were only special agreements with the persons insuring against such loss or damage as they should sustain. That the party insuring must have a property at the time of the loss, or he could sustain no loss, and consequently be entitled to no satisfaction; and that this construction manifestly appeared from the whole tenor of the proposals. That there was no contract or agreement ever made between the office and the appellants, for any insurance on the premises in question. That not only the express words, but the end and design of the contract with Ireland, did, in case of any loss, limit and restrain the satisfaction to such loss as should be sustained by Richard Ireland only; and the endorsement on the [436] policy declared that right to his executor Anthony Ireland only. That these policies were not in the nature of them assignable, nor was the interest in them ever intended to be transferrable from one to another, without the express consent of the office. That the transactions in the present case, by changing the property backwards and forwards, and rendering it uncertain whose the true property was, manifestly shewed a designed imposition, and fully justified the caution which the office had taken to prevent the policies from being assignable, without the special consent and concurrence of the managers; which method is pursued by all the insurance-offices, who are equally strict and careful in this respect. Lastly, that the appellants' claim was at best founded only upon an assignment never agreed for till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened: and therefore it was hoped that the decree would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 23. p. 505.)

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CASE 2.—GIO MARINO DE GHETTOFF and others,—*Appellants*; THE LONDON ASSURANCE COMPANY,—*Respondents* [1st February 1730].

[Mew's Dig. xiii. 1334.]

[To a bill brought to recover a sum of money upon a policy of insurance, the defendants demurred, because the plaintiff's remedy was at law. Demurrer allowed.]

**\*\* ORDER** of Lord Chancellor King **AFFIRMED**.

Cases of this nature are not the subject of inquiry even in a Court of Equity, because the demand is plainly a demand at law, and the loss and damage sustained are as much the object of proof by witnesses as any other species of damage whatever. Parke, c. 20.

The Policy in the present case was taken in a trustee's name; and it was suggested, that the witnesses lived abroad, and that the trustee would not

let the plaintiffs bring an action in his name; but these circumstances, Lord Chancellor King declared, made no difference. See Mosely, 83, 4: and *Foll v. Chambers*, Mosely, 193. S.P.

There may however be cases where an application to a Court of Equity, on the part of the Insured, is strictly proper, and will be entertained: as if the trustee in a policy do actually refuse his name to the *cestui que trust* in an action at law. 1 Atk. 547. So if witnesses reside abroad, whose testimony is requisite to the decision of the question, the Court of Chancery will grant a commission to examine those witnesses. 2 Atk. 359. See Parke, c. 20.

There also cases in which the Insurers may go into Equity to obtain injunctions to stay proceedings against them at law; as in case of their witnesses being abroad, and their having a commission to examine them. 2 Atk. 359. And on suspicion of fraud on the part of the insured; in which case the Court of Equity will compel the party charged to make a full disclosure on oath of all the circumstances within his knowledge, and to deliver up all papers and documents material to the question. But, except in these instances, all issues upon policies of insurance must be tried in the Courts of Common Law. Parke, c. 20.\*\*

\*\* Mosely, 83: Parke, 393.\*\*

In the year 1720, some merchants at Ostend set up a trade to the East Indies; and, amongst others, one James Maelcamp equipped a ship called the *Flandria*, for a voyage to China, wherein several persons were concerned.

Maelcamp had the care and direction of the ship, and gave receipts to the several persons concerned for the monies they paid, promising to be accountable to them for their respective proportions of the net profit of the voyage.

These transactions being carried on mostly at Ostend, or Antwerp, the several persons who had a mind to be concerned in the undertaking, gave directions to their correspondents at those places, to pay Maelcamp what sums they thought fit and to take his receipts for the same.

The appellants gave directions to one Lewis Francis de Conninck, to pay several large sums to Maelcamp, on account of the said undertaking; and accordingly de Conninck paid him divers sums, amounting to 35,000 guilders, and took distinct receipts for the same, according to the proportion for which the appellants were concerned therein: he also, by the order and direction of the appellants, and for their use and benefit, agreed with the respondents to insure on the said ship the *Flandria* £5000, and by a policy dated the 26th of December 1720, this insurance was effected at a premium of £12 per cent.

The ship sailed from Ostend on the 13th of February 1721, new stile, in order to proceed to China; but in her way, and before she arrived there, some time in the month of July 1722, was seized at Bencoolen in the East Indies, by the governor of that place, being a settlement of the United Company of merchants of England trading to the East Indies; and the ship and cargo were thereupon confiscated.

The appellants, upon notice of this event, applied to the respondents for payment of the £5000 insured, and produced to them the several receipts for their respective interests in the ship, and affidavits affirming the several sums therein mentioned to have been really and *bona fide* paid by them respectively; but the respondents refusing to pay the appellants the said £5000, or make them any satisfaction whatsoever, they, in Trinity Term 1728, brought their bill in the Court of Chancery against the respondents and the said Lewis Francis de Conninck, praying, that the respondents might be decreed to pay the appellants the said sum of £5000, with interest, according to their several and respective shares and proportions thereof.

To this bill the respondents put in a demurrer and answer, and to such part of the bill as sought to compel them to pay the appellants the £5000, or to make them any satisfaction for any loss that had happened to the ship, they demurred; and for [438] cause of demurrer shewed, that if the policy of insurance in the bill mentioned was forfeited, a proper action at law lay to recover the money due thereupon; and that the appellants, if they were entitled to such relief as they prayed by their bill, might have their complete and adequate remedy by an action at law

where such matters were properly cognizable, and where the appellants ought to prove their interest in, and the loss of the ship; by their answer they admitted the policy, and said, that they had heard that the ship was seized at Bencoolen.

This demurrer came on to be argued on the 15th of January 1728, before the Lord Chancellor King; when his Lordship was pleased to order, that the consideration thereof should be respite until the coming in of the defendant Conninck's answer, he having not then put in his answer to the bill; and if the appellants did not procure such answer in two months, the demurrer should be allowed.

Conninck accordingly put in his answer within the two months, and thereby admitted, that he made the assurance in his own name, in trust and for the benefit of the appellants; but said, he did not care to permit the appellants to bring any action against the respondents on the policy in his name; he being advised, that if any such action should be brought, and they should not prevail therein, he would be personally liable to pay all the costs and charges occasioned in consequence thereof.

On the 21st of November 1729, the demurrer came on to be further argued; when it was ordered, that the same should be allowed.

The appellants therefore appealed from the order, contending (C. Talbot, W. Melmoth), that they could not maintain an action at law upon the policy, in their own names; and that it was in the power of Conninck, whether he would permit his name to be made use of in such action, or not. But if the appellants were able to bring an action in their own names, it would be to no purpose, because all their witnesses who could prove the seizure and confiscation of the ship, and the respective interests of the appellants therein, lived at different places abroad, and were not in the power of the appellants, nor could they compel them to come over here to be examined upon any trial at law. That therefore the appellants had no remedy against the respondents upon this policy, but in a Court of Equity, where they might have a commission for examining their witnesses abroad, and thereby be enabled to prove the seizure and confiscation of the ship. That in case they were deprived of this remedy, they would not only lose the £5000, to which they were justly entitled, but also the £600 which they paid as a premium for making the insurance; while the respondents, though debtors to the appellants in £5000, and interest, would, instead of paying such debt, go away with £600 of their money.

On the other side it was insisted (J. Willes, D. Ryder), that the appellants' demand was plainly a demand at law, as they had nothing to prove but their interest and the loss of the ship, which were facts proper to [439] be tried by a jury. That there was no equity suggested by the appellants' bill, but a pretended difficulty to produce witnesses, and that their trustee refused to permit them to bring an action in his name: the former might with equal reason be suggested in almost every case of a policy of insurance, and the latter appeared manifestly to be thrown into the bill merely to change the jurisdiction, and was in a great measure falsified by the trustee's answer; for he did not say he ever refused, but only that he did not care to permit his name to be made use of. And if bills of this kind were encouraged, it would be very easy to bring all sorts of property to be tried in a Court of Equity. It was therefore hoped, that the order would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed. (Jour. vol. 23. p. 600.)

CASE 3.—GEORGE FITZ-GERALD,—*Plaintiff*; CHARLES POLE,—*Defendant*  
(in Error) [1st March 1754].

[Mew's Dig. xiii. 1064; 1182; 1240. S. C. Willes, 641.]

[Insurance was made upon a privateer for a cruise of four months. The ship was valued at £1000 *without further account*, and free from average. During the cruise the crew mutinied, and carried the ship into port, whereby the benefit of the cruise was lost. But as the ship, which was the thing insured,

was in safety at the expiration of the four months, the underwriters were held not to be liable.]

\*\* JUDGMENT of the Exchequer Chamber, reversing Judgment of K. B. AFFIRMED.

See Parke on Insurance, c. 9. where it is said, that the House of Lords confirmed the judgment of reversal, being of opinion with the majority of the Judges, that the Insurer being, by the terms of the policy, *free from all average*, the plaintiff could not be entitled to recover but in case of a total loss; and the ship being found by the special verdict to be in good safety at her proper port, at and after the end of the four months for which the insurance was made, there could be no loss.\*\*

2 Burrow, 691, 695. cited in *Goss v. Withers*. Weakert's Insurance p. 413.

\*\* Parke, 170.\*\*

Peter Joyce, a mariner, being part owner of a ship called the *Goodfellow* privateer, together with the other owners, fitted her out in a warlike manner to cruise against his Majesty's enemies, and obtained a proper commission for that purpose from the Lords of the Admiralty. Mr. Joyce being himself the master of the ship, and abroad, employed Messrs. George Fitz-Gerald, uncle and nephew, and partners, to make an insurance for his interest and use; and they accordingly procured a policy of insurance for £1000 to be signed by several under-writers, among whom the defendant Charles Pole under-wrote for £100 on the 31st of August 1744.

[440] The purpose for which the *Goodfellow* privateer was fitted out and employed, during the time for which the insurance was made, being, on the 14th of June 1744, totally defeated by a mutiny of the sailors on board, their desertion from her, and carrying off the fire-arms belonging to the ship; the plaintiff, who had survived his uncle and partners, in Hilary Term 1748, on the behalf and for the use of Peter Joyce, brought an action in the Court of King's Bench against the defendant Charles Pole, to recover the money by him subscribed, as on a total loss.

For this purpose the declaration alleged, that on the 31st of August 1744, the said George the elder, and George the younger, whom the said George the younger had survived, were partners together in the way of trade and merchandize, to wit, at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap; and the said George the elder and George the younger being so partners together, on the same day and year, at London aforesaid, in the parish and ward aforesaid, according to the custom of merchants, caused to be made a certain writing or policy of assurance, purporting thereby, and containing therein, that the said George the elder and George the younger, by the names of George Fitz-Gerald and Company, as well in his own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from Jamaica, to any ports and places where and whatsoever, at sea or shore, a cruising from port to ports, and place to places, for and during the term and space of four calendar months, upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the *Goodfellow* privateer, whereof was master, under God, for that present voyage, Peter Joyce, or whosoever else should go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, was or should be named or called, beginning the adventure upon the said ship, etc. from and immediately following the 14th day of June then last, and so should continue and endure until the said ship, with all her said tackle, apparel, etc. should be arrived at any ports and places, where and whatsoever, a cruising from port to ports, and place to places, for and during the term and space of four calendar months, commencing as above written, without prejudice to that insurance; the said ship, etc. for so much as concerned the assured, was and should be valued (one half part of the ship) at £1000 sterling, without further account to be given by the assured for the same; touching the adventures and perils which they the assurers were contented to bear, and did take upon them in that voyage, they were, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettizons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detain-

ments of all kings, princes, and people of what nation, condition, or quality soever, barrety of the master [441] and mariners, and of all other perils, losses, and misfortunes, that had or should come to the hurt, detriment, or damage of the said ship, etc. or any part thereof: and in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said ship, etc. or any part thereof, without prejudice to that insurance; to the charges whereof they the assurers would contribute, each one according to the rate and quantity of his sum therein insured: and it was agreed by them the insurers, that that writing or policy of assurance should be of as much force and effect as the surest writing or policy of assurance theretofore made in Lombard-street, or in the Royal Exchange, or elsewhere in London. And so they the assurers were contented, and did thereby promise and bind themselves, each for his own part, their heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for that assurance by the assured, at and after the rate of twenty guineas per cent. And in case of loss, (which God forbid,) the assured to abate but £2 per cent. the assurers being free from all average. Of which said writing or policy of assurance so made as aforesaid, he the said Charles, afterwards, to wit, on the said 31st day of August, in the said year of our Lord 1744, at London aforesaid, in the parish and ward aforesaid, had notice; and thereupon he the said Charles, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, in consideration that the said George the elder and George the younger, at the special instance and request of the said Charles, had undertaken, and then and there faithfully promised the said Charles, to perform and fulfil every thing in the said writing or policy of assurance mentioned on their parts and behalfs to be performed and fulfilled, and had then and there paid to the said Charles twenty guineas, as a reward for the assurance of £100 upon the said premises mentioned and contained in the said writing or policy of assurance, he the said Charles undertook, and then and there faithfully promised the said George the elder and George the younger, that he the said Charles would become, and he did then and there become an assurer to the said George the elder and George the younger, for the sum of £100 on the premises mentioned in the said writing or policy of assurance; and that he the said Charles would perform and fulfil every thing in the said writing or policy of assurance contained, to be performed on his the said Charles's part and behalf, as such an assurer, as to the said £100 by him so assured, and then and there subscribed the said writing or policy of assurance, for the assurance of the said £100: and the said George the now plaintiff further said, the said insurance so made by the said George the elder and George the younger as aforesaid, was made for and on account of, and in trust for, and for the use and benefit of Peter Joyce, and that the interest which the said Peter Joyce, at the time of making the [442] said insurance as aforesaid, and during the said cruise and voyage hereafter mentioned, had in the said ship, being a privateer, amounted to a large sum of money, to wit, £2000 and upwards; and that the said ship, on the said 14th day of June in the said writing or policy of assurance mentioned, in the said year of our Lord 1744, being at Jamaica aforesaid, in parts beyond the seas, in good safety, set sail and departed from thence in and upon her said intended voyage a cruising, according to the intention of the said writing or policy of assurance; and from and after the said 14th day of June, was a cruising from port to ports, and place to places, until the said ship afterwards, and within the said four calendar months, commencing from the said 14th day of June, to wit, on the 23d day of September in the said year of our Lord 1744, then sailing upon the high seas, and at a great distance from Jamaica aforesaid, and proceeding in her said voyage, was in a mutinous manner, by force and arms, against the will of the then master and officers of the said ship, seized, taken, restrained, and detained by the greatest part of the mariners then on board her, and the command, direction, and government thereof were taken from the said master, and the said ship was not permitted to sail and proceed in her said voyage a cruising any longer, but was then and there, contrary to and against the will of the said master and officers, by the said mariners in a mutinous manner carried back again to Jamaica aforesaid, where the

said mariners afterwards, to wit, on the 30th day of the same September, being then and there arrived with the said ship, against the will of the said master and officers, ran away from the said ship with the boats belonging to the same ship, and totally quitted and deserted her, whereby and by means whereof the said ship did not, nor could not, perform her said voyage a cruising for and during the said four calendar months, according to the intention of the said writing or policy of assurance; but from the time of taking, seizing, and detaining of the said ship as aforesaid, for and during the residue of the said four calendar months then to come and unexpired, was totally disabled to perform the same, whereby the owners and proprietors of the said ship totally lost all profit, benefit, and advantage, that might have accrued to them in and from the said cruise, during the residue of the said four calendar months: of all which premises the said Charles Pole afterwards, to wit, on the 1st day of May in the year of our Lord 1745, at London aforesaid, in the parish and ward aforesaid, had notice, and was then and there requested by the said George the elder and George the younger to pay to them £98, parcel of the said £100, deducting £2 residue thereof, in respect of the said loss; which the said Charles, according to the form and effect of the said writing or policy of assurance, and of his said promise and undertaking, then and there ought to have paid to the said George the elder and George the younger.

To this declaration the defendant pleaded the general issue: and, at the Sittings after Hilary Term 1748, the cause was tried [443] in London, before the Lord Chief Justice, by a special jury; when, at the request of the defendant's counsel, a special verdict was found to the effect following:

That the said Charles, on the said 30th day of August 1744, did sign and subscribe the policy of assurance in the declaration mentioned, in the words and figures thereof, as stated in the declaration. That the said ship *Goodfellow* was safe at Jamaica on the 14th of June 1744, and sailed from thence the same day, upon the cruise in the policy mentioned, and that the said ship was an English privateer, and duly commissioned as such. That on the 10th of July 1744, the said ship *Goodfellow*, in her said cruise, met with and took a French ship, with money and goods on board, to the value of £4200 sterling, as a prize; and that afterwards, to wit, on the 31st day of August following, Peter Joyce, the captain of the said ship *Goodfellow*, being through illness unable to continue in the command of the said ship *Goodfellow*, quitted the said ship, with the consent of all the crew thereof; and the first lieutenant, John Hussey, was, by joint consent of the said captain and all the sailors and mariners belonging to the said ship, appointed commander thereof: that the said ship *Goodfellow*, under the command of the said John Hussey, (on whom the said command would necessarily have devolved in case of the captain Peter Joyce's death,) was sailing on the said cruise for a port or place called the River of Dogs, to fetch water; and afterwards, while the said ship was necessarily sailing for the River of Dogs aforesaid, and within the four months mentioned in the said policy, viz. on the 23d day of September 1744, the crew of the said ship mutinied against the said Captain John Hussey and his officers; and by force carried the said ship, against the will of the said Captain John Hussey and other officers, who could not resist the same, towards Jamaica; and before her arrival in port there, causelessly, against the consent of the said Captain John Hussey, seized the boat, fire-arms, and cutlasses, and carried off the same, and deserted the said privateer; by which the said voyage and cruise was totally prevented and lost for the remainder of the said four months from the said 23d day of September: that the said ship arrived at Jamaica upon the 29th day of September in the said year 1744, and was there in good safety at and after the end of the four months aforesaid; but was prevented by the said mutiny and desertion from further pursuing her said cruise: that the insurance upon the said ship *Goodfellow* was made for the account of Peter Joyce, the owner, and also the captain for the former part of the cruise; and that the said Peter Joyce had interest in the said ship *Goodfellow* to the amount of the sum insured.

This ship was afterwards lost in a hurricane which happened in Jamaica on the 20th of October 1744; and what was saved out of the wreck did not answer the expence of the salvage: but as this event happened four days after the expiration of the time limited in the policy, it did not fall under the consideration of the jury in this action.



[444] The special verdict came on to be argued in the Court of King's Bench, in Easter Term 1759, when the Court unanimously gave judgment for the plaintiff.

Whereupon the defendant brought a writ of error in the Exchequer Chamber, where the cause was argued; and that Court was pleased to reverse the judgment of the Court of King's Bench.

But to reverse this judgment of reversal, the present writ of error was brought in Parliament; and on behalf of the plaintiff it was said (W. Murray, A. Hume Campbell) to be found, that by the mutiny, etc. the voyage and cruise was totally prevented and lost for the remainder of the four months from the 23d of September; that Peter Joyce had interest during the cruise in the ship, to the amount of the sum insured; and that the ship was in being at and after the end of the four months.

The general question therefore is, Whether an event has happened, upon which the under-writers, by the terms of the policy, are to pay?

Though different accounts are given of the invention of insurances, yet they certainly were brought into practice by merchants, for the sake of trade, and in order to divide the risk. The nature of the contract originally was, that a specified voyage should be performed free from perils; and in case of accident, the insurer was, for a certain price, to bear the trader harmless. Hence it followed, that this contract originally related to the safety of a voyage particularly described, in respect either of a ship or cargo; and that the insured could not recover beyond the amount of his real loss: therefore, without abandoning what was saved to the insurer, he could not recover the whole value, except in the case of a total loss. A very inaccurate form of this contract was anciently used among merchants, and drawn by themselves. It was brought into England by persons who came from abroad, and settled in Lombard-street; and the terms of it, though very imperfectly penned, having acquired a sense from the usage of merchants, the form is followed to this day, and every policy refers to those made in Lombard-street. Hence, contrary to the general rule, parol evidence is admitted to explain this contract, though in writing; and the words are controuled, or liberally supplied, by the intent of the agreement, the usage of merchants, and, above all, by judicial determinations, which are the strongest evidence of the received law of merchants. And upon these policies, the voyage, and not the bare existence of ship and cargo, is the subject matter of the insurance.

In process of time, however, variations were made by express agreement from the first kind of policy; it being troublesome to the trader to prove the value of his interest, and ascertain the amount of the loss, he gave the insurer a higher premium to agree to estimate his interest at a precise sum, and to give up his claim to what might be saved; and the insured, on the other hand, waived any claims of contribution, in respect of accidents which [445] might obstruct but not defeat the voyage. To recover therefore upon this kind of policy, the insured need only prove that he had an interest, without shewing the value.

But cases where it might not be proper for the trader to disclose the nature of his interest, introduced a third kind of policy; where the insurer dispensed with the insured having any interest either in ship or cargo. In these two last kind of policies, valued free from average, and interest or no interest, it is manifest that the performance of the voyage or adventure in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance; and so it has often been adjudged\*.

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\* *Depaiba v. Ludlow*, Comyns Rep. 360. Insurance on a hoy used for a packet-boat from Helvoetalsuys to Harwich, interest or no interest, without further account. The hoy in her voyage was taken by a Swedish ship, though no war then between Sweden and Great Britain; and after being nine days in her custody, the hoy was retaken by an English man of war, carried to Copenhagen, and from thence to Harwich, where she was at the time of the trial. A verdict was given for the plaintiff, subject to the opinion of the Court of C. B. The case was twice argued; first by civilians, and then by common lawyers; and the Court gave judgment for the plaintiff, though the ship was then in being at Harwich. The question was not, whether the property of the ship was lost by the capture; but whether the capture was a peril insured against, and had happened in the voyage.

[446] Many other kinds of insurances upon other sorts of things, in the nature of wagers or bargains upon contingencies, have been introduced; as to which, the agreement of the parties is the rule that governs: As, That a man shall live such a time—That one man shall outlive another—That a voyage shall be performed in a given time—That a ship shall arrive at such a port before such a fair.—And every other contingency may be insured at a fixed sum. Many merchants, with a view to their own gain, as well as the public service, desiring to engage in fitting out privateers, the great expence of which consists in the outset, the victualling stores, the advance money paid to the sailors, etc. they bethought themselves whether they could divide the risk by insurance. By the first kind of insurance, open policies, they could not do it, because there was no cargo; and the value of the ship was not the measure of the owner's expence and risk. Neither could they do it according to the second or third kind of policies, as describing any particular voyage: the

*Barclay v. Collier*, B. R. Mich. 1744. Insurance on the ship called the *Ludlow-Castle* man of war, from Jamaica to England, interest or no interest, free of average, etc. The ship was in her voyage compelled by storms at sea to put into Antigua; where Admiral Knowles, being in want of a hulk for his Majesty's service, thought proper to convert the *Ludlow-Castle* to that use; but the treasure on board her was brought home in the *Scarboroughh*. The insured brought his action, and though it appeared in evidence, that the ship was existing and upon the establishment, yet it was determined, and a verdict given by a special jury accordingly, that the voyage from Jamaica being lost, the plaintiff was entitled to recover.

*Stoney v. Brown*, B. R. Trin. 1746. Insurance on the *Sarah* galley at and from London to Gibraltar, and from thence to London, valued at the sum insured. This ship was chartered from London for Gibraltar, and thence to the Nore, to receive orders from the freighter; and he plaintiff was the sole owner of the ship. The ship arrived at Gibraltar in June, and was loaded with wines by the freighter's correspondent for her return-voyage. At Gibraltar the ship was seized by the *Salisbury* and *Solebay* men of war, the captain turned out of possession, and several of the sailors impressed. The captors proceeded against the ship and cargo as forfeited; but the ship was ordered to be restored, and was sent by the freighter's correspondent with a cargo for Dunkirk, where she was afterwards overset and lost. An action was brought by the insured; and though it was relied on for the defendant, that the ship was not totally lost, but had been delivered after the capture to the agent of the freighter, and by him sent on another voyage; yet as the taking at Gibraltar was a breach of the policy in the voyage, whereby the return-voyage was prevented, a special jury gave the plaintiff a verdict for a total loss, and he had judgment accordingly.

*Hanbury v. King*, B. R. Mich. 1746. Insurance on the *Anna*, at and from any port or place, or degree of latitude, wheresoever the ship might be on the 7th of May 1741, to any port, place, and degree of latitude, until her arrival at London, interest or no interest, free of average, etc. This ship was a tender to the ships sent to the South Sea under the command of Lord Anson, and proceeded to the island of Juan Fernandez, where she was unloaded, and discharged the King's service. But being in want of stores to return to England, she was sold by the captain for the use of the fleet, for £300, for which he received a bill on the Commissioners of the Navy, which was afterwards paid to the plaintiff the sole owner, together with the freight and all the sailors' wages to the time of the sale of the ship. The plaintiff also received £6410 for the freight of the outward bound voyage, and £2590 for seven months' freight, as the computed time for the ship's return home. An action was brought on the policy; and although it was insisted on for the defendant, that the ship had not been destroyed by any peril in the policy, but sold by the owner for the use of government, who had for the conveniency of the service disposed of her as was thought [446] fit; and that the insured had actually received a price and freight for her, as having performed her homeward-bound voyage; so that if there was any loss in point of value, it would only be a partial and average loss, which was expressly not to charge the insurer; yet upon all the above facts, agreed between the parties, as the ship had been rendered incapable of performing the service for which she was fitted out, viz., attending the fleet in the South Seas and

way taken therefore was, to insure the ship from all perils, enumerated as a privateer, to cruise during a limited time: and such insurance of privateers is a modern practice. The very end of this contract shews, that *the capacity of the ship to cruise, notwithstanding the perils*, and not the existence or the property of the ship at the end of the limited time, is the subject matter of such an insurance. And this is not only the obvious meaning of the parties to such a contract, but judicial determinations have declared this to be the sense\*. The legis[447]-lature also has considered the insurance of privateers as beneficial, and plainly understood that the existence of the ship was not the subject matter of the insurance: for an act of the 19 Geo. II. c. 37, which prohibits insurances interest or no interest, provides, that assurances on private ships of war, fitted out by any of his Majesty's subjects, *solely to cruise* against his Majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without

home, the plaintiff recovered a verdict for a total loss, by a special jury, agreeable to the directions of the Court.

*Dean v. Ditcher*, Strange 1260. Insurance on goods in the *Dursley* galley, interest or no interest, free of average, etc., at and from Jamaica to Bristol. The ship in her voyage was taken by a Spanish privateer, and carried into a port in Spain, where, after being kept eight days, she was cut out by an English privateer. The insured brought an action on the policy. The insurer insisted it was only an average loss, the ship and goods existing, and by statute were to be restored to the owners on salvage. But it was determined by a special jury, and a verdict given accordingly, that notwithstanding the existence of the ship and goods, yet the insured voyage being lost, the plaintiff was entitled to recover upon that policy.

*Whitehead v. Bance*, B. R. Mich. 1749. Insurance on the *Dispatch* galley, interest or no interest, free of average, etc., from Jamaica to Hull. In her voyage she was taken by a French privateer, and carried to Hamburgh; and after being twelve days in the hands of the enemy, she was retaken by an English ship, and brought to London; where she was adjudged to be restored to the owner, paying salvage. The owner sold the ship, and paid the salvage. An action being brought on the policy, it was held to have been a loss of the voyage; and the special jury gave a verdict accordingly.

\* *Pond v. King*, 1 Wilson 191. Insurance for three months, from the 21st of December 1744, upon the *Salamander* privateer, to any port or places whatsoever, interest or no interest, free of average, etc. The privateer was taken in the second month by a French man of war, who took the captain and most of his men, with the commission and provisions, on board his own ship, and was carrying his prize into France; but soon afterwards the privateer was retaken by an English ship, which took her on a cruise, and then carried her into Lisbon, where she remained. An action being brought on the policy, a special verdict was found; and upon arguing it in the Court of King's Bench, judgment was unanimously given for the plaintiff, and no writ of error was ever brought against this judgment.

*Jenkins v. Mackenzie*, Mich. 1749. Insurance on a privateer for two months. In the first month she was taken by the enemy, and afterwards retaken by Admiral Martin, who before the end of that month sent her into Bristol. The privateer had received no damage in the engagement in which she had been taken, but what might have been repaired without any great expence if she could have been put into a dock; but when she arrived at Bristol, the docks were full, and workmen so scarce, that she could not be repaired before the time in the policy expired. The plaintiff brought his action, against which the defendant insisted, that the ship existing, and he not having insured against the fulness of docks and scarcity of workmen, he could not be liable for a loss: yet as the two months' cruise was lost by a peril within the policy, the plaintiff had a verdict.

*Fitzgerald v. Wainhouse*, B. R. Mich. 1749. An action upon the very same policy now in question, against another under-writer, in which the plaintiff declared *verbatim* as in this case. It was defended at the trial; but a special jury gave a verdict for the plaintiff, agreeable to the directions of the Court, and judgment accordingly. The defendant indeed brought a writ of error, but despairing of success, suffered it to be nonprossed, and paid the money.

benefit of salvage to the assurers. And there was no occasion to except the case of privateers, had the existence of the ship been looked upon as the only object; for the value of the insurance might have been confined to the interest in the ship.

Upon some of these reasons and authorities, as well as others, the Court of King's Bench gave judgment in this case for the plaintiff. But the objections to this judgment principally relied on, were these: I. That as the ship existed at the end of four months, nothing was to be paid; the insurers only undertaking that *the ship* should not be totally lost or destroyed within that time. II. That suppose the meaning was to insure the ship's capacity to cruise during four months, notwithstanding the perils mentioned; yet unless she was prevented by any of the means mentioned in the policy, during the whole time, nothing was to be paid. For the insurance must be taken to be only against the entire loss of the whole time; but in this case the ship cruised for part of the time. III. That if the ship's capacity to cruise, and not the bare existence of the ship, was the thing insured; it was not found that Peter Joyce had any interest in the cruise, only that he was owner of and had interest in the ship during the cruise.

As to the first objection, it was said to prove, that if during the whole four months the ship had been by force turned into a fire-ship or transport, detained in port by an embargo, taken and kept by privateers, arrested and detained by princes, or so disabled in a storm the first day, as not to be capable of going to sea dur-[448]-ing the time; provided the owners had the ship or her hull again, the insurers were to pay nothing. But this, besides contradicting so many principles and authorities, proved more than would be seriously contended for. As to the second objection, according to that rate of arguing, if the ship was safe at any time on the 15th of June, there never could be a loss afterwards; and though she had been burnt, sunk, or taken on the 16th, the insurer would not be liable: which, besides contradicting all the authorities in the cases of privateers, in every one of which the ship had cruised for some time, reduced the four months to the first instant of that time; and therefore was a flat contradiction to the express terms of the policy.—And to the third objection it was answered, that the property of the ship carried an interest in her capacity to cruise; a public law having given prizes taken by privateers, to and among the owner and owners of such ship or vessel, and the several persons who shall be on board the same, in such shares and proportions as shall be agreed on with the owner or owners. And to suppose the owner to have parted with his whole interest in the use of the ship during the cruise, and yet to have retained his interest in the privateer during the cruise, was to make an intendment contrary to the averment in the declaration, and finding of the verdict; and to suppose a case which never existed in fact, namely, that the owner of a ship lets her out on freight to cruise as a privateer. But the parties in this contract have agreed and understood, that the use of this ship was attendant upon the property; for they have insured the ship's capacity to cruise, and valued it on the ship. Lastly, that there have been judicial determinations, and one upon this very policy, in favour of what the plaintiff in error contended for, unreversed and unappealed from; and people probably have transacted losses upon their authority, and entered into contracts according to the sense judicially received. That in mercantile contracts, especially for the sake of certainty, it is better to adhere to decisions, even if they were at first erroneous. That all new contracts were made in the sense of the judicial determinations; and supposing an interpretation at first wrong, it becomes afterwards unjust and highly inconvenient to vary from it. And therefore it was hoped, that the judgment of the Exchequer Chamber would be reversed, and the judgment of the Court of King's Bench affirmed.

On the other side it was contended (R. Henley, T. Sewell), that the insurer being by the terms of the policy *free from all average*, the plaintiff could not be entitled to recover but in case of a total loss; and the ship being found by the special verdict to be in good safety at and after the end of the four months for which the insurance was made, there could be no such loss. That the ship alone was insured, and not the cruise; and to contend otherwise was not only contrary to the express words and plain meaning and intention of the policy, by which the *ship alone* was repeatedly expressed to be the thing insured, but it was also contrary to the nature of an insurance; the safety of the ship itself, or of whatever else is the im-

[449]-mediate object of the insurance, being the only thing insured; and not any uncertain benefit which may arise to the owner by means or in consequence of it. Nor can any such consequential benefit be properly the subject matter of an insurance, as it is not capable of being estimated. But supposing the cruise, or the benefit of the cruise, or the free use of the ship for the cruise, to have been the thing insured; yet even of any of these three there was no total loss, the ship having actually cruised till within about a fortnight of the whole time, and taken a rich prize of the value of £4200 sterling. And supposing that what was found by the verdict, amounted to a total loss of any of these; yet it was not found, nor was it averred in the declaration, that Peter Joyce, for whose benefit the insurance was made, had any interest in the cruise, but only in the ship itself; and to recover in an action upon a valued policy, the plaintiff must aver an interest in his declaration, and prove it at the trial. It was therefore hoped, that the judgment given for the defendant would be affirmed with costs.

AFTER hearing counsel for three days on this writ of error, the judges were directed to deliver their opinions upon the following questions, viz. 1st, "Whether the facts found by the special verdict in this cause, do amount to a breach of the policy of insurance, upon which the action is brought. 2d. In case they do, whether the want of an averment in the declaration that the plaintiff, or Peter Joyce, was interested in the cruise therein mentioned, is an error in this record." And the Judges having taken time to consider, and differing in their opinions, they delivered them with their reasons, *seriatim*: whereupon it was ORDERED and ADJUDGED, that the judgment given in the Court of Exchequer Chamber, reversing the judgment given in the Court of King's Bench, should be affirmed; and that the record should be remitted: and it was further ORDERED, that the plaintiff in error should pay to the defendant in error, £5 for his costs in the House.\* (Jour. vol. 28. p. 213-225.)

[450] CASE 4.—ROBERT MAC NAIR,—*Appellant*; JAMES COULTER and others,—*Respondents* [15th February 1773].

[Mew's Dig. xiii. 1142. 1 Scots R.R. 465.]

[In the case of a valued policy on both ship and cargo, the assured must recover the whole sum underwritten, because he could not have any claim for a return of premium for short interest, if the ship had arrived safe.]

\*\* INTERLOCUTORS of the Court of Session in Scotland REVERSED, and the Cross Appeal dismissed.

Of policies there are two kinds, *valued* and *open*: the difference is, that in the former, property insured is valued at prime cost at the time of effecting the policy; in the latter, the value is not mentioned. In the case of an open policy the value must be proved, in the other it is *agreed*; and it is just as if the parties had admitted it at the trial. 2 Burr. 1117.

A *Valued Policy* is not a wager policy: it originates from the circumstance of its being sometimes troublesome to the trader to prove the value of his interest, or to ascertain the quantity of his loss; he therefore gives the insurer a higher premium to agree to estimate his interest at a sum certain. In this case the plaintiff must prove *some* interest, although he need not prove the value of his interest. But if a valued policy were used merely as a cover to a wager in order to evade the statute, (19 Geo. II. c. 37.) it would be void. 2 Burr. 1167. 4 Burr. 1966. Parke, c. 14.\*\*

In the year 1749, Robert Mac Nair, the appellant in the original appeal, was concerned in a sugar-house at Glasgow, in Scotland; and being desirous of em-

\* In a memorandum on the back of the printed case it is said, that the Judges of the King's Bench were of opinion with the plaintiff on both the questions: that the rest of the Judges, together with the Lord Chancellor, were of opinion against the plaintiff on the first question: and that as to the second question, they differed in their opinions.

ploying his son James Mac Nair, he resolved to send him out with an adventure of merchandize to Barbadoes; and to encourage him, and engage his attention and application to business, the appellant gave him one fourth share in the adventure.

The appellant then freighted a ship at Glasgow, and shipped a cargo on board her, with which James Mac Nair proceeded to Barbadoes; where having arrived, he put his cargo under the care of Messieurs Harveys, merchants there, to whom he was addressed. But finding some difficulty at Barbadoes, to sell to advantage all the merchandize he carried out, Messieurs Harveys recommended what remained undisposed of to Virginia, and accordingly the same was shipped in a proper vessel, and James Mac Nair went in her as supercargo. At Virginia he disposed of the whole of his adventure, and purchased of Messieurs Hutchins and Tucker, merchants there, a small ship or vessel called the *Jean*, not exceeding eighty tons burthen; for which, and her boat, tackle, and apparel, he paid £450 Virginia currency, (being equal to £360 sterling,) as appeared by the bill of sale made thereof to him, dated the 13th of November 1749.

On the 1st of November 1749, James Mac Nair wrote a letter to the appellant, dated at Virginia, wherein, *inter alia*, he said, "I have purchased a vessel of forty-seven foot keel for £350 current money, and am now purchasing her a cargo for Barbadoes, in order for purchasing sugars." Again, "This vessel I have purchased, I believe she will answer you very well; she is a [451] new vessel, never was out to sea yet, which will prove to your contentment; her name is the *Jean*." Having thus purchased the *Jean* ready fitted and equipped, he got a cargo for her, and proceeded therewith back to Barbadoes, and afterwards returned again to Virginia, where he then loaded another cargo in the *Jean* to be carried to Barbadoes. The insurance made on the *Jean* and her cargo, for this last voyage, was the subject of the present dispute between the parties.

On the 7th of May 1750, James Mac Nair, being at Virginia, wrote a letter to his father, wherein after mentioning several particulars relative to the disposal of his last cargo, he proceeded to acquaint him with the value of the cargo, which he then intended to ship for Barbadoes, in the following words, viz. "You advised me to acquaint you of the value I will have on board, in case you make insurance, she (meaning the ship *Jean*) will carry 450 barrels of corn, which amounts to £312 and about sixty barrels of pork, at 55s. per barrel, £165, total amount £477 but she will not carry near the amount of the cargo that I have bought here, of which I must take bills for the remainder." On the 22d of the same month, he wrote another letter from Virginia to the appellant, wherein he acquainted him, that he hoped to sail in about ten days, and when at Barbadoes would write to him.

On the 8th of June 1750, the appellant, by Mr. Stalker his broker, caused a policy of insurance to be effected at Glasgow, filled up in the name of the appellant and company, (meaning his son the said James Mac Nair,) in the usual form insuring against the usual perils of the sea, etc. upon the said ship *Jean* and her cargo, for a voyage from Virginia to Barbadoes; and James Mac Nair was therein mentioned as master of the ship; the ship and her cargo were therein valued at £1000 without any further account to be given by the assured to the assured or any of them, for the same; according to which particular sum, all losses were to be paid by the underwriters, proportionably to the several sums by them underwritten, and the assurers confessed themselves paid the consideration or premium at the rate of £1 15s. per cent. and it was thereby agreed, that in case of any loss there should be an abatement of £2 per cent. at payment thereof.

This policy of insurance was underwritten by the respondents Coulter and Bogle for £100 each, by the respondents Graham and Cross for £200 each, by Archibald Ingram, James Spreul, and George Buchanan, since deceased, for £100 each, and by one James Johnson for £100, so that the sum of £1000 in the whole was underwrote and insured by the said policy of insurance.

When this policy was effected, the appellant did not produce to the underwriters the letter he had received from his son James Mac Nair, dated the 7th of May 1750, wherein the son informed him, that the total value of his whole cargo on board would not exceed £480, neither did the appellant acquaint the underwriters with the kind of vessel the *Jean* was, or that she, with her boat [452] and all her tackle, etc. cost only £360 sterling; although he was possessed of a full knowledge of the facts from his son's letters of the 1st of November 1749, and 7th of May 1750, and

from which he knew or was acquainted, that the value of both the ship and all her cargo would not exceed £840 sterling.

On the 25th of June 1750, the said ship *Jean* sailed from Hampton Road, in Virginia, with some corn and other merchandize on board, on her said insured voyage to Barbadoes, but having lost an anchor and cable, she put back and sailed again on the 27th of the same month; on which day James Mac Nair wrote to his father the following extraordinary letter, which appears to be dated at Virginia, the said 27th of June 1750. "Honoured Sir, I meeting with this opportunity, thought fit to acquaint you of my being in good health, hoping that you and all the family are in the same. I am here lying for a fair wind, and all clear to sail, of which you have an account of the value of yours I have on board, and also of Baillie James Smith, viz. 4850 bushels Indian corn at 4s. per bushel, and forty-five barrels pork at £3 per barrel, and fifty barrels tar at 32s. 6d. per barrel, 8000 staves at £7 per thousand, and of live stock and other goods to the amount of £75, and the value of the vessel, which amounts to £787 odd money sterling, which in all amounts to £2104 5s. sterling; and as I have done the utmost in my power since I left you, concerning your goods and Baillie James Smith's, of which there is £145 of his to be deducted out of the above sum, of which I have made Thomas Craig master of the brig *Jean* for Barbadoes, and then to Glasgow; and as he is a young man, and I could get no other, you will please insure at least £1800 sterling; and that you need not fear that it is more than the value that I have on board; neither delay any time after you receive this letter in getting insurance, or if you do fail you may perhaps be a sufferer; and acquaint Baillie James Smith concerning his value, that in case the vessel meet with any accident, that he need not blame me in not advising him; but be sure you do not neglect to insure the above value of yours in time, for there is an island called Bermudas, that lies betwixt Virginia and Barbadoes, that I am very much afraid of, and that there strange notions runs in my head, that I will meet with some accident about it, and I beg of you to lose no time in insuring the whole, as all is well yet. Be sure that in case you mistake, and have any doubt about the master's name, is Thomas Craig, master of the *Jean* brigantine, her burthen is about 114 tons. I wrote you before that I carried command of her; but in case of insurance, and any misfortune happens, I being a young man the insurers might have reflected on me; so as I have put in a man that has served his time to the sea, and being experienced in that way, they can make no reflections, and I shall act every thing as if the whole is insured, and hopes as before, you will lose no time; and I will not fail in it, for I am very eager on insur-[453]-ance, as we are all born to misfortunes." And in postscript to this last letter he added, "When you receive this letter, if you cannot get insurance in Glasgow, be sure to write directly to London."

It did not clearly appear, on what day the appellant received this last letter on his son; but it was evident he received it previous to, or on the 13th of August 1750, and had communicated it to Baillie James Smith: for on the 13th of August 1750, the appellant wrote a letter to the said James Mac Nair, wherein he acknowledged the receipt of his said letter of the 27th of June 1750, and gave him very particular instructions about making out his invoice and bills of lading, in the following words; viz. "You'll be sure to write Mr. David Currie merchant in London, what value you will have both of ship and cargo for our account, and you'll advise Mr. David Currie what effects you will have of Baillie Smith's, so as he may make insurance for him also; and what you order for him you'll mark S. and what you bring for us you'll mark R. M. you'll take care your invoice be sent, and send us a copy of them by London, and also by any other ship offering to our place; we will not grudge the postage of at least three of them. I made insurance from Virginia to Barbadoes for £1000, and have wrote to Mr. Currie to insure what you write for, and have received his advice that he will do it as soon as you advise him; and in case of any misfortune, the bills of lading and the voice that you send by London, or any other ship, will prove the value lost." And on the same day, Baillie James Smith wrote a letter to Mr. David Currie, directing him to make insurance for him for £100 sterling, for goods on his account from Virginia to Barbadoes, on board the *Jean* brigantine, Thomas Craig master: and added, "I am advised she was waiting for a wind and clear to sail the 27th of the last."

The appellant was not satisfied with the insurance for £1000 which he had effected previous to his receipt of his son's letter of the 27th of June 1750; for it was in proof, that on the 19th of August 1750, he went to one Mr. John Jamieson of Glasgow, in order to effect a further insurance; but upon reading the letter, Jamieson answered, that considering the contents of it, he would not insure £100 for £50 premium; and upon the appellant's asking the reason, Jamieson replied, that the goods were over valued in the letter, and that he did not like the dreaming, which to him looked like a waking dream.

This answer and refusal did not however put a stop to the appellant's attempting to effect a further insurance; for on the next day, he gave the following order in writing to Mr. Stalker his broker for that purpose, viz. "Goods aboard the *Jean* brigantine, Thomas Craig master, 4850 bushels of corn at 2s., £485; 8000 barrel staves at 40s., £16; forty-five barrels pork at 40s., £90; fifty barrels tar at 20s., £50; live stock and other goods £75, the vessel £787; £1503.

[454] "Mr. Andrew Stalker, Above is a note of the value of ship and goods freight, and of the *Jean* brigantine, Mr. Thomas Craig master, from Virginia to Barbadoes, which I value at £1503 sterling, when at Barbadoes; and desire you. as there is only £1000 sterling insured, that you'll get £350 more insured, in the terms you got the other £1000 done.—My last advices was dated Virginia, June 27th 1750; she was then clear to sail.—Yours, Robert Mac Nair."

Under this order, Stalker effected a further insurance for £350 on the *Jean* and her cargo; but which he would not have effected, nor would any insurer have underwrote it, had he been made acquainted of the ship's having only cost £360, and with the contents of the said letters of the 7th of May and 27th of June 1750, or either of them; not only for the reason hinted at by Mr. Jamieson, but because on being told how small the vessel was, and what a trifling sum she cost, and upon comparing the appellant's order to Mr. Stalker, with both or either of the son's letters of the 7th of May and 27th of June 1750, the very great difference between the son's first and second letters as to the quantity and value of the cargo, and the difference made also by the appellant, even from both his son's letters, by his order to Mr. Stalker, were too striking not to draw the attention of any man, and deter him from becoming an underwriter on a policy, where every circumstance must inform him, or give him the strongest reason to believe, that a fraud was intended.

Soon after this last insurance was effected, the underwriters on both policies were called upon for a total loss; it being alleged, that the said ship *Jean* having struck upon the rocks which lay out near upon the island of Bermudas, on the north side thereof, the crew thereupon left her, and landed in the ship's boat on the said island, and that the ship being there wrecked, she and all her cargo was lost, save a few trifles, which produced about £23 7s.

Bermudas being many leagues out of the usual due course of the voyage from Virginia to Barbadoes, the underwriters on both the policies refused to pay the loss; and the appellant and underwriters on the said last policy, whereon £350 was underwrote, having agreed upon a reference, the arbitrators, after examining the evidence, letters, and papers, had no difficulty in awarding the appellant to deliver up this policy to be cancelled.

The great difference and contradiction between the contents of James Mac Nair's letters to the appellant, of the 1st of November 1749, the 7th of May, and 27th of June 1750, coupled with proof of his greatly over-rating the burthen of the ship, so very considerably over valuing both her and the cargo, and representing the cargo to consist of so much more than it actually did consist of, together with a vast variety of other circumstances, respecting the character and conduct of James Mac Nair, all of which were in evidence in the present cause, furnished the underwriters on the policy in question with the strongest grounds to conclude, that [455] he had wilfully cast away the ship and her cargo; and therefore he was, in March 1751, brought to a criminal trial in the High Admiralty Court of Edinburgh; but it unfortunately happening, that none of the crew could be found to give evidence, except the second mate and a boy, from whom every thing during the voyage had been industriously concealed, the evidence was thought insufficient to induce a conviction; and therefore he was acquitted, though not very honourably, for the jury returned the following verdict, viz. "they unanimously find the panel hath endeavoured to defraud the insurers, by giving orders to insure



a greater quantity of goods than the ship *Jean* brigantine could hold, and by putting a value both upon his ship and cargo, much higher than their real worth; but they are also unanimously of opinion, that it was not proven that he wilfully cast away or destroyed the ship and cargo at the time and place libelled, or was art and part in so doing."

The fact found by the former part of this verdict, together with the appellant's conduct in obtaining a further insurance after he had received his son's said three letters, and what the underwriters conceived to be a notorious deviation, coupled with the very particular instructions given by the appellant, by the letter of the 13th of August 1750, to his son James, respecting his making up and sending home invoices and bills of lading, induced the underwriters, from a principle of public as well as private justice, to commence a civil action in the same Court against the appellant and his son, to reduce or vacate the policy in question; and thereupon the appellant thought proper to commence a counter action in his own name, against the underwriters to compel payment from them of a total loss under the said policy.

These causes were carried on with great spirit on both sides, and various questions were made by the counsel in the Court below; but the most material questions were, 1st, whether there was any deviation from the due usual course of the voyage insured? And if there was, then 2dly, whether such deviation was wilful, or only accidental. But supposing there was no wilful deviation, then 3dly, whether the underwriters were liable to pay the appellant the full sum of £1000 under the valuation in the policy, or only so much as was the real, exact, and true value of the ship and cargo insured?

A great variety of circumstantial and positive evidence was offered by both parties, in support and contradiction of these questions; but the two first, respecting the deviation, were finally settled upon an appeal to the House of Lords by the underwriters, in March 1770; and therefore the noticing the evidence relative to those points was presumed, upon the present occasion, to be unnecessary.

The underwriters, as to the 3d question, insisted, that an insurance is a contract made for the purpose of protecting the property of an adventurer in ships and trade from any loss, which may arise by the perils of the sea and other perils insured against, [456] on or for the particular voyage specified in the policy; and if any loss happens to the object of the insurance, the assured is to be reimbursed by the insurers, to the amount of the prime or first cost of the thing insured; that the assured ought never to gain more than the real value or amount of his loss; nor should the underwriter ever pay less than the loss, according to the customary and settled plan or rule of adjusting losses on policies of insurance, practised in the country or place where such policies are effected; that an over valuation in a policy, carries with it the strongest badge of a bad or ill intent in the assured, who never would pay a premium for more than his real property, unless he entertained some doubts about the integrity or ability of the captain of the ship, or about the ship, and proposed to benefit by a loss; that an over valuation is also contrary to the spirit of the act 19th George II. which was made to prevent the pernicious practice of making insurances interest or no interest, without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and the Legislature seems to have had it in view by this statute, to correct two evils, viz. the obtaining insurances upon ships and cargoes in which the assureds had no interest, or if there was interest, the greatly over valuing that interest, which was a temptation to the fraudulent destruction of ships; and also to oblige the assured to produce proof of interest.

The appellant, well knowing what was the customary method of settling losses at Glasgow upon policies of insurance, worded like that in question, and clearly apprehending himself obliged to prove the value of his ship and cargo, in order to ascertain the *quantum* of the loss to be paid by the underwriters; and the underwriters, possessed of a full knowledge of the custom of adjusting such policies in Scotland, and therefore conceiving themselves not liable, under the said policy of insurance, to pay the appellant more than the real and true value and amount of the ship *Jean*, and such of her cargo as did not belong to Baillie James Smith, after deducting the salvage, being £23 7s.; both parties under this idea, and

satisfied of its being the established practice in Scotland for underwriters on policies worded as that in question, to pay no more than the real true value or amount of the property insured, and to make a return of premium for short interest in cases where the ships perfected their voyages, and there turned out to be short interest; entered into proof respecting the value of both the ship and the cargo insured, or covered by the policy of insurance now in question: but this evidence of value was not before the Court of Admiralty, when the decret of the 24th of December 1754 was pronounced.

The appellant endeavoured to fix the value of the ship and cargo insured at £1434 4s. 3d. by producing a bill of lading signed by Thomas Craig, as master of the ship, but who in fact was mate, and an invoice appearing to be dated at Virginia the 16th of June 1750, and signed by James Mac Nair, as follows, viz. "To 875 [457] barrels India corn, at 12s. 6d., £546 17s. 6d.; to fifty barrels pork, at 45s., £112 10s.; to fifty barrels tar, at 15s., £37 10s.; to 12,000 barrel staves, at 45s., £27; to 3000 heading, at 70s., £10 10s.; the *Jean* cost, charges and expences on her, £699 16s. 9d. Total £1434 4s. 3d."

The underwriters on their part insisted, that this bill of lading and invoice were fictitious, and calculated by James Mac Nair and his mate Thomas Craig, who appeared to be privy to and assisting him in his designs, to impose on them a value greatly exceeding the real and true value; and that the value of the ship was clearly and indisputably fixed, by James Mac Nair's letter to the appellant, of the 1st of November 1749, by the bill of sale of the ship from Messrs. Hutchins and Tucker, wherein £450 Virginia currency, equal to £360 sterling, was the consideration; and by the oaths of John Hutchins and John Tucker, who deposed that they sold her to James Mac Nair for £450 Virginia currency. And as to the cargo, a manifest thereof from the naval officer at Virginia was produced in evidence, which shewed that 2495 bushels of corn, thirty-five barrels of pork, fifty barrels of tar, and 5650 barrel staves, were actually shipped on board the *Jean*, for the voyage in question. And John Hood, who furnished the cargo, positively deposed, that the ship from her construction could not stow or contain above eighty or eighty-three tons of cargo; and that he was certain, she could not have contained one half of the goods mentioned in the bill of lading produced by the appellant, the goods being represented therein as only half a ton short of 160 tons; that James Mac Nair told the deponent, he had wrote to the appellant to make insurance on the ship and cargo, to the extent of £700 sterling, and thereupon the deponent said, that it was too high a value, but James Mac Nair answered, that the same would be worth that or more when he came to Barbadoes; and Hood set the value of the whole cargo actually shipped, at £346 10s. 3d. sterling. In confirmation of Hood's evidence, there were affidavits made by Robert Franks, Thomas Godfrey, John Hutchins, and John Tucker, who all had either been owners, or had sailed between Virginia and Barbadoes as master of the *Jean*, before James Mac Nair bought her, and they all proved that her burthen corresponded with the evidence given by Hood.

The only question before the Admiralty Court being respecting the deviation, on the hearing of the causes on the 24th of December 1754, the Court of Admiralty "assoiled the appellant Robert Mac Nair from the reduction, and decerned the underwriters in payment to him of the sums by them severally underwritten, with a discount of £2 per cent. in terms of the policy, and of £23 7s. sterling, as the acknowledged value of what was recovered of the wreck; and the underwriters were further decerned in payment to the appellant Robert Mac Nair, of £83 1s. as the expence of extracting the decret."

[458] The underwriters, being greatly dissatisfied with this decree, exhibited a bill of suspension to the Court of Session; after which James Mac Nair died, and as to him the action abated, but it was afterwards revived against his brother and representative Robert Mac Nair jun. and after the parties had entered into evidence touching the value of the ship and cargo, the cause came on to be heard before the Lords of Session; when their Lordships, by a majority of six to five, found the wilful deviation not proved; and accordingly, on the 8th of February 1765, pronounced the following interlocutor: "On the report of the Lord Auchinleck, the Lords repel the objections to the policy of insurance, upon the act of the 19th of his late Majesty: find it not proven, that there was any wilful deviation in the voyage from Virginia

to Barbadoes; find the policy of insurance does not in this case oblige the insurers to pay the sums at which the ship and cargo were insured, but only the real value of the ship and cargo; and find the value of the ship to be £450 Virginia currency, being the original price paid by James Mac Nair for her, and as mentioned in John Hood's oath. Find that James Mac Nair's invoice is no evidence of the value of the cargo; and with respect to that, and the other points in the cause, remit it to the Lord Ordinary to proceed accordingly." Against this interlocutor, even the appellant Robert Mac Nair thought proper to reclaim, because it restricted the value of the ship to £450 Virginia currency; whereas he insisted, that there was sufficient evidence of that value amounting to £600 currency. The underwriters also reclaimed against that part of it, finding the deviation not proved: and upon the 21st of June following, both these reclaiming petitions came on to be heard; when, with respect to the appellant Robert Mac Nair's petition, the Lords thought proper to refuse the desire of it, and to adhere to their former interlocutor. But as to the petition of the underwriters, their Lordships were pleased to vary their former opinion, and to find, "That with respect to the deviation in the voyage from Virginia to Barbadoes, no action lies on the policy of insurance; and remitted it to the Lord Ordinary to proceed in the cause accordingly."

This last interlocutor the underwriters apprehended to be agreeable to their evidence, and the substantial justice of the case; yet the appellant thought proper to present a reclaiming petition, which, being answered by the underwriters, came on to be heard on the 7th of August 1765; when their Lordships, by a majority of seven to six, pronounced an interlocutor, "finding it not proven that there was any wilful deviation in the voyage from Virginia to Barbadoes." And upon the underwriters reclaiming from this interlocutor, their Lordships on the 11th of March 1766, by a majority of six to five, "adhered to their former interlocutor, and refused the desire of the petition."

George Buchanan and James Spreul, two of the underwriters on the policy in question, died; and the cause was revived against [459] Margaret, Jean, and Grizel Spreuls, as representatives of the said James Spreul, and against Andrew Buchanan, as representative of his father, the said George Buchanan.

From the said several interlocutors of the 8th of February 1765, the 7th of August 1765, and the 11th of March 1766, so far as they rejected the evidence of an actual deviation out of the due usual course of the insured voyage from Virginia to Barbadoes, the said John Graham, James Coulter, and the representatives of the said George Buchanan and James Spreul, and also all the other underwriters on the policy of insurance in question, (except James Johnson who underwrote £100 thereon,) appealed to the House of Lords; and in March 1770, the appeal came on to be heard, when the said interlocutors of the Court below, so far as appealed against, were affirmed; but the question agitated between the parties upon that occasion, was so far from being clear in favour of the now appellant Robert Mac Nair, that no costs were given him upon that appeal\*.

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\* The printed cases on this appeal were nearly similar to the present; but the arguments urged on each side being somewhat different, it is thought proper to insert them in this note.

On behalf of the appellants, who were the underwriters, it was insisted (J. Dunning, J. Dalrymple), that there was clear evidence of a deviation, considerably out of the usual course of the voyage insured; and attended with circumstances, which carried conviction of an intention in James Mac Nair so to do, even before the ship left Virginia. That the fact of a deviation being established, the respondent, though he did not admit it was wilful, had offered no evidence which could induce a belief that it happened by mistake, or the irresistible influence of any storm or current, or through any other involuntary cause. That the policy in question, being made for a voyage from Virginia to Barbadoes, and the assured, by the tenor of it, engaging on his part, that the ship should be navigated in, and not out of the usual due course of that voyage; it follows, that if the ship was not navigated accordingly, but was intentionally carried or conducted out of the usual due course of the insured voyage, the policy was from that moment discharged; agreeable to the established law in cases of insurance, which never subjects underwriters to losses, which

[460] Afterwards Archibald Ingram, one of the underwriters, died, and the cause was revived against his representative and son Archibald Ingram; and the said action came again to be insisted on, before the Lord Auchinleck, Ordinary, and the appellant [461] moved his Lordship, to ascertain the sum for which the under-

happen out of the voyage they insure for; as they cannot at the time of the contract, have a view to any perils out of the voyage, nor is any premium or satisfaction paid or made to them for the same; and equality is essential in such contracts. For if the law were otherwise, no insurer could underwrite a policy with any degree of certainty or safety; it would then be in the power of every commander of a ship, either with a view to benefit his owners, or to serve his own purposes, to increase the insurer's risque, by running his vessel into perils by a deviation, against which no adequate premium or satisfaction could be paid or made at the time of effecting the insurance, because the fact could not then be foreseen or apprehended; and this would put an end to the practice of insuring, the only effectual means which the wisdom of the commercial world has hitherto found out, of securing their property from the common perils attending its necessary transportation. That if ever there was a case in which a policy of insurance should be discharged, by reason of a deviation, it was the present, which was pregnant with circumstances that went near to vacate it for fraud; the actions, behaviour, and conduct both of the respondent and his son, being utterly inconsistent with that good faith, which in such cases ought to be strictly adhered to, and to preserve which, Courts of Justice in all countries have invariably been attentive.

On the part of the respondent it was admitted (J. Montgomery, A. Wedderburn, J. Swinton), that the ship was insured on a voyage from Virginia to Barbadoes. The question between the parties was, whether there had been a wilful and intentional deviation from the voyage insured, so as to liberate the underwriters, and vacate the policy. Throughout the whole of the proceedings, the appellants had endeavoured to maintain two contradictory propositions. 1st, That Mac Nair intended to run upon the rocks, on purpose to destroy the ship. 2d, That he intended to go to Bermudas, as a better market for his corn. Both these could not be true; and it was hoped, the respondent had proved each of them to be false. In support of the first proposition, the appellants had thought it material to impeach James Mac Nair's character; that he was in general a bad man, and capable of the crime imputed to him. For proof of this, they referred to John Hood's evidence, as to his character in general, and tending in particular to prove, that he endeavoured to defraud one Colonel Turner of £150. But what Hood swore upon this and other particulars, he did not merit any credit for; because he was partner or storekeeper for one of the underwriters, and agent for them all, in collecting and procuring evidence against James Mac Nair. He had shewn a zeal, and even a rancour, inconsistent with the character of a witness; and his depositions to prove the quantity and particulars of Mac Nair's cargo, were falsified by written evidence, recovered out of his own hands. That no colourable reason could be assigned for Mac Nair's intending wilfully to destroy the ship. Though the appellants disputed the amount of the value, yet it was proved by all the witnesses, that the vessel was fully loaded; and even Hood and Craig proved this, at the same time that Mac Nair had the strongest reason to doubt of his being insured; for though he knew the respondent's inclination to insure, yet by his letter of the 6th of March 1750, from Barbadoes, and of the 22d of May 1750, from Virginia, addressed to the respondent, he had dissuaded him from insurance on this very voyage. If he had had any view of destroying the ship in this voyage, he surely would have written the ante-dated letter from Virginia before he sailed. That letter after the wreck, plainly shewed his fear that he was not insured, and all his letters to the respondent discovered the same uncertainty, and that he was afraid to look the respondent in the face on that account, and because he had dissuaded him from insurance. It was in proof, that he sold his long-boat before he proceeded on this voyage; and that he had nothing on board but a yawl, scarcely sufficient to contain the whole crew: it was also proved, that the coast of Bermudas is very dangerous, and that no man in his right senses would venture upon it in the night time; that they actually did run the risk of their lives, by the smallness of the boat, the distance of the shore, and the darkness of the night: that

writers were liable by the policy; and after various proceedings, his Lordship directed the parties to give in mutual informations to the whole Lords of Session.

[462] This being done accordingly, on the 13th of February 1772, the cause came on to be advised by their Lordships, when the procurator for the insurers

James Mac Nair was the last man who left the ship and came into the boat, and appeared to be in great concern for the loss of the ship; Mathie the second mate expressly swore, that in his opinion there was no foul play, that the ship was not industriously cast away, but was lost by accident; and that after they came to Bermudas, he was informed, there were three or more sloops which had been wrecked upon the same side of the island, either the same night, or the night after the *Jean* was wrecked; and that some of those sloops were bound from Philadelphia to the southward. John Murchie a sailor, corroborated this witness, and swore that James Mac Nair was the last man who left the ship, and was the most anxious person; that he cut the fore-jeers after all the crew had got into the boat, and proposed to have an anchor heaved over for saving the ship, but this the crew would not agree to. He also proved the leaving the large boat behind in Virginia; and though he assigned as a reason for this, that she was crazy and shattered, yet he added, that the ship was so deeply loaded, that it would have been improper to have carried the boat along with them. As to the objection, that Mac Nair was carrying on a losing trade, it hardly merited an answer, when the above circumstances were considered, that he was uncertain if insured, and fully loaded. Had it even been true, that he had lost in trade, would he cover one misconduct with a greater, not to say a crime, and that too at the imminent peril of his life? But what strongly tended to put an end to all suspicion on this head, was his letter to Hood in December 1750, at a time when he was to stand trial for his life: he there said, "As some of the crew went from Bermudas to Virginia, you'll please acquaint them to come home as soon as possible, of which you'll be so good as advise me, if you have seen any of them; particularly John Mathie, if you know he be in Virginia, pray acquaint him to come home, as he was mate of the vessel, to make it appear how that she was; for the underwriters want very much to see some of the hands; and if you can know where he is, advise him to come home." If Mac Nair had been consciously guilty of such a crime, he never would have written in this anxious manner for the crew to come home; and it was a circumstance which must go far to presume his innocence.

With respect to the second point insisted on by the appellants, viz. That Mac Nair deviated from the voyage, with an intention of going to Bermudas to sell his corn at a greater advantage; it was said, that as Bermudas lies in the very line of the insured voyage, and seamen only keep to the eastward of it to avoid its dangerous rocks; as it was in proof, that numbers of vessels, without any intention of going to that place, are yet cast away there, of which there were three or four instances at the time of the shipwreck in question; and that during the beginning of the voyage, there was exceeding stormy weather, which might occasion the navigators to mistake their reckoning; so the ship's being actually wrecked there, did not found the smallest presumption, that the navigators had an intention of going to Bermudas; and nothing was incumbent upon them to prove but the wreck, which was not denied. That the only positive evidence which the appellants had produced, was Thomas Craig, the first mate of the ship and conductor of the voyage: but his oath did not merit the smallest degree of credit; 1st, Because, in the criminal prosecution, the appellants themselves proved him to be a person of bad fame, and not an honest man. 2d, It was in proof, that he was brought over from the Isle of Man, on purpose to give evidence in this action against the respondent, and received from the underwriters a previous discharge of all claims against himself. 3d, That before examination, he received from the underwriters several sums of money, and promises to be provided for. 4th, That previous to his being examined, he uttered the strongest expressions of malice and resentment against the respondent, declaring, *he would sacrifice his soul to hell to get amends of the respondent.* 5th, That immediately after the shipwreck, he deposed before the Governor of Bermudas, that the vessel was bound from Virginia to Barbadoes, and proceeded on her voyage till the shipwreck; which was the very reverse of what he had now sworn. 6th, That when he first came home, he told James Wilson, clerk to the tan-work at Glasgow,

having passed from the objections of *res judicata*, and consented that the Court might judge in the cause [463] with respect to the policy of insurance being a valued policy, as if the interlocutor of the 8th of February 1765, had not been pronounced, or was still open; and averred and offered to prove, that according to the invariable practice of Glasgow, where this policy was underwrote, and where both parties resided, policies, such as the present, were not held valued policies so as to relieve [464] the insured from the necessity of proving both the extent and value of the cargo; their Lordships, without permitting the insurers to give evi-

that they had no intention to touch at Bermudas, but came there accidentally. 7th, That two hours before the disaster happened, he told John Murchie, a sailor on board, that Mac Nair was in great distress, and was gone to bed, being afraid of the island of Bermudas; but Craig told him at the same time, he (Craig) would be damned if they should see Bermudas that voyage. 8th, He was contradicted in many particulars by John Mathie, as to what happened immediately before the wreck, and as to the keeping of journals. Lastly, his evidence itself carried manifest marks of falsehood; for he not only made himself the only confidant of this secret design to touch at Bermudas, but the reason he gave for it was, that they might get a better market for their corn and other goods, of which the ship was quite full. This he stated as their only view and plan; and yet, from the whole tenor of what followed in his deposition, he clearly intimated, that their plan was to cast away the ship, and that Mac Nair and himself made all necessary preparations for it. The smallest faith therefore could not be given to the improbable, contradictory, and contradicted evidence of this infamous, prepared, corrupted, resentful, and perjured witness: and which was accordingly rejected and declared unworthy of credit, by the sentence of the Judge Admiral, before whom it was taken. The only other title of evidence in support of the appellants hypothesis, was a passage in Mathie's second deposition, who swore, "that when the ship was in sail during the course of the voyage, he heard James Mac Nair say once in a joking laughing way, that he had a good mind to call at Bermudas, as he heard corn was selling at nine bitts per bushel." But Mathie did not give the least insinuation that he believed Mac Nair was serious, or that such a voyage was ever intended; on the contrary, it appeared by the whole tenor of his evidence, that he was hired for Barbadoes, and understood that the ship was intended only for that port: and nothing could be a stronger demonstration of this, than the apprehensions which he expressed, that from his reckoning he judged they had mistaken their course, and would be in danger of being too near Bermudas; which clearly intimated his opinion, that Craig and Mac Nair thought themselves at a great distance from it. It was evident that his belief, as well as that of all the crew, was, that they were bound directly for Barbadoes; and so they swore before the Governor of Bermudas, immediately after the wreck. On the other hand, the respondent had brought as strong proof as the nature of the thing would admit of, that there was no wilful deviation; but that the shipwreck happened by accident. For had James Mac Nair intended for Bermudas as a better market, no probable reason could be assigned why he should make a secret of it, from those who were to navigate the vessel; and more particularly from Mathie, who had the management of the course, for one half of the twenty-four hours. The ship was cleared out for Barbadoes, the men were all hired for that place; and as Mac Nair had, by all his letters, signified to his father that this was his intended voyage, in case he inclined to make insurance: so whatever doubts he might have about his not being insured for Barbadoes, he was absolutely certain of not being insured for Bermudas.

But it is said, that on the 1st of July they saw a sail, which they supposed came from Bermudas, and Mac Nair refused to speak with her. This surely was a strong argument that he had no intention of going to Bermudas, as this ship could have informed them of their situation, and the prices of grain, and every thing else they wanted to know. It is also said, that in the evening before the wreck, they handed their sails: and for this Mathie in his deposition assigned the reasons, namely, that they foresaw a squall coming, and the squall actually came; for though they were sailing within six points, as appeared by the journal, they went at the rate of five knots an hour, when their sails were handed. The course for Bermudas is quite different from the course for Barbadoes, and vessels bound from Virginia

dence of the said practice at Glasgow, on the said 13th day of February 1772, pronounced an interlocutor in the following words: viz. "Upon report of Lord Auchinleck, and having advised the mutual informations and whole proceedings in this cause, the Lords find the charger (appellant Robert Mac Nair) is not entitled to recover from the suspenders (respondents) the thousand pounds sterling specified in the policy, but only a sum equal to the damage he sustained by the loss of the ship *Jean* and her cargo; find that in this circumstantial case, the bill of lading and

to Bermudas keep many degrees to the westward of it, until they come into the same latitude upon its parallel, and then sail directly eastward upon it. This fact was not only proved by a cloud of witnesses, but was supported also by this solid reason; that the latitude of a place can always be found at sea by an observation: whereas the longitude cannot be discovered, and is only guessed at by what is called the dead reckoning. This calculation, owing to winds, currents, and the variation of the compass, is extremely uncertain; so that no seaman can ever be sure of the longitude of a ship's place, and therefore never attempts to come at a small place like Bermudas, upon the south or north, but always endeavours to put it upon a latitude of which he can be certain. Again: the safe course for Barbadoes is to keep at least a degree to the northward of Bermudas, and above twenty-one leagues to the eastward of it; not that this is the shortest way, but it is the safest, in order to keep clear of the rocks. By the book called the *Mariner's Compass*, which was proved to be the book the navigators trusted to, Bermudas lies in latitude 32 d. 25 m. and in west longitude 63 d. 40 m. By the journal of Thomas Craig, which was proved to have been made the rule for navigating the ship, it appeared they had an observation on Monday the 2d of July, at noon, fourteen hours before the wreck; by that observation they were in latitude 33 d. 24 m. and in longitude 63 d. 20 m. that is in other words, they were fifty-nine miles north, and twenty miles east of the middle of the island; and by the same journal it appeared, that from and after that time, the wind blew from S. W. and S. W. by S. and their course was S. S. E. and S. E. by S. Now supposing the island and ship to have been really situated as above described, it was absolute demonstration, that the course she steered was a proper course for Barbadoes, and must have carried them between twenty and thirty leagues to the eastward of Bermudas; it was true, the ship was not in the place where Craig and Mac Nair supposed themselves to be, but that was nothing to the purpose; because the conduct of the navigators of a ship is not to be judged by the true place in which the shipwreck afterwards happens, but by the place where the journal shews the conductors at the time thought themselves to be; and this appeared from the journal of Craig, who had the conduct of the navigation. Upon this journal, the appellants had from the beginning founded all their arguments, and the credit of it was supported by the whole evidence in the cause; and by nothing more than Mac Nair's own journal agreeing with it in every thing until the last twenty-four hours, and disagreeing with it only during that critical period; which shewed, that Mac Nair's journal was made up *ex post facto*, in order to apologise for his conduct, by giving a false account of the ship's course.

But it was said, that Mathie's reckoning differed, and he supposed himself on the 2d of July at noon, about a degree more westerly, and twenty-six miles more southerly; and that trusting to his own reckoning, he told them they would certainly fall in with Bermudas, and see it or feel it before morning. To this it was answered, that Mathie certainly differed in opinion from Craig, as to the situation of the ship, and the danger of being wrecked upon Bermudas; but it never entered into his head, that they were in the intention of going to Bermudas; he was only afraid, that in the course to Barbadoes, they were too nigh Bermudas. He was only second mate, a young man, hired about ten days before; and Mac Nair trusted to the reckoning of Craig his first mate, an experienced sailor, and who had conducted the ship in the two former voyages. This also answered the objection of their sailing near the wind, when they might with ease have sailed to the eastward, for Craig thought himself in no hazard. It appeared, that they were wrecked upon the north-east part of the island; and it was proved by Mathie, that if they had sailed one single point more to the east, they would have been absolutely clear of the island and the rocks. It was also in proof, that on the 1st of July they had it in their power to have steered to the westward, into the proper course for Ber-

invoice, which last is only signed by James Mac Nair, cannot be admitted as good evidence neither of the quantities nor values of the goods, which were put on board the ship in Virginia; but find that the quantities must be held to be as ascertained by the manifest of the naval officer, and the values as ascertained by the oath of John Hood, by whom the goods were most furnished; find the suspenders (respondents) are also liable to make good the value of the ship, as formerly ascertained, expence of shipping the goods, and the freight thereof from Virginia to Barbadoes, and likewise the sum paid for the insurance; but find that out of the sums afore-

mudas, had they intended that place. From all which, on considering merely the journal of the voyage, and the supposed course of the ship, it was clear the navigators of her did not intend for Bermudas, but Barbadoes; and all the circumstances upon which the contrary hypothesis was built, amounted only to this, that considering the bad weather which they had, they were too rash and venturous in their course.

With regard to the plans and opinions of ship-masters, if there was no other evidence to rely upon, the four ship-masters named by the Judge Admiral, upon the suggestion of parties, on calculating the reckoning as recorded in Craig's journal, exhibited a plan, by which the course of the ship would still have been more clear of the island, than according to the observation in that journal; and the opinion was confirmed by a great many ship-masters of skill and credit. This must greatly preponderate against the opinions of the ship-masters, produced as witnesses for the appellants, which was, that the navigators of the ship had a mind to see Bermudas; more especially, as this opinion related to plans which were made up upon erroneous principles. One of these ship-masters, namely, John Gray, after having deposed like the others, that in his opinion the navigators of the ship had a mind to see Bermudas, yet upon a question being put to him, supposing the ship to be where she was placed by Craig's journal, and Bermudas lying in 64 or 63 d. 40 m. in steering a S. S. E. course, could that course carry her to Bermudas? deposed, "that if the ship and island were in the respective longitudes and latitudes mentioned in the interrogatory, a S. S. E. course could not have carried the ship on the island, or so nigh it as to meet with any harm." And almost all the ship-masters agreed that even if Mac Nair's intention had been to have gone into the island, no man in his senses would have done it in the night time, and in the manner he did, as it so evidently endangered the lives of the whole crew. Mathie swore, that the night was quite dark, the moon being set, and that they did not see the island till day light; and one of the appellant's ship-masters swore, that no person bound to the island will go upon it in the night time, even supposing he had seen it in the day time. But further: the plans exhibited by the appellants were erroneous: some of their operators upon those plans swore, that they were drawn upon the principles of plain sailing, which supposes a degree of longitude equal to a degree of latitude, over the whole globe; others swore, that they were delineated by Mercator's sailing; and one of them swore, that their chart was neither a plain, nor a Mercator's chart. These plans did not mark the degrees of longitude; and it was obvious to the eye that they were erroneous, because they did not place the ship according to the observation on the 2nd of July, twenty miles to the eastward of the middle of the island; they placed her considerably to the westward of it, and by so doing, brought the descriptive line of her course upon the north east part of the island: but if the ship was brought eastward to the supposed place, by the aforesaid observation, the line of her course would fall considerably to the eastward of the island.

But it was said by the appellants, that the true course for Barbadoes, is twenty, thirty, forty, or fifty leagues to the northward of Bermudas; because a ship may have the benefit of the trade winds, and come in upon the north east of Barbadoes. To this it was answered by the respondent, that the trade winds begin about the Tropic, and blow from the N. E. Barbadoes is about 1200 miles south of Bermudas, and 300 miles east of it. Supposing the trade winds blew the whole way from Bermudas to Barbadoes, which they do not, a ship would have no difficulty in going to Barbadoes in a strait line; because in such a line, they would not be within ten points of the wind, and every ship can easily sail within six. But by Craig's journal of the voyage, which he made after the shipwreck, as a passenger in



said, the suspenders (respondents) are entitled to have a deduction of two per cent. in terms of the policy, as also to have deduction of the value of the goods aboard the *Jean*, which belonged to Mr. Smith, to the extent of £100 sterling; and in the last place, find the suspenders (respondents) liable for the interest of the balance, after deducting as above, from the date of the decree of the Admiral Court, and remit to the Lord Ordinary to proceed accordingly."

From the interlocutors of the 8th of February, and 21st of June 1765, the original appeal was brought; and the interlocutor of the 13th of February 1772, was the subject of the cross appeal.

In support of the original appeal it was contended (J. Montgomery, A. Wedderburn), that this was a valued policy of both ship and cargo, where not the ship only, but a considerable interest on board, were admitted to have existed. That under such policy, the assured must recover the whole sum in the policy, as he could not have any claim for a return of premium for short interest, if the ship had arrived safe. That in all valued policies, the assured having such an interest on board, as to take it out of the meaning of the statute 19 Geo. II. the constant rule has been to take the *quantum* of that interest from the value expressed in the policy, without any further proof of the quantity or value of the goods. But if any further or particular proof of the extent of interest in ship and cargo was required than the policy, it was manifest, that the value of the ship, as ascertained by the interlocutors of the 8th of February and 21st of June 1765, could not be held to be her true value at the time she was lost. For although James Mac Nair purchased [465] her for £450, yet it was proved and admitted, that she then stood in need of many repairs, and wanted no less than two anchors and one cable, to fit her for going to sea; so that the expences laid out in her outfit, which it was proved amounted to £150, were as much a part of her original price and value as the £450. Accordingly James Mac Nair in all his letters to the appellant, when under no temptation to say otherwise, fairly valued her at £600, the sum she cost him, without regard to the other expences laid out in keeping her in repair; and Hood himself swore, that the ship was always kept clean and in good order, and being built of mulberry frame, made her last better and less liable to decay than if she had been built of oak. And Alexander Montgomery, ship-master, a witness for the respondents, swore, that in May or June 1750, when he saw the ship in Virginia, he reckoned her worth £500 or £600 of that currency. And it was also proved, that two years before James Mac Nair's purchase, she had been built and sold for £700.

With respect to the cargo, the kinds and quantities were fully proved by the bill of lading, and other evidence in support of it. The respondents themselves had admitted and proved the authenticity of that paper, and in their pleadings had stated that it was of its true date, and not made up *ex post facto*, as the letter of the 27th of June. But independent of this admission, it bore every mark of authenticity, because it was written or filled up in the handwriting either of Hood or his clerk. The discrepancy between its contents, and the letter of the 27th of June, further confirmed it; and what was very remarkable, although Hood in his deposition went every possible length to discredit the invoice of the cargo, yet he did not attempt the least insinuation against the bill of lading. Nay more, no direct attack had been made upon it since the commencement of the suit, till the present time; and even now, the respondents were forced to combat it by inferences and implication only. It was proved by the tonnage bill, that the ship was rated by the naval officer at 115 tons, and the appellant had demonstrated, upon the principles laid down by the respondents themselves, that the cargo contained in the bill of lading amounted only to 130 tons; which was not near such an excess between the rated and real tonnage, as he alleged, and offered to prove was the practice in general,

the Bermudas Packet, it did not appear that this ship took any such easting as the appellants contended, in order to get the trade winds, but that she nearly followed the direct course. Lastly, that supposing even a fraud or misconduct in Mac Nair, the respondent was expressly secured in the policy against the barratry of the master, and the appellants had brought no evidence whatever of any copartnership between the respondent and his son; and therefore the respondent hoped, that there lay no solid objection in this case, upon the statute of the 19th George II.

and pointed out several particular instances in support of it. It was further proved by all the witnesses, that the ship was fully loaded; and if so, by what cargo was she filled? The cargo furnished by Mr. Hood would not fill her by fifteen tons, even according to his own computation of her tonnage; neither, according to the same rules, could the cargo contained in the manifest fill her by several tons. Hood's evidence must therefore be rejected and laid aside, as well as the manifest. But if the rate of tonnage laid down by the appellant was adopted, then it followed as a consequence, that the goods contained in the bill of lading were necessary to fill her completely. It was also proved, that James Mac Nair had funds in his hands, suffi-<sup>[466]</sup>-cient to purchase the cargo contained in the bill of lading: for 1st, It had all along been stated, and not denied, that when Mac Nair first went to Barbadoes, he carried goods with him to the value of £1100 sterling. 2d, That from thence he went to Virginia, with the valuable part of his cargo, leaving with Messrs. Harveys goods and outstanding debts to the amount of £260 currency. 3d, That at Virginia he sold his cargo for £800, drew upon the appellant for £250 sterling, and so possessed a stock of £1115 Virginia currency. 4th, That there he purchased the ship and cargo, and returned to Barbadoes in March 1750; and it appeared that the goods sold by Messrs. Harveys on that voyage amounted to £617; and upon the whole he cleared £300 Barbadoes currency. 5th, That before the sales of this cargo were fully completed, he returned again to Virginia with a cargo value £509 19s. 11d. currency, and sold it at the advanced price of £624 19s. 10d.; and besides the three remaining hogsheads of rum, he had goods on board to the value of £138 3s. 9d. prime cost. Thus matters stood at the time of Mac Nair's purchasing the cargo in question; and agreeably hereto, he in his letters to the appellant of the 7th and 25th of March 1750, uniformly rated the ship at £600 and the cargo at between £600 and £700 currency. It was proved, that the ship cost £600, and the value of his cargo was equally confirmed by the writings and accounts of third parties; so that it might be concluded, the valuation put on the ship and cargo by these letters, on which the appellant made the insurance in question, was a fair and just one. It must further be remarked, that Mac Nair, in his letters, had dissuaded the appellant from making insurance, and therefore when he had no reason to expect an insurance was made, and when he could have no bad intention, he uniformly valued the ship and cargo as above. On the other hand it was observable, how great a difference there was in his valuation by the letter of the 27th of June 1750; at that time, when, by the wreck of the ship, he was reduced to the utmost despair, he did not content himself with an estimation of £600 for the ship and £700 currency for the cargo, the former value which he put upon them; but he estimated both at near double that value. This valuation therefore, when there was a clear design of over-rating the ship and cargo, seemed to be conclusive that the former value was not over-rated, because it was a valuation made when he lay under no temptation whatever, and moreover confirmed, as before observed, by writings under the hands of other parties. If therefore the value of the ship was to be considered at £600 and that he had in his hands when he purchased the cargo in question £700, which was £100 more than by his letters he mentioned to have had in the former voyage, when he insured the like sum of £1000 sterling; it was clear, that with this last sum, he had more than sufficient to purchase the goods contained in the bill of lading, the prime cost whereof amounted to £606 currency, to which being added freight, at one third of the value, £202, and <sup>[467]</sup> the price of the ship, £600; the whole amount was £1408, besides premium of insurance, commission, and repairs of the ship, amounting to considerably more than the £1000 insured on account of the appellant; and sufficient to answer the value of Smith's goods, which were found to be only £100 sterling, both by the sum he recovered for them, and by the last interlocutor of the Court of Session.

On behalf of the respondents in the original appeal it was argued, (J. Dunning, F. Norton), that losses in policies of insurance are to be adjusted and paid by the underwriters, agreeable to the mode or rule observed in such cases in the country, or at the place, where they are effected, in regard the assured and insurers are both supposed to have that in view when the contract is entered into; and in the present case, the appellant had himself admitted, by his proceedings, and entering into evidence of the value in the Court of Session, that the policy of insurance in question

was not to be considered in Scotland as a policy which obliged the underwriters to pay the whole £1000. And this was also confirmed by the repeated determinations of the Lords of Session ; who had thereby pointed out the rule observed in Scotland, in settling losses on policies of insurance worded as the one now in question, to be by allowing the assured so far as to the full amount of his interest in the ship and cargo, which were the objects of the insurance. That the rule of adjusting insurances, which the Lords of Session have adopted, so far as it goes to the value of ship and cargo, and charges of making the insurance, is agreeable to the spirit of the statute 19 Geo. II. as it most effectually discourages the pernicious practice of making insurance for more interest than the assured really has in the thing insured ; and therefore it was substantially adhering to the intentions of the Legislature, and did complete justice to the appellant, by giving him a satisfaction to the full amount of the original value and prime cost of his ship and cargo, and expences of insuring them ; which fully answered the purposes of an insurance, and fully indemnified him from any loss arising from the perils insured against by the policy. That allowing in all cases the assured to recover from the under-writers to the full amount of the valuation set by himself in his policy, was giving the greatest encouragement to fraud, and this ought the rather not to be done in a case circumstanced like the present, where it was evident, that both the appellant and his son, who had the command of and was interested in the ship and cargo, were contriving and planning schemes to over-reach and impose upon the underwriters, by misrepresenting both the value of the ship, and the quantity and value of the cargo ; and there was no doubt, but that by the policy in question, the appellant had valued property at £1000 sterling, which in fact did not exceed £579 2s. 9d. For £450 Virginia currency, the price of the ship at par, was equal only to £360 sterling ; and deduct £145 for Mr. Smith's property, at which it was fixed by James Mac Nair's letter of the 27th of June 1750, from £346 10s. 3d. [468] the value of the whole cargo, as appeared by Hood's evidence ; and it fixed the appellant's interest in the cargo at £201 10s. 3d. to which add £17 12s. 6d. for the premium and charges of the insurance, and the whole of the appellant's interest, in both ship and cargo, was clearly ascertained not to exceed £579 2s. 9d. That the underwriters upon any policy of insurance on which a loss has happened, are entitled to the benefit of salvage ; and therefore, in the present case, the insurers were clearly to have a proportionable deduction of the £23 7s. being the produce of what was saved of the ship and cargo : for if otherwise, it would be admitting the policy to be void by the statute 19 Geo. II. which expressly enacts, that no insurance shall be made without benefit of salvage to the insurer ; and by the express words of this policy there was to be a deduction of £2 per cent. in case of loss.

In support of the cross appeal it was said, that, by the policy of insurance in question, as in all others, the underwriters did not engage jointly and severally for the whole amount of the money thereby insured ; but only engaged severally and respectively, each for himself, to the amount of the sum or sums by them respectively subscribed ; so that to make them jointly liable for any loss, was not only expressly contrary to their contract, but to common justice ; and it was equally so, to allow the appellant Robert Mac Nair to cover and recover under this policy, the freight which the ship would have made on the voyage had she performed it ; for the policy was on the ship and cargo only, and not on the freight ; and if Mac Nair had intended to insure the freight, he ought to have observed the method which is daily practised, by effecting a policy upon the freight in express terms. That a policy of insurance is not a contract which carries interest for any sums the underwriters may become liable to, on account of a loss ; they only engage to be answerable for the loss itself, not for any interest for or upon such loss : and it cannot be compared to a bond, note, or other security, which upon the face of them carry interest, or are payable on a day certain, and therefore entitle the obligee, or holder, to recover interest for his principal money up to the time of payment. Besides, the *quantum* of the loss for which the underwriters were in the present case liable, still remained unliquidated. That there never was any instance where an assured recovered interest from his underwriters, on an unadjusted policy of insurance, contested in any of the Courts of Law ; and in this case, the questions between the parties, and the various decisions of them, evidently appeared to have been such, as well warranted the underwriters

in litigating the payment of the loss demanded by the appellant Mac Nair; and from the complexion of the whole business, the great difficulty of the case, and the different determinations upon it, a case could seldom occur in which the assured was entitled to less favour, or had less pretence to hope for more than he was strictly and legally entitled to recover, or where the underwriters could be better warranted in disputing a loss.

[469] But to this it was answered on the part of the original appellant, that if he was entitled to recover any part of the sum under the policy, he certainly had an equal claim to the interest of it, during the time it had been unjustly withheld from him; and this point was now so well established by the practice of the Court of Session, that none of the Judges had any doubt upon it. In all cases, where there is a *mora* in the debtor's paying, whether arising from his disputing the principal or otherwise, interest, under the name of damages, is always awarded to the creditor from the time that the sum found to be justly owing became due, or ought to have been paid. Upon this principle, the Judge Admiral had no difficulty to find interest due from the commencement of the suit; and the Court of Session had also no difficulty in finding interest due, though they confined the period of its commencement to the date of the Judge Admiral's decree. As to the objection, that interest does not commence till the amount of the loss is ascertained, which in the present case was not yet done; it was said, that the establishing of such a rule, would be tempting underwriters to dispute and procrastinate the adjustment of losses, and would enable them to maintain ill-grounded litigations at the expence of the insured. A more pointed instance of which could not be given than what the present case furnished. Besides, it is ever the practice in open policies, to allow freight, premiums of insurance, and all charges, to be brought *in computo* of the loss; for otherwise the insured would not be fully indemnified.

After hearing counsel on these appeals, it was ORDERED and ADJUDGED, that the interlocutors of the 8th of February and the 21st of June 1765, so far as they found that the policy of insurance did not, in this case, oblige the insurers to pay the sum at which the ship and cargo were insured; and also the interlocutor of the 13th of February 1772, so far as it found, that the appellant was not entitled to recover from the respondents the £1000 sterling, specified in the policy, but only a sum equal to the damage he sustained by the loss of the ship *Jean* and her cargo; should be reversed: and it was DECLARED, that the appellant was entitled to recover from the respondents the sums by them severally underwritten, and interest thereof from the date of the decree of the Admiralty Court; and of the sum of £83 1s. sterling, as the expence of extracting the decree of the said Court, with a discount of £9 per cent. in terms of the policy, and of the sum of £23 7s. sterling, as the acknowledged value of what was recovered of the wreck: and it was further ORDERED, that the cross appeal should be dismissed; and that the Court of Session in Scotland should give all proper and necessary directions for carrying this judgment into execution. (MS. Jour. *sub anno* 1772-3, p. 219.)

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[470] CASE 5.—ALEXANDER ELLIOT and others,—*Appellants*; WILLIAM WILSON and Company,—*Respondents* [25th November 1776].

[Mew's Dig. xiii. 1214. 1 Scots R.R. 500.]

[A wilful deviation from the due course of an insured voyage, is in all cases a determination of the policy; from that moment the contract between the Insurers and Insured is at an end; and it is totally immaterial from what cause, or at what place the subsequent loss arises, the Insurers being in no case answerable for it.]

\*\* INTERLOCUTORS of the Courts of Scotland REVERSED.

Deviation is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. See Parke, c. 17; where the principles of this case, as already stated, are fully recognised. It is added, that it makes no difference

whether the insured was or was not consenting to the deviation; and if the deviation be but for a single night, or for an hour, it is fatal. But if a merchant ship carry a Letter of Marque, she may *chase* an enemy, though she may not cruise without being guilty of a deviation. Parke, 295-9. But wherever the deviation is occasioned by absolute necessity, as where the crew force the captain to deviate, the underwriters continue liable. 2 Stra. 1264. The general justifications for a deviation seem to be these; to repair the vessel, to avoid an impending storm, to escape from an enemy, or to seek for convey. See 1 Atk. 545: 1 Term Rep. 22: 2 Salk. 445: 2 Stra. 1265. But in case of a deviation from necessity, such voyage of necessity must be pursued in the direct course, and in the shortest time possible. Dougl. (271.) 284.

A deviation merely intended, but never carried into effect, does not discharge the Insurers, but they remain liable till actual deviation, or, as it is termed, the dividing-point of the two voyages. 2 Stra. 1249: Dougl. (346) 361: 2 Ld. Raym. 840: 2 Salk. 444. But if the parties never intended to sail on the voyage insured, the Insurer is discharged, though the loss should happen before the dividing-point of the two voyages. Dougl. 16.

In all cases, deviation or not is a question of fact to be decided according to the circumstances of the case, subject to the general rules relating thereto. Dougl. 781.\*\*

\*\* Parke 295, c. 17.\*\*

The harbour of Carron, situate near the head of the Frith of Forth, is chiefly resorted to by ships in the service of the Carron Company, who have a great iron work and considerable collieries in the neighbourhood. From thence vessels, intended principally to convey the manufactures of the Company, their coal and such goods as may be offered them on freight, sail periodically for Hull, and other places on the Eastern coast of England. This is a coasting or carrying trade, the vessels in going down the Frith touching at different places to take in additional loading, or to discharge part of what they have received at places higher in the river. Particularly, it is usual for these vessels to call at Borrowstoness and Leith, and at Morrison's Haven, a port six miles further down the Frith, and on the same side with Leith, in the bay of Prestonpans.

In February 1774, the respondents had occasion to ship fourteen hogsheads of tobacco on board one of these vessels for Hull, and desiring to insure them, gave the following instructions in writing to Hamilton and Bogle, insurance brokers in Glasgow: "Please to insure for our account by the *Kingston*, George Finley master, [471] from Carron to Hull, *with liberty to call as usual*, fourteen hogsheads of tobacco;" and these instructions were entered in the brokers' books for the perusal of the underwriters, as is the practice at Glasgow.

Upon the 9th of February, the appellants underwrote a policy of insurance in these terms: "Beginning the adventure of the said tobacco, at and from the loading thereof on board said *Kingston*, at Carron wharf, and to continue and endure until said *Kingston* (*being allowed a liberty to call at Leith*) shall arrive at Hull, and there be safely delivered."

The respondents were not privy to the allowance to call at Leith being thus substituted in the policy for the more general term, *as usual*, mentioned in their instructions to the broker. The premium agreed on was £1 5s. per cent. a rate equal at least, if not higher than was in use to be given on the voyage, in cases where it was understood, or expressed in the policy, that the vessel might touch at the customary ports. And in particular, some of these appellants, in February 1772, underwrote a policy upon this very vessel, and for the same voyage, with liberty to call at Leith and Morrison's Haven, at a premium of £1 per cent. only.

The vessel thus insured had sailed from Carron five days before the date of the policy, that is, on the 4th of February 1774; it did not call or touch at Leith, but put into Morrison's Haven; set sail from thence on the 9th; got safe into the direct course from Carron to Hull; cleared the Frith of Forth, and proceeded with a fair wind, till, on the evening of the 10th, the vessel being overtaken by a storm at Holy Island, on the coast of Northumberland, was wrecked, and the cargo totally lost. All these were facts admitted; nor was it alleged by the appellants that the ship received the smallest damage in going into or coming out of Morrison's Haven.

Intelligence of this misfortune reached Glasgow on the 14th of February, when the respondents for the first time saw the policy of insurance, or understood that it differed in terms from their instructions to the broker in whose hands it remained. It did not however occur to them that this slight variation would afford a handle to the underwriters for refusing payment; nor does it seem to have then occurred to these gentlemen, who immediately wrote to the respondents, desiring they would request the Carron Company to give the necessary orders for preserving the tobacco, and forwarding it to Hull, promising to contribute towards the expence so far as they were interested.

After this seeming acquiescence, the respondents were not a little surprised, when, upon the 24th of February, a protest was taken against them by all the underwriters in person, attended by a notary public and witnesses; in the instrument which they caused the notary to draw up and sign on that occasion, they were pleased to give the following account of the matter: "Upon Wednesday the 9th of February current, a policy was offered to [472] the said James Coulter, Alexander Elliot, Robert Carrick, Andrew Dunlop, and Henry Ritchie, in the office of Archibald and Gilbert Hamilton, insurance brokers in Glasgow, for their underwriting as insurers on goods, for account of the said William Wilson and Company, on board the ship *Kingston*, Captain Finley, from Carron shore to Hull, with liberty to touch as usual. Upon requiring the broker to explain what he meant, by touching as usual, he said he meant a liberty to stop at Leith Road or Harbour for a short time, in case any passengers or goods were expected from that place; and upon inquiring the advices about the time of sailing, he said that he was informed the vessel had sailed the Saturday before, being the 5th of February current. In these circumstances, the said James Coulter and the other persons aforesaid were satisfied with the conditions of the voyage, and signed the policy, which contains a liberty to touch at Leith, *and no where else*; and as the wind and weather were favourable from the Sunday to the Wednesday, they had good reason to conclude the vessel would make a safe and speedy passage to Hull. But being now well informed that, instead of prosecuting the voyage described in the policy, the said ship *Kingston*, was designedly carried into the port of Morrison's Haven near Prestonpans, where she staid four or five days, having really sailed on Friday the 4th current, taking in a large quantity of a very dangerous commodity, viz. sulphur; and from which port of Morrison's Haven she did not depart till the 9th of the month, and was the next day wrecked near Holy Island in her way to Hull; which misfortune was entirely owing to her stay in that harbour, whereby she lost many days of the most favourable winds and weather, which would have completed her voyage in safety, in place of meeting with a change of wind and storm of snow, which occasioned her shipwreck: and the said underwriters would not have underwritten upon the said policy, if they had known the vessel had been to call at Morrison's Haven, and take in an additional cargo: wherefore the said James Coulter, Alexander Elliot, Robert Carrick, and Andrew Dunlop, for themselves, and as procurators for the said Henry Ritchie, did and do protest, that this plain deviation, contrary to the express stipulation in the policy, must, according to the constant practice of merchants, render the policy null and void; and therefore they hold themselves to have no further concern in the goods insured."

The appellants persisting in their refusal, and an arbitration entered into having ended without any award, the respondents were obliged to bring their action against the appellants for payment, in the Court of Admiralty in Scotland, the only competent Court for determining questions about insurances, and other maritime affairs in that country, in the first instance. At the same time the respondents brought separate actions against the brokers, for having without orders taken the policy in terms different from the instructions; and against the Carron Company as freighters of [473] the vessel, on the ground of not having informed these respondents of an intention to call at Morrison's Haven; both these actions concluding against the several defendants, only in the event of the underwriters being acquitted.

The appellants put in their defences, which were followed by other pleadings of the parties; and on the 6th of January 1775, the Judge Admiral pronounced the following interlocutor: "Having advised process, and the defences for Alex-

ander Elliot and others, with the answers made thereto for William Wilson and Company, merchants in Glasgow, pursuers, and the replies and duplies, and the policy of insurance produced and libelled on, and the other writs produced; and having considered the whole circumstances of this case, and in particular that it is not alleged by the defenders that the pursuers were in the knowledge of the ship the *Kingston* being intended to put into Morrison's Haven, repels the defence pled by the defenders."

The appellants reclaimed against this interlocutor; and answers being put in to their petition, the Judge Admiral, in regard they set forth and seemed to found on conversations between them and the brokers, at the time of underwriting, or settling the terms of the policy, "allowed them to bring proof of what passed at and previous to making the insurance." But the appellants presented a second petition, declining to go into any proof, insisting that the cause turned singly upon the words of the policy, and demanding judgment on the abstract question, whether the vessel touching at Morrison's Haven, when not allowed by the policy, discharged the underwriters? Whereupon the Judge, by interlocutor dated the 7th of April 1775, again decreed in favour of the respondents.

The appellants then sued out a writ of suspension from the Court of Session of these sentences of the Judge Admiral, and after the usual preliminary step of procedure before the Lord Ordinary, the cause being reported to the whole Lords, their Lordships, having before them the opinions of several of the most eminent merchants both in England and Scotland, gave judgment for the respondents on the 23d of January 1776, in the following terms: "Having advised informations, *hinc inde*, and considered the policy of insurance and whole circumstances of the case, the Lords repel the reasons of suspension, find the letters orderly proceeded," (i.e. that the appellants were obliged to pay the sums underwritten, in terms of the Judge Admiral's decree,) "and decern."

The appellants having reclaimed against this interlocutor, the following judgment was, on the 7th of March 1776, pronounced by the Court: "The Lords having advised this petition, with the answers, they find the suspenders severally liable to the chargers in payment of the respective principal sums, and interest thereof, decerned for and underwrote by them; and also find them conjunctly and severally liable in the expence of the extract of the decret before the Admiralty Court, as the [474] same shall be certified by the Clerk of the said Court; and in so far find the letters orderly proceeded, and adhere to the former interlocutor; and as to all other expences found due by the Admiral, they suspend the letters *simpliciter*, and decern and find the suspenders liable in the expences of the extract before this Court, as the same shall be certified by the collector of the clerk's dues, and decern, and find no other expences before this Court due."

From these several interlocutors the present appeal was brought; and on behalf of the appellants it was contended (J. Dunning, A. Macdonald), that a wilful deviation from the due course of an insured voyage is in all cases a determination of the policy; from that moment the engagement between the insurers and insured is at an end; and it is immaterial from what cause, or at what place, a subsequent loss arises, the insurers being in no case answerable for it. The going into Morrison's Haven was a wilful deviation from the due course of a voyage from Carron to Hull; and though it may be true, as contended on the part of the respondents, that ships sailing through the Frith of Forth, have sometimes been permitted by the terms of a policy underwritten at the same premium as the present, to go into this port, it would not avail them in the present case, since this policy gave no such permission. The respondents appeared by their instructions to their broker to have been aware, that the going without permission into any port but that of their destination, would be a deviation; and the broker, finding it difficult to get a policy underwritten on any other terms, thought fit to restrain the liberty of calling to the port of Leith. But, independent of what passed between the broker and the underwriters before their signing this policy, it was submitted, that a policy, penned like the present, giving liberty to call at one port, excluded every claim to a liberty of calling at any other.

On behalf of the respondents it was said (E. Thurlow, A. Wedderburn), that what the appellants called a deviation in this case, could not have the effect of

vacating the policy, there being neither an increase nor a difference of risk; for the voyage, as actually made, was one and the same chance with that insured against, even taking the policy in the strict sense contended for. The appellants indeed, to give a colour to their plea, by the appearance of a different risk, argued that the loss was occasioned by going into Morrison's Haven; for had there been no interruption of the course from Carron to Hull, the vessel would have escaped the storm which overtook it at Holy Island. But as the vessel was allowed to call at Leith, without any limitation of the time of staying there, the risk of the voyage being prolonged by calling at a port in the course of it, was clearly undertaken by the insurers; and it made no difference of hazard, whether that port was Leith or Morrison's Haven; policies of insurance are to be construed largely, and for the insured; a rigid adherence to literal terms has been deservedly reprobated in Courts of Law, and among merchants. Every voluntary deviation from the direct line has not the effect to discharge the underwriters, it [475] being sufficient if the voyage is *according to usage*. But the appellants' argument went even farther than literal interpretation, for they would construe "liberty to call at Leith," as a direct prohibition to call any where else; though the juster and more natural conclusion was, that had such prohibition been intended, it would have been expressed; and as it was not disputed, that vessels in the trade from Carron to Hull usually touch at Morrison's Haven, and that this consisted with the knowledge of the appellants, the voyage, *as made*, was according to usage, and within the intent of the policy. The appellants were not at liberty to deviate from the respondents' instructions shewn to them, but ought either to have kept to the precise terms of those instructions, or not have signed the policy at all; especially when they were told, that the vessel had previously sailed. If their plea now was not affected, their conduct then was insidious and wrong; and as, by their silence, the respondent was led to believe himself secure in all events, they were in equity obliged to make good his loss.

Like most other questions arising from insurance, the present fell to be judged upon equitable principles, resulting from the special circumstances of the case: and when all circumstances here were considered, the plea of the appellants must be deemed an attempt to evade payment, equally illiberal and ineffectual. An express allowance to call at one port being given, the vessel passed it and touched at another, only six miles farther down the river, and in the course of the voyage insured. The alleged deviation was singly the act of entering Morrison's Haven; for the vessel's sailing close by it never could have been so termed, so near was it to the direct course of the voyage; and nothing being more common than to tack from one shore to the other in going down the Frith; calling at Leith, or at Morrison's Haven, was but the difference of a name, for the time of staying at the port mentioned in the policy was not limited. The risk was not greater, as it is allowed by every person acquainted with the coast, that Morrison's Haven is even a safer and more accessible harbour than Leith; and in fact no damage was sustained by the deviation, the vessel having regained the direct course to Hull, and being wrecked after proceeding in it several leagues. But further: the words in the policy, whatever the appellants now affected to understand by them, seemed to have been used as synonymous with those in the respondents' instructions to the broker. The appellants admitted having seen the instructions, and asked the broker what was meant by *calling as usual*. The words inserted in their place could not be intended to limit the more general term, because the insured were neither masters of the vessel, nor had any direction or knowledge of the precise course of the voyage; and because it was understood by all the parties concerned, that the vessel had sailed from Carron three days at least before making the insurance, and consequently might be in some other port at that instant, as it actually was; a circumstance which it was not impossible for the underwriters to be acquainted with. It was evident, there-[476]-fore, that the broker could not possibly mean to make the policy void, in case the vessel had called, or might call, at the other usual places besides Leith; and if the appellants *tacitly* entertained such an idea, having the instructions before their eyes, being acquainted that the vessel had already sailed, knowing the usage, and taking the accustomed premium, they were guilty of a fraud, from which they could not be allowed to reap any advantage.



BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the interlocutors complained of should be reversed: and it was DECLARED, that the respondents were entitled to a return of the premium paid by them to the appellants: and it was therefore ORDERED and ADJUDGED, that the appellants should pay or cause to be paid to the respondents the said premium. (M.S. Jour. *sub anno* 1776-7. p. 105.)

CASE 6.—JOHN ALSTON and others,—*Appellants*; COLIN CAMPBELL and others  
—*Respondents* [3d March 1779].

[Mew's Dig. xiii. 1130. 1 Scots R.R. 534. See *The Innisfallen*, 1866,  
L.R. 2 Ad. and E. 72: and M.S.A. 1894, s. 34.]

[A. having insured £800 upon his own ship, and being greatly indebted to B. deposits several securities in his hands, and also makes an absolute assignment to him of this ship. The ship was afterwards lost. On an action brought against the underwriters to recover the insurance, they insisted that the policy was void for want of interest, under the statute 19 Geo. 2. c. 37. (against wager-policies,) A. having sold the ship previous to the loss. But it was held, that he had a sufficient interest in the ship at the time of the loss; the real transaction being no more than a pledge or security for the debt due to B.]

**\*\*INTERLOCUTORS of the Scotch Courts AFFIRMED.**

This seems a case *primae impressionis*: and it appears the defence was thought a very weak one, by the large costs given in the appeal.\*\*

The *Snow Frederick*, of which Richard Caldwell, merchant in Londonderry, was the sole owner, sailed from Ireland to the West Indies in 1773, insurance being made upon the outward voyage to Grenada, at Glasgow, by the respondents Campbell and Company, for account of Mr. Caldwell. The vessel arrived safe at Grenada, and from Grenada went to St. Christophers; from whence Campbell the master wrote to Mr. Caldwell, upon the 13th of August, acquainting him that he proposed to sail the same day for Jamaica, and to call at St. Eustatia.

The respondent M'Allister being in advance and under acceptances for Mr. Caldwell to a large amount, and having wrote him pressingly for remittances, received a letter from him dated the 14th of November 1773; in which, after mentioning disappointments which prevented his remitting, and that he feared the consequences, he says, "However, as your engagements for me are of that nature which demand a preference to every other, I have thought it expedient to secure you against the worst; so that if you possibly can procure any aid in meantime to defend you against your acceptances, you are not in the smallest danger [477] of suffering a farthing by me. The *securities* I now inclose you are—

|   |       |
|---|-------|
| First, a bill of sale of the <i>snow Frederick</i> , for which I paid at the outset of her present voyage . . . . . | £700  |
| An assignment of her freight home . . . . .   | 300   |
| Ditto of the goods sent out by her . . . . .  | 500   |
| Ditto of goods in the hands of John Martin . . . . .  | 550   |
| All these, I doubt not, will produce you . . . . .  | £2050 |

beside the flax sent you; which, on the whole, will sufficiently guard you against every engagement you are under for me: all I dread is the temporary distress it will occasion to you." He then expressed his hopes that these *securities* would soon come round to reimburse Mr. M'Allister; and he added, "Campbell, I think, must soon appear. You will have it in your power to order him directly to Dublin, or where you please; and, I trust, he alone may bring sufficient with him to relieve you of every difficulty on my account. I shall attend your answer to this with the utmost anxiety; and, for God's sake, weigh matters well ere you take any resolution, except it be to resist the pressure for a few months, which must relieve you."

The bill of sale was in the form of an absolute transfer, for the consideration of £700 in hand paid, and the receipt whereof it acknowledged. The assignments were in the same style, being all operations of Mr. Caldwell's, and unknown to the respondent till receipt of the letter inclosing them.

To this letter the respondent M'Allister returned an answer, describing the shock given him by the intelligence it conveyed of Caldwell's situation; and adding, "You have, I believe, given me all the *securities* in your power, but this you should have done earlier; for, should you not be able to stand your ground some little time, it would involve me in a suit under the bankruptcy act, should that be issued against you, and wrest the effects out of my hands. To guard as much as possible against that, you must send me every necessary paper relating to the ship, such as any prior bill of sale handed to you, charter-party with the master, bills of lading if come to hand, and policy of insurance if you have it, or any other paper you think can serve me; and if you can hold up for some little time, the transaction would have a better appearance. If the policy of insurance hath not been sent you, you must give me an order on those whose hands it remains in, and let me know the sum covered; and, I beseech you for God's sake, if you can think of any other thing more expedient for my security, that you will do it. You can have no idea of the distress you have brought upon me, and it lies upon you to extricate me in the best manner you can. *You will inform me every circumstance relating to the ship*, and when you received any letters from her; and also give me an order on the captain to deliver the cargo to my order, and to [478] proceed wherever I shall direct; and what returns you expect by her, or any other information that may occur to you on that head. I am your much distressed," etc. The respondent again wrote Mr. Caldwell, "Your intentions to me am satisfied is just *with regard to securing me in the best manner*; and if you can support yourself against the bills that are not under my acceptance, I hope things will take a more favourable turn."

Mr. Caldwell wrote to the respondent, on 21st November 1773: "Inclosed you have the original bill of sale I had of the *Frederick*, from Mr. William Caldwell, of whom she was built. The last account I had of her was from St. Kitts, the 13th of August; she was then sailing down to Jamaica, where the captain had orders to sell his cargo, and load home with rum. The instant I hear from him, you shall be advised; and, as he had orders to touch at Broadhaven on his homeward passage, you can, from that, order him where you please. Inclosed is a letter to him for that purpose, which you may keep by for some time, till I give you the first news I hear from him. No insurance is yet ordered on him home; it will be time enough when the date of his sailing can be ascertained. Inclosed is a letter for Mr. Martin, which you will forward. I shall deliver yours to Major to-morrow, and enforce his remittance as much as possible. If you don't hear from him *per* next post, you must make some attorney write him a letter. I send you inclosed the bills of lading for the goods *per* Campbell out. The ship was insured at Glasgow. I have not the policy, nor is it material in the outward passage. There is nothing I can devise for your security that shall not be complied with; and, for God's sake, let me beseech you to bear up. I hope there is not a possibility that your security can be impeached." He again wrote to the respondent, on the 23d; "I wrote you last post, inclosing sundry papers relative to the *securities in your hands*: *I trust there is nothing on earth can invalidate the securities you have got*. As soon as I hear the least account of Captain Campbell, you shall be advised."

The respondent M'Allister afterwards caused insurance to be made upon the homeward voyage from Jamaica to Ireland, but no insurance was made by him upon the voyage from St. Christophers to Jamaica.

Mr. Caldwell was indebted to the other respondents, Campbell and Company, about £800, including £192 for furnishings to this ship the *Frederick*; and one of their partners being at Londonderry, suggested to him the propriety of covering the vessel for the whole voyage; whereupon he wrote the following letter: "Londonderry, 10th December 1773. Messrs. Colin Campbell and Company. Sirs, I have received a letter from Captain James Campbell of the snow *Frederick*, dated St. Kitts, 13th August, advising, he was that day clear to sail for Kingston, Jamaica, having already been at Grenada, to which place you insured this vessel; but, not

being able to sell there, he was [479] proceeding to leeward, and in his way would touch at St. Eustatia. You'll please therefore, on receipt of this, to get leave, on the former policy, for the vessel to proceed from St. Kitts to Jamaica, with liberty to touch at St. Eustatia, paying such additional premium as may be judged adequate; or if it is thought better to open a new policy for the like sum of £800 sterling, I am equally satisfied. The above is the last account I had of the vessel. The captain writes, that she was tight and in good order; so that I hope the premium will be moderate. I am, Sirs," etc.

A policy was accordingly opened at Glasgow on the 28th of December 1773, and under-wrote by the appellants, "To and in favour of Messrs. Colin Campbell and Company, for account of Mr. Richard Caldwell, upon the body, tackle, coats, apparel, and other furniture of and in the *Frederick*, whereof James Campbell is master, for the present voyage, beginning the adventure upon the said body and others foresaid, at and from St. Kitts, and to continue and endure until the said *Frederick* shall arrive at St. Eustatia, while there, from thence to Kingston in Jamaica, and till said *Frederick* shall be there safely moored: the said body and others foresaid shall be valued at £800."

Upon the 17th of January 1774, intelligence was received of the vessel's having been lost in the passage from St. Kitts to Jamaica, by letters from the master, dated at Philadelphia. It appeared that the misfortune happened upon the coast of St. Domingo, from whence the master and one or two of the men, after a variety of adventures, got to North America; and the same thing appeared from proceedings had before the Admiralty Office of Jackmel in St. Domingo.

The respondents Campbell and Company, as creditors of Caldwell used arrestments in the hands of the appellants; and in the character of arresters, as well as being the persons to whom the sum was payable by the policy, brought their action in the Court of Session against the underwriters, for payment.

The appellants at first made some difficulty, implying a suspicion that the loss might have been known before insuring. The respondent M'Allister being informed of it by the other respondents, made an affidavit particularizing circumstances, which removed all doubts on that head: but this affidavit stating the bill of sale by Caldwell to M'Allister, in November 1773, the underwriters immediately started the objection, that Caldwell had no interest in the ship at the time of making the insurance

To satisfy them on this head, the respondent M'Allister made a fresh affidavit, explaining the nature of the transaction between him and Caldwell, and deponing, "That he did not receive the bill of sale under any other intent, meaning, or idea, but as part security for the debt due to him by the said Richard Caldwell, and to account with or allow to him all such sum or sums of money as should or might arise or accrue to him the said John M'Allister, from the neat produce of said ship, when actually [480] sold, as intended to be done after her arrival; and also from the neat produce of the homeward freight of said vessel; or, in case of loss, to the produce of any insurance which might happen to be effected on said vessel or freight at the time of such loss, either by means of the said Richard Caldwell, or this deponent, whether the same should amount to more than the £700 already mentioned." And Caldwell also made affidavit, mentioning the whole particulars, and said, "That it was not his intention to charge the said John M'Allister with the sum of £700 or any other greater or lesser sum than should, *bona fide*, arise and accrue from the actual sale of the snow, which was intended to be made after her arrival, and from the homeward freight, after all the expences attending the same should be deducted; or, in case of the vessel's being lost, from the produce of any insurance which might be made upon her; and that the bill of sale, though absolute, was meant for no other purpose than as above; and all this, by reason that the said Richard Caldwell was then considerably indebted to the said John M'Allister."

The action having come before the Lord Gardenstone, as Ordinary, the respondent M'Allister put in his claim; and it was reserved to him to plead his preference, when the main question, whether the underwriters were liable, should be determined as between the appellants and the other respondents.

The appellants pleaded, that the policy was void by the statute of the 19th of

his late Majesty, in respect that Caldwell, for whose account it bears the insurance to have been made, had then no interest in the vessel, having previously sold the property to M'Allister. And the Lord Ordinary at first acquitted the underwriters; but the respondents having stated the case more fully in a representation, along with which the letters of correspondence between Caldwell and M'Allister were produced, to shew there was no absolute sale, but only a pledge or security; answers were put in for the appellants, in which they did not take any objection to the letters; but insisted, that they did not shew the nature of the transaction to be otherwise than an absolute transfer, leaving no interest in Caldwell which could entitle him to make insurance; and thereupon the Lord Ordinary, on the 9th of July 1777, pronounced the following interlocutor: "Having considered the case proposed by both parties for the opinion of merchants, and having also resumed the consideration of the representation and answers, together with the correspondence between Caldwell and M'Allister, produced with the representation, judges, that it is now unnecessary to resort to the opinion of merchants, as the case must be determined, on a rational and legal construction of the said correspondence, as relative to the bill of sale or vendition of the ship: finds, that though the bill of sale is by its tenor and *ex facie* an absolute vendition, yet the same is qualified by the relative correspondence of the parties, which imports only a conveyance in security of the ship and other [481] particulars mentioned in the said correspondence: finds, that notwithstanding this conveyance in security, Caldwell continued to have such legal property and interest in the ship as entitled him to make insurance upon her; therefore alters the former interlocutor, finds the pursuers entitled to recover the insurance money, and decerns."

The appellants presented their petition to the Court, stating and admitting the policy of insurance, the bill of sale by Caldwell to M'Allister, the letters of correspondence between them, and their affidavits; "but endeavouring to shew that the case, nevertheless, came within the statute: upon considering which, with answers for the respondents Campbell and Company, the Court of Session, on the 19th of November 1777, pronounced the following interlocutor: "The Lords having advised this petition, with the answers, they adhere to the Lord Ordinary's interlocutor reclaimed against, and refuse the petition: find the petitioners liable in expences of process, of which ordain an account to be given in." And by an after interlocutor of the 20th of December, the respondents' costs were taxed to £30 with the expence of the extract.

The cause having then returned to the Ordinary to determine upon the different interests of the two respondents, they represented by their counsel, that they had come to an agreement, and prayed that the appellants might be ordered to pay the money in question to them by equal proportions; whereupon his Lordship pronounced the following interlocutor: "Prefers Colin Campbell and Company, and John M'Allister and his attornies, *pari passu*, to the sum of £800 sterling, and decerns in the preference in the forthcoming, and for payment accordingly." And the appellants having presented their representation against this last interlocutor, it was refused by the Lord Ordinary.

The appellant therefore thought proper to appeal from all the interlocutors, insisting (J. Dunning, G. Elliott), that the policy was void for want of interest, Mr. Caldwell having sold the vessel by a deed of sale to Mr. M'Allister. That the evidence offered by the respondents to qualify that sale is inadmissible, because it consisted only of affidavits made by M'Allister, who was a party, and Caldwell, who was materially interested, for the purpose of establishing their own right; and of letters between the same parties, which were not authenticated, and which Caldwell and M'Allister were both incompetent to authenticate. That the evidence offered by the respondents was accompanied by many circumstances of suspicion, which, independent of its inadmissibility, required that it should be received with great caution. And that the correspondence which was brought to overturn the deed did not impeach, but rather confirmed its import.

On the other side it was said (A. Wedderburn, A. Macdonald), that although it may otherwise appear upon the face of the instrument executed by Caldwell, yet there was no absolute or immediate transfer of the property in the ship for value paid or agreed upon; nor could that be meant under [482] the circumstances of

this case. The real transaction was no more than a pledge or security lodged with M'Allister, the value whereof would of course be allowed to Caldwell, when it was made effectual, or the proceeds were actually in M'Allister's hands; but, till then, his demand against Caldwell remained as before. As therefore the loss of the ship in the interval must have been sustained by Caldwell, an interest subsisted in him sufficient to warrant him in insuring her. And though in the event which had happened, the benefit of the insurance might come to M'Allister as involved in the pledge, that did not vary the case, and was no concern of the appellants.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the several interlocutors complained of, affirmed, with £80 costs. (MS. Jour. *sub anno* 1779. p. 372.)

CASE 7.—JOHN THOMSON,—*Appellant*; GEORGE BUCHANAN and others,—*Respondents* [13th March 1782].

[Mews' Dig. xiii. 1178; *Thompson v. Buchanan*, 1 Scots R.R. 562.]

[It is established by the law of every mercantile state, and the uniform determinations of the Courts of Westminster-Hall, that the suppression or concealment of *material* intelligence respecting a matter of insurance, whether fraudulent or not, vitiates the policy.]

\*\* INTERLOCUTOR of the Court of Session in Scotland, REVERSED; DECREE of the Judge Admiral there, AFFIRMED.

The policy is void if the broker conceal any *material* circumstances, though the only ground for not mentioning them should be, that the facts concealed appeared immaterial to him. *Shirley v. Wilkinson*. Dougl. (293.) 306. n. But the thing concealed must be some *fact*, not a mere speculation or expectation of the Insured. *Barber v. Fletcher*, Dougl. 292; (305;) which seems also the point of the present case. And there are many matters as to which the Insured may be innocently silent: 1st, As to what the Insurer knows: 2d, As to what he ought to know: 3d, As to what lessens the risk. See *Carter v. Boehm*, 3 Burr. 1905: 1 Black. 593: *Planche v. Fletcher*, Dougl. 238. (251.): Parke, c. 10. And also the *reasons* for the respondent in the present case.

In all cases of fraud, wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person interested himself, or of his *agent*; for in either case, *the contract is founded in deception*, and the policy is consequently void. And this rule prevails, though the act cannot be traced to the owner of the property insured. *Stewart v. Dunlop*, in Dom. Proc. 1785: *Fitzherbert v. Mather*, 1 Term Rep. 12: Parke, c. 10.

The present case (*Thomson v. Buchanan*) does not appear to have been a case of fraud or concealment, though that was *alleged* by the under-writers in their defence, on which the ultimate decision was against them.

In the case of *Campbell & al. v. Russell & Co.* in Dom. Proc. 4th March 1794, a strong case of concealment was made out; and the House reversed the interlocutors which affirmed the sentence of the Judge Admiral, who had held the Insurers liable. The present case was there cited, both as to the doctrine of concealment in general, and also as to the duty of the Insurer in respect to what he ought to know. The case of *Campbell v. Russell* itself depending more on its private circumstances than on any disputed principles of law, it did not seem necessary to insert it in this work, which is perhaps already too much swelled by cases of that description.

[483] As the case of *Stewart v. Dunlop* established a material rule, and went on particular circumstances, a short state of it is here inserted. It was omitted by Mr. Brown in his collection of Cases for this work.

STEWART &amp; AL. V. DUNLOP &amp; AL. 8th April 1785.

This case came before the House on an appeal from the Court of Sessions in Scotland, which had determined in favour of the respondents, the Underwriters. The case was shortly this: A man having arrived in the brigantine *Henrietta* at Greenock, knowing of the loss of the ship insured, and meeting a Mr. Boog, a friend and intimate acquaintance of the Insured, and a partner with him in some other adventures, communicated the intelligence of the loss of the ship to him; *who desired it might be concealed*. The same day, as appeared by the evidence, Boog held a conversation with the plaintiff's clerk, who made this deposition; "That neither at that time, nor at any other time of the said day, had he any conversation whatever with the said Mr. Boog, or message from him, either in writing or otherwise, relative to the *Peggy* (the ship insured); nor did he get *any hint* from him, or any other person, relative to the making Insurance upon her, further than the said Mr. Boog's asking the deponent if he knew whether there was any insurance made upon her, and if there was any account of her." After this conversation, the plaintiff desired the clerk to get an insurance effected; which he did, without stating a word (at least it did not appear that he stated any) of this conversation to his master. Upon the whole of the evidence in this cause, although it did not appear by any deposition, that the plaintiff knew of the loss of the ship at the time he made the insurance, the Lords of Session decreed, "That the Insurance made by the plaintiff *would not have been made*, if the brigantine *Henrietta* had not arrived in the road of Greenock the day preceding, and brought intelligence that the ship *Peggy* was taken; and, therefore, *that the policy was void*." The House of Lords confirmed this decree; considering clearly, as it should seem, according to the terms of the decree of the Court of Sessions, that the contract was founded in deception.

The case of *Fitzherbert v. Mather*, mentioned above, was decided expressly upon the point of *fraud in the agent*; it appearing that the Insured himself was not guilty of any improper conduct. 1 Term Rep. 12. See Parka, c. 10.\*\*

The appellant having, in summer 1778, freighted his ship *Griesty* for Gibraltar, with orders, after unloading there, to proceed to Malaga, there to load and return to Leith, he insured the ship to Gibraltar, and directed the master to advise him of her arrival there, for his government in insuring from Gibraltar to Malaga, and back. Accordingly, the ship having arrived safe at Gibraltar, Lamb the master, on the 28th of September 1778, wrote the appellant as follows: "This is to acquaint you of my safe arrival here yesterday, after a long hard passage; and to acquaint you, that there is as much danger in going from here to Malaga, as coming from England here. I hear that the merchants at Malaga won't ship any goods on board of English ships, before they hear of a convoy to take them from there. I am going to write to Ferry to-morrow by post, to hear what he thinks of it; for there is a great many ships at Malaga that is chartered, and the merchants won't ship on board of them. They are shipping on board of Spanish ships for London. I shall write my wife by next post, and by that time I shall be able to give you a more full account of things how they are."

Upon receipt of this letter, the appellant made inquiry at Edinburgh, and also wrote to his correspondents at London and Glasgow, to know upon what terms he could get the vessel insured. A premium, which the appellant thought exorbitant, being asked [484] at all the places, as the Mediterranean was supposed to swarm with French privateers, a good deal of time was spent; but at last the insurance was done at Glasgow, though at no less a premium than twenty-five guineas per cent. The policy, which the respondents under-wrote to the extent of £600, bore to be on the ship from Gibraltar to Malaga, and from Malaga to Leith, with liberty to call at Gibraltar, and against all losses from enemies, sea, hazard, etc. in common form; and it particularly mentioned, that the last advice was from Gibraltar, of the 28th September 1778; that the vessel only arrived there the day

before, and had a cargo to discharge; and if she sailed with convoy from Malaga to Gibraltar bound to England, and arrived safe, five per cent. should be returned.

On the evening of the day on which the insurance was made at Glasgow, viz. 20th November 1778, the appellant at Leith received a letter from Lamb the master, dated from Almeida the 21st of October 1778, advising, that the ship having sailed from Gibraltar on the 9th of October, was taken off Malaga by a French privateer, and carried into Almeida.

This intelligence was immediately communicated to the respondents, and the appellant, upon getting the proper documents of the loss, laid the same before them, with every advice which he had relative to the ship. And Lamb the master having returned home in May 1779, made affidavit as to the capture; but the respondents declined making payment, on pretence that the appellant should have laid before them the shipmaster's letter of the 28th of September 1778, as it contained, they said, material intelligence which ought to have been communicated to them: they also pretended that another letter had been wrote by the master to his wife, he having said in his letter of the 28th of September, that he was to write to her next post, though they were assured by the wife herself, and by Lamb upon his return, that no such letter had been written or received; and they even insinuated that the appellant knew of the loss before ordering the insurance.

The appellant was therefore obliged to bring his action against them before the High Court of Admiralty of Scotland, for payment of the sums respectively under-written on the ship; and the respondents having given in defences, insisting upon the topics abovementioned, they prayed examination as to the letter alleged to have been written by Lamb to his wife, from Gibraltar; and the Judge Admiral ordained the appellant to exhibit the said letter upon oath, and granted diligence also against Lamb and his wife.

Lamb was accordingly examined, and deposed, that though in his letter to the appellant of the 28th of September, he said he was to write to his wife next post, yet in fact he did not write to her from Gibraltar; but wrote a letter to the appellant, and another to his wife, on the 21st of October, from Almeida.

The appellant deposed, that he had no other advice of the loss of the ship than that contained in the letter from Lamb of the 21st of October; and that he had not in his possession, nor did he know [485] or suspect where such letter as that alleged by the respondents was. And Mrs. Lamb deposed, that her husband wrote her a letter from Almeida, that she delivered it to the appellant a day or two after she received it, that said letter was dated 21st of October 1778.

On the 18th February 1780, the Judge Admiral, after advising the depositions and different papers, allowed a proof of all facts and circumstances tending to shew, that prior to the 20th November 1778, the date of the policy, the appellant knew of the ship having been taken and made prize of; and in general allowed the respondents a proof of all their allegations, and of all facts and circumstances they might think material thereto, and a joint probation to the appellant.

The respondents becoming sensible that all their insinuations were groundless and injurious, and that the only reason why the insurance had been made so late, was the appellant's making trial where he could get it cheapest, moved the Court for judgment on the cause as it stood; and in consequence of their thus declining to bring farther proofs, the Judge Admiral *circumduced the term*, and found the respondents liable for the sums severally under-written by them, and interest thereof from the 1st July 1779, and decerned. And afterwards, upon a petition for expences, with answers, the Judge modified the expence to £4 sterling, and decerned for the same, and for the certified expence of extracting the decree, being £6 13s. 4d.

The respondents presented to the Court of Session a bill of suspension of this decree of the Judge Admiral, upon the single ground, that the master's letter of the 28th of September 1778, quoted above, ought to have been communicated to them, and that keeping back the intelligence it contained made the policy void.

The appellant had not withheld the letter from any desire to conceal, but truly because it had never entered his imagination that it contained any intelligence material to the under-writers; and he now pleaded, that he was under no obligation to communicate to them the contents of such letter: but the Lord Justice

Clerk, Ordinary, appointed the parties to lodge informations, that the question might be reported to the Court; which was done, and the following interlocutor was, 20th June 1781, pronounced: "The Lords suspend the letters *simpliciter*, and decern."

The appellant conceiving himself to be greatly aggrieved by this interlocutor, appealed therefrom; and on his behalf it was insisted (H. Dundas, J. Dunning), that although it may be incumbent on one who offers a policy to an under-writer to communicate every *fact* within his knowledge, which the under-writer may be supposed ignorant of, and which is material to guide him in computing the premium he is to demand, or determining whether he will under-write the risque at all, yet it is not necessary for the assured to communicate matters of public notoriety, or his own or his correspondents *speculations* upon the risque or the degree of danger to which they may fancy the voyage exposed. There was no *fact* disclosed by [486] the master's letter of 28th of September 1778, (the only channel by which the assured are alleged to have had intelligence,) other than the date of the arrival at Gibraltar, which was communicated; for as to *there being as much danger in going from Gibraltar to Malaga, as from England to Gibraltar*, it was no more than the captain's opinion, founded upon circumstances no better known to him than to the under-writers, who were aware of a considerable degree of danger, as was evident from the high premium they took. The captain's representation of what was doing at Malaga, according to his information received at Gibraltar, was no more than that the merchants were acting as the notorious state of the Mediterranean seemed to render prudent, and plainly was rather intended to shew the appellant the chance of his ship's not getting a freight at Malaga, than her danger from the enemy. No person could consider this part of the letter as stating facts to be depended on, or that consisted with the master's knowledge, but merely matter of vague report; and really it had no foundation, for it is certain that at this very time many English ships were loading at Malaga. In a word, there was nothing mentioned or alluded to in the letter, which the respondents, in the middle of a war between Great Britain and France, could be ignorant of, or which it was reasonable to suppose would have prevented their under-writing upon the terms they did.

On the other side (J. Wallace, A. Macdonald), it was said to be established by the law of every mercantile state, and the uniform determinations of the Courts of Westminster Hall, that the suppression or concealment of material intelligence, whether fraudulent or not, vitiates a policy of insurance: and the appellant was in good faith bound to lay before the respondents, at the time of making the insurance, the letter of advice from Lamb his ship-master, which contained intelligence which they could not be presumed to know, and which was material to have been communicated in order to enable them to ascertain the premium on the voyage they were applied to insure; and as by the concealment or suppression of that letter, and the alarming intelligence it contained, the object of the policy was materially varied, the risk understood to be run greatly changed, and the respondents grossly deceived, the policy is void.

But to this it is objected, that there was no concealment, the respondents did not desire to see the letter, nor did it occur to the appellant that there was any reason to shew it to them, as it contained nothing but public news, nothing but what was a political peril from war, which the respondents were bound to know, and which in fact they did know, as appeared from the exorbitancy of the premium they required: the letter, had it been shewn to them, would not have led them to demand more, but probably would have induced them to take less. The answer to this was, that the respondents had not an opportunity to ask to see the letter. The appellant, on the 19th November, wrote his broker, that he could not get the ship insured at London for less than twenty-five [487] guineas: "If you can get £600 insured on said brig, at and from Gibraltar to Malaga and to Leith, at twenty-five guineas, will please do it. *You must advise me by five o'clock in the evening.*" And so precipitately was this business transacted, that the insurance was completed at Glasgow, forty-five miles distant, the very next day, the 20th; and the same evening advice was received of the capture of the ship. The respondents trusted entirely to the appellant's representation, and proceeded upon confidence, that he had not kept back any circumstance in his knowledge to mislead



them. They had no grounds to presume the appellant had received any other advice than of the ship's arrival on the 27th September, and had a cargo to discharge. They had it not in their power to know the special and alarming intelligence contained in the ship-master's letter, which was confessedly written for the purpose of the appellant's *government* in making the insurance, and which in good faith he was bound to communicate to the respondents for their government also. Had they known the special and alarming advices contained in that letter, which was carefully, if not fraudulently, concealed from them, they would either have not insured at all, or insisted on a much higher premium.

But besides the alarming intelligence contained in Lamb's letter of the 28th September, he says he shall write his wife next post, when he hoped to give a more full account of things: but this material circumstance the appellant carefully concealed from the under-writers, well knowing if they had known that he had reason to expect such a letter, the under-writers would naturally have called for it; and if they had been told no such letter was received, they would have as naturally concluded that the adventure was very hazardous, if not desperate, and of course have refused it; for it must be observed, that on the 20th of November the policy was under-written, so that the appellant had received Lamb's letter of advice near a month before, as appeared from the post-mark on the letter. And of consequence, not having heard from Lamb as he had promised, he had good reason to be alarmed for the fate of the ship; accordingly, the very same evening he received advice of her capture.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the interlocutor therein complained of should be reversed, and that the decree of the Judge Admiral in Scotland should be affirmed. (MS. Jour. *sub anno* 1782. p. 259.)

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[488] CASE 8.—JOHN LAIRD,—*Appellant*; ARCHIBALD ROBERTSON and others,  
—*Respondents* [20th April 1791].

[Mew's Dig. xiii. 1043; 1 Scots R.R. 746. See *Fairlie v. Christie*, 1817,  
7 Taun. 415.]

[A ship is insured for a voyage from Virginia to Rotterdam, with leave to call at a port in England; and after the Under-writers had signed the policy, the destination of the voyage was altered to the port of Hull, there to discharge instead of Rotterdam, and a memorandum of this alteration was endorsed on the policy. Hull is not a port in the course between Virginia and Rotterdam, but two degrees North of that course. The ship was afterwards lost. Held, that the alteration of the voyage vacated the policy as to all the Under-writers, except those who signed the endorsement.]

\*\* INTERLOCUTORS of the Scotch Courts REVERSED.\*\*

See the note to ca. 5. as to the general doctrine of deviation, of which the above seems a species.

In November 1788, Mr. Gammell, merchant in Greenock, meaning to send a cargo of tobacco from Rapahannock in Virginia to Rotterdam, by a ship called the *Fanny*; and as it is usual for vessels, in the course of such a voyage, to call at some port in the British Channel, for advice, and to take in or put out passengers, or to get pilots, which they commonly do at Dover, he instructed the respondents to obtain insurance "on tobacco, by the ship *Fanny*, Captain Henderson, at and from her ports in Virginia to Rotterdam, with liberty to call at a port in England."

The appellant being authorized to under-write policies for James and Henry Ritchie, merchants in Glasgow, under-wrote £100 for each of those gentlemen, for a premium of two and a quarter per cent. upon a policy in these words: "On tobacco from the loading on board the *Fanny* at her ports in Virginia, (say her loading ports in Virginia,) and to continue and endure until she shall arrive at Rotterdam, (*with leave to call at a port in England*,) and until the tobacco be there safely landed."

After the policy was subscribed, Mr. Gammell appears to have been informed, that the vessel, in place of clearing out for Rotterdam, was to be cleared out for Hull, a port not in the course between Virginia and Rotterdam, but two degrees North of that course; and being sensible that the under-writers upon the policy were no longer bound in consequence of this alteration, addressed the following letter to the brokers: "Gentlemen, by a letter I received yesterday from Virginia, it appears that my friends there intended to send the *Fanny* from the Rapahannock River to York River, there to take on board part of the cargo of tobacco; and in that event she will proceed to Hull in England, there to discharge her cargo, and not to Rotterdam. To this I suppose the under-writers have no objection; and I wish the tobacco shipped in York River to be valued at £13 sterling per hogshead. If the under-writers agree to this, please to endorse the same on the back of the policy for them to sign it; and you [489] will please to insure the £400 sterling for these tobaccos at 45s. per hogshead, as above."

In consequence of this letter, what follows was endorsed upon the policy: "Greenock, 8th January 1789. Mr. Gammell having been advised by his friends in Virginia, that they intended sending the within-mentioned brig *Fanny* from the Rapahannock River to York River, there to take on board part of her cargo of tobacco; and in that event, the *Fanny* will proceed to Hull in England, there to discharge her cargo, and not to Rotterdam; should the *Fanny* therefore go to York River, we, the under-writers on the within-mentioned tobacco, agree to it, and the risk to Hull, the same as if she were to proceed to Rotterdam; and we also agree to the York River tobacco being valued at £13 per hogshead."

This endorsement was subscribed by the other insurers; but the appellant considering this to be an alteration of the voyage, declined to sign it, thereby intimating to the broker that he was no longer bound. By the endorsement on the policy it was mentioned, that the ship was to proceed from the Rapahannock to York River, and the value of tobacco was increased from £10 to £13 per hogshead, circumstances which were not in view when the first policy was subscribed: for though, by the policy, the commencement of the voyage was from the loading ports in Virginia, yet as the vessel then lay in the Rapahannock, and the tobacco was valued at the price of Rapahannock tobacco, the appellant was led to calculate upon the probability that the vessel was to sail from that river. But the material circumstance was, that the vessel was not to clear out for Rotterdam, but for Hull; so that there was not only a probability that the voyage was to have a different commencement, but a certainty that it was to terminate at quite a different port. The appellant, of consequence, understood himself to be liberated from the policy; and the insured, by the endorsement, also declared their understanding, in the clearest manner, that the policy did not apply to the voyage which had been actually undertaken. If any obligation arose from the policy, it was, by the mutual consent of parties, entirely departed from. The appellant had no claim to the premium in case of the ship's safe arrival, nor was he liable for the loss if any should happen.

The vessel, in the mean time, is said to have cleared out for Hull, and to have proceeded directly on her voyage for that port, in the course of which she was lost.

Mr. Gammell recovered the sums under-written from such of the insurers as had subscribed the endorsement; but the same intelligence and candour which he had discovered in the preceding part of the transaction, in giving notice of the alteration of the voyage, likewise appeared in this stage of the business: he never thought of making a demand upon the appellant; sensible, that as he had not signed the endorsement, no obligation lay upon him; but he made his demand upon the respondents the brokers, who, in consequence of the refusal, ought to have got the policy filled up. [490] The respondents accordingly paid Mr. Gammell, upon an assignment of the original policy, which Mr. Gammell had no interest to refuse, leaving to them to make of it what they could.

The respondents brought an action against the appellant in the Court of Admiralty in Scotland, where, by mutual consent, a decree went in absence, and a bill of suspension was presented to the Court of Session; which being reported to the Court by the Lord Stonefield, Ordinary, he pronounced the following interlocutor: "The Lord Ordinary having reported this cause on memorials to the Lords, refuses the bill, but sists execution for fourteen days."

The appellant presented his petition reclaiming against this interlocutor, to which answers were put in, and the Court pronounced the following interlocutor: "The Lords having advised this petition, with the answers thereto, they adhere to the interlocutor reclaimed against, and refuse the desire of the petition."

The appellant conceiving himself to be greatly aggrieved by the interlocutors of the 2d June and 16th November 1790, appealed therefrom, insisting (T. Erskine, W. Adam), that the ground of the judgment now brought under review was this: that liberty to call at a port in England, implied a power to call at any port without distinction, whether such port might be in the course to Rotterdam or not; that of consequence the policy gave a power to call at Hull; and supposing this to be the case, a liberty to discharge at Hull must also be implied, as by this means the voyage would only be shortened, and the risk lessened. But the appellant with great deference apprehended, that this proceeded upon a mistake in supposing that the liberty to call at a port in England gave a power to call at any port. In all policies, the line of the voyage to be insured is specified. If it is a trading voyage, the several ports are particularly mentioned. If it is not a trading voyage, the loading and discharging ports are the points or extremes; and the voyage insured is the usual line or course of navigation between these two. A liberty to call at other ports, sometimes in more limited, sometimes in more general terms, is given. This is often necessary for various purposes, different from the unloading of the cargo; sometimes, especially in long voyages between distant ports, and both at a distance from the residence of the owners, either for leaving or receiving advices; sometimes to put out or take in passengers; sometimes to take in pilots: but whichever of these is the case, the liberty to call is merely a subordinate object; an accessorial consideration; and therefore, from the nature of the thing, must be understood in a consistency with the primary object of the parties in the voyage. In other words, it imports only a liberty to call at some intermediate port in the course of the voyage, lying in the usual tract between the two ports specified as the two extremes. If it is meant that the ship should have liberty to call at a port not in the course of the voyage, that port is specially mentioned; if it is not mentioned, and it was meant that the vessel should go there at the time [491] the policy is signed, this is a concealment of a material fact which the insurer is entitled to know, and therefore vacates the policy. If it was not in view at the time the policy was signed, but is afterwards resolved on prior to the commencement of the voyage; then it is an alteration of the voyage insured, and in the same way vacates the policy. That in this case, the policy bore, that the ship was to load at Virginia, and to discharge at Rotterdam: Virginia and Rotterdam therefore were the two points, and the voyage insured was the ordinary course of navigation between them. The liberty to call at a port in England, in the understanding of merchants and insurers, could import no more than a liberty to call at some port in England in the course of that voyage, that is, some port in the English Channel, Plymouth, Falmouth, Dover, etc.; at which last place ships from America to Holland frequently and usually call, in order to get pilots for the coast of Holland. That, in this case, the calling at a port was for some incidental purpose, different from the main object of the voyage, appeared from the terms both of the order for insurance and the policy. In both, Rotterdam is fixed for the port of discharge. In the order, the stipulation respecting the liberty to call is brought in at the end, after mention of Rotterdam as the discharging port, and after the course of the voyage is thereby fixed; and in the policy it is introduced merely in a parenthesis, as a matter not essentially connected with the great subject of the contract between the parties. That when a policy is laid before an under-writer, the object of his attention is the usual course of navigation between the loading and discharging ports. He considers the length of the voyage, the time it may require to perform it, the season in which it is to be performed, with the various risks incident to a vessel in the course of it: upon these he calculates the hazard, and the consideration he ought to have, or chooses to have, for taking that upon himself. If a liberty to call at a port different from the other two be not specified, the insurer, understanding this to be in the course of the voyage, knows what he is doing; he knows what are the ports that lie in the course of such a voyage, or what are usually called at by ships in such a voyage. The risk attending this admits of calculation very nearly as much as the voyage

itself, and may be estimated by the under-writer in fixing the premium of insurance. But if the liberty to call were to be taken in the latitude assumed by the respondent, if it is to be understood as importing a liberty to go out of the course of the voyage, it would be beyond the reach of all calculation; and it is difficult to suppose that an under-writer would undertake it at all, or at least it may be supposed, that when entering into a blind bargain of this kind, he would take care to stipulate a high premium, much beyond the premium that is given for insuring the voyage without such stipulation.

Suppose two ships bound from Leith, one of them to Orkney, and another to London, and both having power to call at a port or ports in Britain, no under-writer would consider that both vessels under [492] this power were at liberty to sail round the whole island, and that however different and opposite their courses and ports of destination were, they were truly hazards precisely of the same kind. He would consider, in one case, what were the ports betwixt Leith and London, at which ships might or were in use to call; and in the other, what were the ports which a ship might call at when she goes to Orkney; and upon these *data* calculate the risk and the premium. If under such a power, a ship were at liberty not only to call at a port out of the course of the voyage, but to discharge the whole of her cargo; and still more if she was at liberty to discharge part of her cargo at such a port, and thereafter proceed with the remainder to the port of destination; it would seem to put an end to the contract formed by the policy altogether, and to make a new one, totally changing the voyage insured, at least as to one side, *i. e.* in so far as the insured are concerned; but nevertheless keeping the insurer bound for the loss, which he had undertaken only for the original voyage, and for a premium calculated accordingly.

Suppose two ships sailing from Leith, one for Hull, the other for Liverpool on the other side of the island, are insured, with liberty to call at a port in England; upon the plea of the chargers, there would be no difference betwixt those two voyages. The ship destined for Hull might go round to Liverpool and discharge her cargo there, in the same way as the other destined for and insured to Liverpool. This, according to the argument of the respondent, would be all in favour of the under-writers; it would be shortening the voyage to Hull, and so lessening the risk. The same ship, according to the same argument, might first go to Liverpool, and if, upon trial, the market there was not found to answer, return to Hull and discharge her cargo there; and all this upon the insurance from Leith to Hull: in this view, what would appear to have been the shortest of the two voyages might in fact be made by much the longest. The voyage from Leith to Liverpool could not be made a great deal longer; but that to Hull might be at least tripled, if not quadrupled, both as to the course and the time, and of consequence as to the risk.

In this case, the ship, instead of sailing directly through the English Channel, might have gone up St. George's Channel all the way to Whitehaven on the coast of Cumberland, and either called there, or discharged part of her cargo there, and afterwards either gone round by the North of Scotland, or returned down St. George's Channel, till she got again into the course from Virginia to Rotterdam. It was unnecessary to observe that this, especially in the depth of winter, the season in which the vessel in question was to perform her voyage, would make a very material addition to the risk. The going to Hull was not so great a deviation as that would have been, but still it was a material one; Hull, as already observed, is about two degrees North of the course to Rotterdam; in going thither to call, or to discharge part of her cargo, [493] she must have twice passed, first in going, and then in returning to her course, in the most dangerous season, the most dangerous part of the coast of England, *viz.* the roads of Yarmouth, besides thirty miles of river navigation, the least to be depended on of any, first going up and then returning down the Humber. Some of the cases above supposed might appear strong ones; but it was submitted, that they shew that a stipulation, such as that in question, is not to be understood literally, but must suffer a limited interpretation: and if this be allowed, it does not appear that any better, or indeed any other rule than that above mentioned, founded in the terms of the policy, and the views of the parties at the time the contract is entered into, can be adopted.

From the facts of the case it is evident, that the very same idea of the matter

was entertained by every person concerned in the transaction in question. Mr. Gammell the owner, the very day after he received advice that the ship was to "*proceed to Hull in England, there to discharge her cargo, and not to Rotterdam,*" informed the brokers, and directed them to apply to the under-writers. This was fully sufficient to mark Mr. Gammell's own sense of the matter; for if the clause in question in the policy imported a power to call at Hull, though not in the course of the voyage from Virginia to Rotterdam; if the insertion of such a clause conveyed sufficient information to the under-writers, and fully apprised them that this either would or might be done; if, in a word, they were already bound by the policy, where was the occasion for Mr. Gammell to put himself, the brokers, or the under-writers, to any further trouble? But this is very plainly spoke out in what follows in the order: Mr. Gammell says, "*to this I suppose the under-writers have no objection;*" which was just in other words saying, I know that the under-writers under the policy are not bound to submit to this; but as they have already subscribed the policy, and as I consider there is no great difference in the hazard, I presume they will have no objection to take this adventure upon them instead of the other. And the case is made plainer still by what follows: Mr. Gammell adds, "*if the under-writers agree to this,* please to endorse the same on the back of the policy, for them to sign it," etc. This plainly shews, that Mr. Gammell understood the under-writers might *not* agree, and that it was optional in them to do so or not. The conduct of the brokers shews, that they likewise understood the matter in the same light. If they had thought that the hazard was sufficiently secured under the first policy, that the under-writers had no ground to complain of concealment or alteration of the voyage, which was now the plea of the chargers, they would have said to Mr. Gammell, that it was unnecessary to take any further trouble in the business; and that the making this proposition to the under-writers, was in effect putting it in their power to be free from the insurance, if they inclined to be so. But no such thing appeared to have occurred to them. Seeing the necessity and propriety of this measure, they made out the endorsement, [494] and got it signed accordingly; and the terms of the endorsement deserve particular notice: after mentioning Mr. Gammell's advice, that it was meant to send the vessel to York River, and in that event to send her to Hull, the endorsement proceeds in these words: "*Should the Fanny therefore go to York River, we the under-writers on the within-mentioned tobacco agree to stand risk to Hull, the same as if she were to proceed to Rotterdam.*" Even under this endorsement, the obligation upon the insurers to underlie the risk of the ship's going to Hull and discharging there, was only conditional, viz. in case the *Fanny* should go to York River. If the vessel had not gone to York River, it plainly follows that the under-writers would not have been liable in virtue of the endorsement; and yet, according to the brokers by whom this endorsement was framed, the under-writers would have been liable at all events. According to them, therefore, the effect of the endorsement was not to extend, but to limit the obligation upon the under-writers. That the appellant's declining to subscribe the endorsement was a declaration no less clear, that he understood he was under no obligation by the original policy, otherwise he could have no motive for declining to adhibit his subscription to the endorsement; and indeed, whatever was his sense of the matter, it was submitted, that his declining to subscribe the endorsement of itself put an end to any agreement betwixt him and the insured. After this it was plain the appellant could have no claim for the premium. Suppose the ship to have arrived safe, and that he had acted so improperly as to insist for payment of the premium, the defence on the part of the insured would have been altogether invincible. They would have said, We intimated to you that we did not consider you as bound, in consequence of this alteration in our plan in sending the vessel and her cargo to Hull, instead of going to Rotterdam; we presented an endorsement for your subscription, substituting the former in place of the last adventure; we did so when matters were perfectly entire, equally so as when the original policy was subscribed; but you refused to sign the endorsement, in other words, you refused to undertake the risk of this new adventure; how then can you pretend, now that the hazard is over and the ship safe, to insist for the premium? It is not difficult to guess what would have been the issue of such a litigation. If the appellant would not have been entitled to the premium, the necessary consequence is, that he cannot be subjected to the loss.

On the other side it was said (J. Scott, W. Grant), that the vessel, having been insured from her loading ports in Virginia to Rotterdam, with leave to call at a port in England, was lost upon her voyage from Virginia to Hull, a port in England. That the policy covered a voyage from Virginia to any port in England, without the view of proceeding farther, because a voyage may be shortened without vacating the policy; the only effect of shortening a voyage being to diminish the risk to the under-writers. That by liberty to call at a port is implied a power of discharging the whole or a part of [495] the cargo at that port; and leave to call at a port in England gave a power to call at any port in England; and such was the meaning of parties. The owners, in making the insurance, were uncertain to what port in England the vessel might be sent, in order to receive their directions with regard to the disposal of the cargo; and by stipulating a general liberty to call at a port in England, they meant to provide for the contingency of her being sent to Hull, or to any other port in England, whither their correspondents might think it most advisable to dispatch her, either with a view to receive directions, or for discharging the cargo. And that though it were a deviation from the insured voyage to touch at Hull on the way to Rotterdam, it was only an intended one, which did not vacate the policy, as the vessel was lost before she reached the dividing point between the two voyages.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the interlocutors therein complained of should be reversed; and that the cause should be remitted back to the Court of Session to pass the bill of suspension. (M.S. Jour. sub anno 1791. p. 769.)

## INTEREST.

CASE 1.—DENNIS KELLY and another,—*Appellants*; Lord BELLEW,—*Respondent* [28th February 1707].

[Mew's Dig. x. 1277.]

[A Master reports so much due for the principal of a portion, and so much for the interest; the Court of Chancery decreed the money so reported due to be paid, together with interest upon the principal sum till payment. On appeal, interest was directed to be carried on for the *whole* sum; principal and interest, stated by the Master's report, from the time of confirming the report.]

\*\* DECREE of the Irish Chancery VARIED.

A stated account ought to carry Interest, especially in cases of mortgage and more strongly when settled by a Master of the Court pursuant to order. Treat. Eq. lib. 5. c. 1. sec. 4. See 2 Eq. Ab. 529. c. 4: 14 Vin. 457. c. 4. in n. In a note to Mr. Fonblanque's edition of the Treatise on Equity, it is said "The report of the Master will not however entitle the creditor, whether mortgagee or otherwise, to interest, before it be confirmed;" and this case *Kelly v. Bellew* is cited to that point; but which does not appear to have been in dispute; and the Abridgment in 14 Vin. 457. ca. 4. in n: 2 Eq. Ab. 529. ca. 1, states the question thus, "Interest to be made principal from the time of stating the account." Mr. Fonblanque also cites *Att. Gen. v. Brown*, 1 P. Wms. 377. It is there expressly stated that the reason of allowing interest only from the time of confirming the report, was in that case because [496] the debt was *not before liquidated*. In *Brown v. Barkham*, 1 P. Wms. 653. Lord Parker says, a *Master's report* computing interest makes that interest principal, and to carry interest; for a report is a judgment of the Court, and appoints a day for the payment, carrying an interest to that day. And Mr. Cox, in his note, cites this case of *Kelly v. Bellew*, to that point; as also *Bacon v. Clarke*, 1 P. Wms. 480. (and see 453.) *Burton or Nutley v. Slattery*, *post*, tit. Mortgage, ca. 11: *Neal v. A*

*Gen. Mosel. 246: Astley v. Powis, 1 Vez. 49; and when confirmed, the whole amount will carry interest, though part of it be in respect of costs. Bickham v. Cross, 2 Vez. 471.\*\**

14 Vin. 457. ca. 4, in n: 2 Eq. Ca. Ab. 529. ca. 1.

By deed dated the 14th of February 1667, duly executed and enrolled, John Lord Bellew and Lady Mary his wife declared the uses of certain fines and recoveries, which had some time before been levied and suffered of divers manors, towns, and lands in the counties of Lowth and Meath, to the use of the said John Lord Bellew for life, with remainders over; and a power was thereby reserved for the said John Lord Bellew, *from time to time and at all times to mortgage, engage, or otherwise charge all and every the premises, or any part thereof, with and for the payment of all or any of his debts, or otherwise, as he should think fit.*

On a treaty of marriage between Walter Bellew Esq. the eldest son of Lord Bellew, with Frances Arabella Wentworth, the daughter of Sir William Wentworth; certain articles were entered into, dated the 18th of September 1686, whereby £6000 was agreed to be the Lady's portion, and to be paid to Lord Bellew; viz. £4000 on the day of marriage, and the remaining £2000 within two years after; and it was, *inter alia*, further agreed, that in case of failure of issue male between the said Walter and Arabella, the daughters of that marriage should have £6000 between them; and if but one daughter, £4000 for their or her portions or portion; to be paid at their respective ages of twenty-one years, or days of marriage, which should first happen after the death of the said Walter, and with a competent maintenance in the mean time.

The marriage took effect, and the £4000 part of the Lady's fortune was paid, and the remaining £2000 secured according to the articles; and Lord Bellew having purchased other lands in the county of Lowth, of the value of £60 per annum. he, in performance of the said marriage-articles, and by virtue of the power reserved to him by the settlement of 1667, by deed dated the 8th of November 1686, charged all his estate in the county of Lowth, (except certain lands limited for the jointure of the said Frances Arabella,) with the payment of the said £6000 for the portions of the daughters of the said Walter, by his said wife, according to the marriage-agreement, with reasonable maintenance in the mean time; and he discharged all the lands comprised in the said deed of 1667, from any other payments, or further execution of his power.

In 1691, John Lord Bellew died, leaving the said Walter his eldest son, and the respondent his youngest; and in 1694, Walter Lord Bellew died without issue male, leaving the appellant Mary, [497] and Frances his two daughters, and co-heirs; who thereupon became entitled to the said £6000 in equal moieties, and also to the new purchased lands in the county of Lowth; but the settled estate, subject to the £6000 charge, came to the respondent, who not only took possession thereof, but also of the new purchased lands.

On the 16th of November 1702, the appellants intermarried, and having ineffectually demanded of the respondent the £3000 for the appellant Mary's portion, they, in Michaelmas Term 1703, exhibited their bill against him in the Court of Chancery in Ireland, in order to compel payment thereof, together with interest from the day of their marriage, at the rate of £10 per cent. which was the then common interest of that kingdom.

The defendant, by his answer to this bill, alleged, that his father John Lord Bellew, previous to his marriage with Mary Bermingham, the defendant's mother, did, by articles dated the 20th of November 1663, covenant to settle a jointure on the said Mary, and to secure his estate to the heirs male of their two bodies, as the said Mary or her trustees should require; reserving to himself a power of charging the estate with the payment of his debts only; and therefore the defendant insisted, that the power contained in the deed of 1667, by virtue whereof the said portions were secured, was void, as being too large, and not warranted by the articles of 1663.

In December 1705, this cause came on to be heard; when the defendant's counsel informing the Court that John Lord Bellew had purchased other lands in the county of Lowth, which were come by descent to the plaintiff Mary and her sister,

and that the plaintiffs had brought an ejectment for a moiety of those lands; the Lord Chancellor was pleased to declare, that he had not the whole cause before him, and therefore directed the defendant to bring a cross bill, in order to affect the new purchased lands with the plaintiffs' demands.

In February following, the defendant accordingly filed a cross bill for this purpose; relying on the articles of 1663, and praying that he might be allowed a maintenance out of the estate, suitable to his quality, and that an injunction might issue to stay all proceedings at law upon the ejectment.

On the 1st of May 1706, both causes came on to be heard; when the Lord Chancellor, assisted by four Judges, directed a trial to be had at the bar of the Court of Common Pleas, upon the following issue; viz. "Whether the said John Lord Bellew did, before his marriage with Mary Bermingham, perfect articles in the same words, with the writing produced by the defendant, except the signature [Mary Bellew]." \*

The issue was accordingly tried on the 11th of June following, when the jury, upon full evidence, found, "that the said John Lord Bellew did not, before his marriage with the said Mary, execute such articles." But the defendant being dissatisfied with this verdict, applied to the Lord Chancellor for a new trial, [498] which, after hearing counsel on both sides, and reading all the proceedings, his Lordship thought fit to refuse; declaring, that he saw no reason to grant a new trial. The defendant then applied by petition, to have the causes re-heard; insisting that the former issue was *too narrow*, and that a new trial ought to be granted on a more proper issue; viz. "Whether or no Lord John did perfect any and what articles, on his intermarriage with the said Mary Bermingham:" but upon hearing counsel on the matter of this petition, the Chancellor, assisted by the Lord Chief Justice and the other Judges of the Court of Common Pleas, were unanimously of opinion, that no other issue ought to be directed; and therefore the petition was dismissed.

On the 16th of November 1706, these causes were heard on the merits; when the Lord Chancellor decreed to the plaintiffs £3000 for the plaintiff Mary's portion, with interest for the same at the rate of £5 per centum per annum, from the time of their marriage; and it was referred to two Masters of the Court to compute such interest, and to state the yearly value of the fee-simple lands in the county of Lowth, and what had been received thereout by the defendant, and also the yearly value of the other lands charged with the portions, and what incumbrances were thereon.

Accordingly the Masters by their report certified, that the interest of the portion from the 16th of November 1702, which was the day of the plaintiff's marriage, to the 16th of November 1706, the date of the decree, amounted, at the rate of £5 per centum per annum, to £600; that the defendant had received out of the new purchased lands £704 15s. 5d.; that the yearly value of the other lands charged with the said portions amounted to £1037; and that there was no other incumbrance thereon but a portion of £3000 payable to the said Frances Bellew, with a maintenance of £100 per annum till her age of fifteen, and from that time £150 per annum till her portion should become due.

The causes being set down to be heard upon this report, were heard accordingly on the 27th of February 1706; when the Lord Chancellor was pleased to decree, that the plaintiffs should recover against the defendant the said sum of £3000, together with £600 for the interest thereof to the 16th day of November then last; and also interest at the rate of £5 per cent. for the said £3000 from thenceforward until it should be paid; that the yearly profits of the plaintiffs' proportion of the fee-simple or new purchased lands, should be applied towards the payment thereof; and that the proceedings at law for the recovery of such fee-simple lands should be stayed by injunction; that all the lands charged with the said portion (except the demesnes of Bellow's-town, which the defendant was to enjoy at £134 6s. per ann. and also except so much thereof as should be sufficient to answer the said yearly payments to be made unto the said Frances Bellew) should be sequestered, and that the defendant should thereout be paid £265 14s. per ann. to make up the value of the said demesne lands £400 [499] which he was to have for his maintenance; and that

\* See 12 Vin. 267. c. 26. where it appears that the form of this issue was objected to. See the argument on the cross appeal; but which is not noticed in the decree.



the rest of the profits should be paid to the plaintiffs until they should be satisfied the said £3000 with interest after the rate aforesaid, and £20 for their costs.

From this decree *both parties* appealed: and, in support of the *original* appeal it was said (J. Jekyll, S. Cowper), that the portion with interest being to be raised by the yearly profits of a small part only of the estate charged therewith, it could not be raised in any reasonable time; whereas, the portion being made payable at a certain time, viz. at the age of twenty-one, or day of marriage, it ought to be raised by sale or mortgage of a sufficient part of the lands liable thereto; and that the appellants were abridged of half the value of this portion by the manner of payment prescribed by the decree. That as no sale or mortgage was decreed, the whole profits of the estate ought to have been applied towards payment of the portion, instead of allowing the respondent £400 per ann. out of the profits for his maintenance; and that this allowance was the less necessary, because the respondent had an estate of £700 per ann. which came to him by his mother, besides the personal estate of his father, which amounted to £5000. That by the law and usage of Ireland, the appellants ought to have interest at the rate of £10 per cent. per ann. and by the constant course of the Courts of Equity, the interest should be made principal from the time of stating the account; and yet the Lord Chancellor had decreed interest after the rate of £5 per cent. only, and that the sum stated by the Master to be due for interest should not carry interest; although it appeared by the report, that the respondent had before that time received considerably more than was sufficient to pay the portion, with full interest, besides the £704 15s. 5d. out of the appellant Mary's own estate. And that after such tedious and expensive suits in Equity, and after a trial at bar, in which the appellants had obtained a verdict, and thereby set aside a false deed, on which the respondent relied for his defence against the just demands of the appellants, they had only £20 decreed them for their costs.

To this it was answered (T. Powys, J. Mountague) on the other side, that as the appellants had only prayed by their bill to be let into the perception of the rents and profits of the estate liable to their portion, the decree, so far, exactly corresponded with the bill. And as to the £400 per ann. allowed for the respondent's maintenance, it was agreeable to the constant rules of equity used in Ireland, for the Lord Chancellor to allow a maintenance to the owners of estates liable to portions, when the portion was not thereby (as in the present case) in any danger; and the *quantum* of this maintenance could not be judged too large for the respondent and his family, when it was considered, that all the residue of the estate being £1700 per ann. was divided among the widow and two daughters of Lord Walter; and all this in consideration only of £5000, which was the whole that was paid of his wife's portion, the remaining £1000 remaining still unpaid; and no part of this £5000 had ever come [500] to the advantage of the present respondent or his family. It was admitted that the estate of the respondent's mother had come to him by virtue of her marriage-settlement; but he was under the necessity of mortgaging it to almost its full value, in order to discharge incumbrances, so that he had no present benefit by that estate; and as to the £5000 alleged to be the amount of Lord John's personal estate, and to have been received by the respondent, he affirmed it to be untrue.

In support of the *cross appeal* it was said, that the decree had given the plaintiffs £3000 and interest; whereas it appeared by the deed of 1667, that they ought not to have been decreed more than £1000. And that the Lord Chancellor, by denying a trial upon a proper issue, for the validity of the produced counterpart of the articles of 1663, had decreed upon a fact which was not fully before him; and thereby the appellant Lord Bellew was deprived of the benefit of a material part of his defence against Mr. Kelly's demands; for it appeared that, upon a proper issue, a verdict must have been found for him on the very evidence that was given against him; and if such verdict had been found, it was conceived that Mr. Kelly and his wife could not have recovered any more than £1000.

But to this it was answered, that Lord Bellew pretended to have no other articles than those of which the produced writing was a counterpart, and which the jury had condemned by their verdict; that this writing was, by a witness examined in the cause, sworn to have been executed *before marriage*, and yet it appeared to be

signed by the lady *with her intended husband's surname*; and therefore it was hoped, that after such an examination as had been had in this matter, the parties would not be sent back again to Ireland, to afford an opportunity of setting up another deed, or of adducing some other evidence not yet heard of in the cause; and the rather as, if there had been no verdict in the case, it ought to be presumed, at this distance of time and after so long an acquiescence under the settlement of 1667, that the same was pursuant to the original agreement of the parties. It was true indeed, that by that settlement Lord Walter had power, when in possession, to charge the estate with £1000 a-piece for his daughters; but it was also true that he never executed that power, and relied wholly on the power reserved to and executed by his father. That the pretended articles of 1663 being now out of the case, no reasonable objection could be made to the power reserved by the deed of 1667; for the lady which the now Lord Bellew's father married in 1663, never settled her inheritance, nor brought any portion in money; besides, the power given to Lord John was not to affect her jointure, and he might surely be trusted with a power over the provision intended for his children, which he had accordingly executed with a due regard to the circumstances of his family; and if the pretended articles of 1663 had been strictly pursued, Lord Walter would have been tenant in tail, and consequently might either have left [501] the whole estate to his daughters, or have charged it with any sum of money whatsoever.

After hearing counsel on both these appeals, it was ORDERED and ADJUDGED, that the decrees or orders appealed against, should be affirmed, with this alteration only, that the £3000 and interest thereby decreed to be paid, should be raised by sale or mortgage of a sufficient part of the estate charged therewith by the said decree; and to that end, the Master to whom the account stood referred by the Court of Chancery in Ireland, should proceed to carry on the account of interest of the said £3000 at the rate of £5 per cent. per ann. carrying on interest at the same rate for the whole sum stated by the Master's report, from the confirmation of the said report; and likewise of what had been raised by, or was then in arrear, and might presently be received without suit, out of the profits of the said estate, which, according to the decree made in Ireland, ought to go towards payment of what was due to the plaintiff Kelly; and when it should appear by the account so taken and carried on, what the monies already raised and liable as aforesaid, should fall short to satisfy the money so to be found due to the said Kelly; the said Master was to proceed to mortgage or sell so much, and such parts of the said estates charged with the said £3000 and interest, as would be sufficient to satisfy and make good what the sums so already raised should fall short to satisfy the said Kelly's demand: but the Master was to take care that a proportionable part of the moiety of the estate in fee descended to the appellant Mary, as one of the co-heirs at law of Lord Walter, should be sold or mortgaged with a proportionable part of the entailed estate, according to the several and respective values of those estates, in order to the satisfaction above mentioned: and it was declared, that the Lords did not think fit to vary the decree as to the allowance of £5 per cent. only for interest, in respect of the necessity of the family, and other circumstances in the present case; without prejudice however, to the rate of interest, which by law might or was then usually received in Ireland in other cases. (Jour. vol. 18. p. 487.) \*\* See Treat. Eq. lib. 5. c. 1. sec. 5, in n.\*\*

[502] CASE 2.—MARTIN CAULFIELD BASIL,—*Appellant*; Sir ARTHUR ATCHESON,  
—*Respondent* [25th June 1715].

[It has been the constant rule of Courts of Equity in Ireland, that where, by a general and national calamity, nothing is made out of lands which are a fund for the payment of interest, no interest ought to run during the continuance of such public calamity.]

\*\* The profits set against interest in an old mortgage.

Decree of Irish Chancery varied.\*\*

Viner, vol. 14. p. 457. ca. 7. vol. 15. p. 440. ca. 3. in n. p. 474. note to X (3)  
ca. 1: 2 Eq. Ca. Ab. 529. ca. 3. 611. ca. 5. 618. ca. 1.

Sir Patrick Atcheson having borrowed £2000 of Martin Basil Esq. did on the

3d of August 1637, make a mortgage in fee to Mr. Basil, of the lands of Carrow-downan in the county of Cavan in Ireland, redeemable in six years on payment of the principal money at one time; and on the 4th of the same month, Mr. Basil demised the mortgaged premises to Sir Patrick, for the said term of six years, at the yearly rent of £200, which was the exact amount of the interest of the mortgage money.

Soon after the execution of this mortgage, Mr. Basil discovered a defect in the title; viz. that the lands were originally plantation lands, and had been granted by patent to Sir Archibald Atcheson, the father of Sir Patrick, on certain terms and conditions; and that these conditions not having been complied with, an inquisition had issued, whereby the lands were returned as forfeited to the crown.

In consequence of this discovery, it became necessary for Mr. Basil to take proper measures to avoid the effect of it, and thereby secure his own title, as well as that of the mortgagor; accordingly, in the year 1638, he, at his own charge, compounded with the crown for the forfeiture, and obtained a new patent for the lands, reserving the right of redemption to Sir Patrick Atcheson at any time within the six years; and this patent was confirmed by the act of parliament which afterwards passed, for remedying defective titles in Ireland.

In the year 1641, the rebellion broke forth in that kingdom, and in the year following Martin Basil died; whereupon the mortgaged premises descended to Ann, his only child and heir at law: and upon her death, which happened in a few months afterwards, William Basil, the appellant's father became entitled; but on account of the troubles arising from the rebellion, the premises lay waste and untenanted for upwards of fifteen years, so that Mr. Basil had no benefit thereof, nor in fact was any part of the £200 per ann. interest ever paid.

In 1681, the widow of Sir Patrick Atcheson made an attempt to defeat this mortgage, by setting up a prior settlement; and she accordingly filed a bill against William Basil, in the Court [503] of Chancery in Ireland, for an account of the rents and profits of the premises which had accrued due since the death of her husband.

To this bill the defendant put in an answer, and thereby, after defending his own title and impugning that of the plaintiff, he stated, that by reason of the long and great devastation of lands in Ireland during the rebellion, he had received nothing out of the mortgaged premises:—that for several years after the settlement of that kingdom, he was obliged to let them at a very low rent, and far short of his interest-money; the county of Cavan being one of the last settled, and least improved part of the country: and that there then remained justly due to him on the said mortgage, after an allowance of all that he had received from the premises, £8650 17s. 7d.

After the coming in of this answer no farther proceedings were had in the cause, nor was any demand made of redeeming the lands during William Basil's lifetime, though he lived above eleven years afterwards.

In 1692, William Basil died; whereupon the appellant, as his heir at law, entered on the premises, and continued in the quiet possession thereof for about four years.

But in Easter Term 1696, Sir Nicholas Atcheson, the respondent's father, thought proper to exhibit a bill against the appellant in the Court of Exchequer in Ireland; praying a redemption of the mortgage, and an account of the rents and profits of the premises.

The appellant, by his answer to this bill, insisted upon the same title as his father had done in the former suit, and that after so great a length of time the estate was not redeemable; and therefore hoped that the Court would not let the plaintiff in to a redemption, or oblige him (the defendant) to account for the rents and profits; it not being in his power to make up any such account, but from such papers as he could recover, as having formerly belonged to his ancestors the said Martin Basil, Ann Basil, and William Basil; many of which were doubtless lost or worn out in so long a space of time as fifty years and upwards: but if the plaintiff would submit to a decree to pay principal, interest, and charges on the mortgage, and give good security for such payment, the defendant was then willing to be redeemed, and account for the rents and profits in the best manner he was able; being

allowed the full interest for the £2000 from the time the same was first lent, together with his own and his father's costs and charges.

The plaintiff having replied to this answer, the defendant rejoined; and thus the cause rested at issue till 1702, when the plaintiff died, and for near ten years afterwards: but at length, in Hilary Term 1711, the respondent, as the son and heir of the late plaintiff, filed his bill of revivor; and the suit being accordingly revived, publication passed, but no witnesses were examined on either side. An order was however made, on the 23d of June [504] 1713, that in consequence of the defendant's offer in his answer, the plaintiff should enter into a recognizance of £5000 to abide the judgment of the Court, and not dismiss his bill; which order was complied with accordingly.

On the 3d of May 1714, the cause was heard; when it was decreed, that the plaintiff should redeem the mortgaged premises, and that the rents and profits thereof should be set against the interest, till the time that the defendant entered into possession; that he should from that time account for what he had received, or might have received without his wilful default; and that he should be allowed interest for his principal money from the time of his entering into possession.

But from this decree the defendant appealed; insisting (N. Lechmere, S. Cowper) that no decree for a redemption ought to have been made after so great a length of time; or, at least, that it ought to have been made upon the terms of the appellant's answer; whereby he would have had his principal and interest computed from the date of the mortgage, and all the subsequent charges and expences of taking in the forfeited title, and of the suit brought by Lady Atcheson, and all other just allowances; but which the decree had taken no care of. That it was conceived the decree could be made upon no other terms than what were contained in the answer; for though it might be said, that the plaintiff having replied, and the defendant rejoined, the cause was at issue; yet, there being no order for publication, the cause came on to hearing as upon bill and answer; in which case it was the constant practice of all Courts of Equity to take the answer as true *in toto*; but which, in the present case, had not been done. That the setting the rents and profits against the interest, from the date of the mortgage in 1637 till the appellant entered in 1692, was very prejudicial, in making him lose a great part of his interest; for, during the rebellion, the profits of the lands were lost entirely; and, even afterwards they fell far short of the interest of the £2000. And lastly, the decree had not directed that the appellant should have his costs of suit; which mortgages, in all cases, were entitled to.

On the other side, it was said (J. Jekyll, E. Northey), to be plain from the appellant's answer, on which the decree was founded, that the estate was redeemable; and, therefore, the appellant could not impose any terms of redemption but such as were reasonable. That the terms which the Court had decreed were reasonable; because it was impossible to account for the profits from the date of the mortgage; and so the appellant insisted by his answer. As to the circumstance of there being no profits for many years after the rebellion, it had been the constant rule of Courts of Equity in Ireland, that where, by a general and national calamity, nothing was made out of lands, which were a fund for the payment of interest, no interest ought to run during the continuance of such public calamity. That the estate in mortgage contained 12,000 acres, had been let ever since the restoration for £300 per ann. and that [505] there was wood upon it to the value of £8000. But if the appellant should prevail in getting an account of the rents and profits directed from 1637, it would be impossible ever to get through such account, and by consequence he would keep this estate for £2000.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree complained of as decreed a redemption of the mortgaged premises should be affirmed: and it was further ORDERED and ADJUDGED, that the residue of the said decree should be so far varied, as that an account should be taken, to see what was due to the appellant for principal and interest, from the time of making the mortgage; in which account, such abatements or allowances were to be made of and for interest, as were usually done in Ireland, on account of rebellions, or other public calamities happening to estates in mortgage; and likewise, that the appellant should account for the profits of the said premises received by him, or

any under whom he claimed, or which might have been received without his or their wilful default; and, in taking which account all just allowances were to be made: and further, that the consideration of the costs of the suit in the Court of Exchequer should be reserved till the said account was taken; and then to be given by the said Court according to the event of that account. (Jour. vol. 20. p. 88.)

CASE 3.—JOHN BRADSHAW and others,—*Appellants*; Sir JOHN ASTLEY and others,—*Respondents* [2d April 1717].

[Where a debt is liquidated by a report, the whole carries interest from the time of confirming such report; and so *toties quoties* as any new report is made.]

\*\* DECREE of Lord Keeper Harcourt CONFIRMED.

The present Editor cannot discover the point of this case, as stated by Mr. Brown. It seems to have turned on the complicated account of a trust-estate; and to be like too many inserted in the work, of too private a nature to require notice.

See *ante* case 1, and the notes there.

The following seems the true point of this case:

Account is to be taken with an annual rest, each year's account to carry interest, in cases where trustee has paid off incumbrances with his own money. Likewise in cases of arrears of annuities and old mortgages, *Mss. table to the most remarkable points in cases upon appeals to the House of Lords; from 1701 to about 1728; said to be Ld. Harcourt's penes Ed.* This is the *Mss. table* so frequently cited in Viner's Abridgment.\*\*

Walter Bressey being seised in fee of the manor of Odston, and certain lands thereunto belonging, in the county of Leicester; by deed dated the 12th of April 1661, in consideration of £1000 paid to him by one John Gisburne, charged part of [506] this estate with a yearly rent of £100 payable to Gisburne for a term of twenty years and an half, and then to determine.

In 1663, Walter died without issue and intestate; whereupon his estate, subject to Gisburne's rent-charge and other debts, descended to Thomas Bressey, his brother and heir; who, by indentures of lease and release, dated the 1st and 2d of May 1665, conveyed the premises to Sir Richard Astley, (the respondent Sir John's father,) John Needham, and Mary Bressey, (the now respondent Bradshaw,) to the use of himself for life, and then to the trustees and their heirs, upon trust, that out of the rents and profits, or by mortgage, sale, or otherwise, as they should think fit, they should raise money for the payment of his debts, with damages for forbearance; and after his debts paid, then to raise £40 for the trustees Astley and Needham, and to pay the residue as follows; viz. one moiety thereof to his sister the said Mary Bressey, and the other moiety between his sister Katherine and the children of Dorothy the wife of Edward Dorcas. And on the 3d of the same month he also made his will; whereby, after confirming the above settlement, he declared that his said sister Katherine and the children of Dorcas should accept of the trustees' account of the surplus, without any trouble or suit in law, he having an assured confidence in their integrity; and he gave the residue of his personal estate to his said sister Mary Bressey, and appointed his three trustees executors of his will.

On the 7th of June following the testator died; when Needham and Bressey declining the trusts, Sir Richard the other trustee entered on the estate, and took upon himself the sole management of the testator's affairs.

The estate being greatly incumbered, and not yielding one year with another, while Gisburne's rent-charge subsisted, above £30 per ann. clear; Sir Richard Astley paid all the debts and incumbrances out of his own money.

It is supposed, that Sir Richard in his lifetime got some absolute conveyance of this estate from the parties entitled thereto; for after his death a deed was found

amongst his writings, dated the 14th of November 1668, enrolled in Chancery, and made between one Henry Frith of the one part, and Sir Richard Astley of the other part; whereby Frith, in performance of a trust reposed in him by Sir Richard, conveyed the premises to him in fee; and in this deed notice was taken that the premises had thencefore, by good and sufficient conveyances and assurances in the law, and by Sir Richard's direction, been conveyed to the said Frith, and one Gough who was then dead, and their heirs, in trust for Sir Richard and his heirs: but such former conveyance could never be found.

In 1687, Sir Richard Astley died, leaving the respondent his only son, an infant of about a month old; but by his will he devised the premises in question, among other estates, to the respondent, whose guardians entered thereon and received the rents and profits thereof during his minority.

[507] The appellants claiming title to the surplus of this estate, after the incumbrances were satisfied, in Hilary Term 1706, exhibited their bill in the Court of Chancery against the respondents, praying a discovery of the several incumbrances upon the premises at the time of Thomas Bressey's death, which had been paid off by Sir Richard Astley; and to be let into possession of the premises, and have an account of the rents and profits thereof.

To this bill the defendant Sir John Astley put in an answer; saying, that he believed his father became a purchaser, and paid the full value of the premises; but not apprehending he should ever be questioned for the estate, he was not so careful in preserving the vouchers for his payments, as otherwise he might have been, in case he had entered and acted only as a trustee, or if an account had been demanded in any reasonable time; but, that after this great length of time, added to the death of parties and the loss of papers, it was impossible for the defendant to make out his father's payments, or the terms on which he purchased; and therefore he insisted on his father's will, and the deeds set forth in his answer, and on forty-four years quiet possession, in bar to any account of rents and profits, or to draw into question his or his father's title to the estate.

On the 9th of February 1710, this cause was heard before the Lord Keeper Harcourt; who decreed, that it should be referred to a Master to take an account of Thomas Bressey's personal estate, and of the debts which he owed; also an account of the profits of the trust-estate, from the death of the said Thomas Bressey, which were received by the said Sir Richard Astley or the defendant Sir John, and an account of what incumbrances were upon the estate at his death; and if it appeared that Sir Richard, out of his own estate, did discharge such incumbrances more than the rents and profits of the trust-estate then in his hands, he as to stand in the place of such incumbrances for so much as he so paid with his own money, with interest, until he was reimbursed what he so paid, with such interest; he was also to be allowed for lasting improvements, and have all other just allowances: and, in taking this account, the Master was to make an annual rest, and where the balance should be found on Sir Richard Astley's side, the Master was to carry on interest for the same; and if upon the account to be taken as aforesaid, it should appear that the said Sir Richard and the defendant Sir John, had disbursed and laid out more than they had received out of the personal estate and profits of the real; then the plaintiffs were to pay what should be reported due, and were to have a conveyance of the trust-estate according to their several proportions in the decree mentioned; but the costs were reserved until after the report.

In pursuance of this decree, the several accounts thereby directed, were taken before the Master; who, by his report of the 24th of April 1714, certified, that he did not find that the said Thomas Bressey had left any personal estate; but that the yearly rents of the real estate, when Sir Richard Astley entered in 1665, amounted to £137 12s. and so continued for the first five [508] years; out of which there was issuing an annuity of £100 to Gisburne, which had then seventeen years and an half to run; which, with another annuity of £5 per ann. for ever, being a charity charged on the said estate; the yearly sum of £4 allowed to Sir Richard for looking after the estate; and some other small deductions, reduced the clear yearly rent to £24 15s. 8d.—That the next seven years the clear rents of the estate were sunk to £21 8s. 8d.; the next two years they were improved to £35 8s. 8d. and the next three years to £37 8s. 8d.—That Gisburne's annuity determining in 1681, the

clear rents were thereby raised to £140 ls. 8d. and soon afterwards improved to £145 3s. 8d. at which they had continued down to the time of the report. The Master also certified, that Sir Richard Astley, the first year he entered, paid off several incumbrances to the value of £1035 11s. which with £80 10s. 11d. arrears of rent-charges then due, some small debts amounting to £28 11s. for funeral expences, and £56 10s. allowed Sir Richard for repairs done in that year, made the whole money advanced by him in that year amount to £1211 11s. 11d.; and in the next year Sir Richard paid £180 more, being a judgment debt, making together £139 11s. 11d. in the whole advanced by him; after which it did not appear that he advanced any more monies until the year 1686, when he new-cased the mansion-house with brick, for which he was allowed £132 8s. 10d. And the Master having made rests, and computed interest according to the decree, found, that on the 1st of May next ensuing the date of his report, there would be due to the defendant Sir John Astley £6837 10s.; which, with £20 given to Sir Richard as a trustee, the Master appointed the plaintiffs to pay the said defendant Sir John, and thereupon he was to convey the estate to them.

To this report the plaintiffs took several exceptions; the first and most material of which was, that the Master had annually carried on interest, not only for the principal sums advanced by Sir Richard Astley for payment of incumbrances; but also for such part of the yearly interest thereof as the yearly profits fell short to satisfy; and that by this method of accounting the plaintiffs were charged with interest upon interest, contrary to the intent and meaning of the decree.

The defendant Sir John Astley also took exceptions to the report; and both sets of exceptions being set down, came on to be heard before the Lord Chancellor Cowper on the 12th of July 1714; when the first exception taken by the plaintiffs being over-ruled, the rest were waived; and the defendant Sir John having thereupon waived all his exceptions, his Lordship ordered the Master's report to stand confirmed.

On the 15th of December following, the cause came on to be heard for further directions; when *the plaintiffs making default*, his Lordship ordered that they should pay the principal sum of £6837 10s. reported due to the defendant Sir John Astley, with subsequent interest and costs, on the 15th of March then next [509] following; or otherwise, that their bill should be dismissed with costs.—The costs were afterwards taxed at £275 17s. and the defendant Sir John forebore prosecuting the plaintiffs for the same, upon a promise from the plaintiff Roe, that some conveyance or release of the premises should be executed to the defendant without further trouble.

But instead of that, the plaintiffs thought proper to appeal (T. Reeve) from Lord Harcourt's decree, and all the subsequent proceedings; because the decree, as drawn up, said in the first of it that if Sir Richard Astley had paid off any incumbrances with his own money, he was to stand in the place of such incumbrancer, till he should be re-imbursed what he so paid, with interest for the same; and the decree afterwards directing an annual rest to be made, and when the balance fell on Sir Richard Astley's side it was to carry interest, if that balance happened at any time to be made up of principal money and arrears of interest not before cleared, as in effect it did at first when the rents of the estate were low; then by this last direction, interest would be computed as well for the interest in arrear as for the principal of which that balance was composed; by which means Sir Richard would be in a much better case than the incumbrancer, in whose place he was to stand; who, if he had been paid off, would have had no more than simple interest for his debt, until the same was discharged: whereas, in the method of accounting taken by the Master, the balance for the second year after Sir Richard entered, was increased to £1483 10s. 6d. by the addition of the preceding year's interest, which remained unpaid; which balance was to carry interest at the same rate, for the next succeeding year; and so much of the interest of that balance as was not then cleared by the rents, being added to the preceding year's balance, made the new balance for the next year; and, in this manner, interest being computed to the end of the account, the original sum of £1391 11s. 11d. was so increased by such yearly turning interest into principal, that when the £100 annuity fell in, the whole profits of the estate would not answer the growing

interest of the balance, so made to be due at that time; and, although the rents of this estate were afterwards improved in the manner before stated, yet the interest, by this method of accounting, was still got so high, that it exceeded the rents: and thus, notwithstanding Sir Richard's being all along in possession of the estate, he had above four times more money reported due to him than what he had ever paid or laid out, though the greatest part of the repairs were allowed to him for above twenty years after he entered, whereas, if the account had been taken in the usual method, by carrying on interest every year for the principal sums advanced, and applying the yearly rents towards sinking such interest till it should be cleared off, and afterwards towards sinking the principal; it would appear, that at the time of the Master's report, admitting all the allowances to Sir Richard therein made, there would have been no more than about £425 resting due to him, instead of the [510] £6837 10s. reported.—That there was the less reason in this case to indulge the respondent with a mode of accounting so beneficial to himself and so disadvantageous to the appellants, because it did not appear in the cause that any of the incumbrances on the estate ever pressed Sir Richard Astley the trustee to pay them off, but it seemed rather to have been a voluntary act of his own in paying the same off as fast as he could out of his own monies, and taking assignments in his own name; thereby to secure the estate to himself, which he seemed to be satisfied he had sufficiently done, considering the then apparent low value of the estate; and therefore rested upon that without ever taking any conveyance from the parties entitled to the reversion, or giving them any consideration for their interest therein; whereas, if he had acted for the benefit of the estate, according to his trust, and had let the incumbrancers rest in the condition he found them, for some time, and applied the rents towards their discharge, they would have been much easier paid off as the rents improved, would have had no more than simple interest for the principal sums due, and then the appellants would not have been charged with interest upon interest as they now were.—As to the length of time before the appellants made their claim, his Lordship on the hearing was well satisfied that there had been no *laches* on their part, by reason of infancy on both sides: for it appeared in the cause that the appellants, the children of Dorcas, were most, if not all, born after Bressey's death, and that none of them were of age till Sir Richard died; that Mary Bressey, the now respondent Bradshaw, was under coverture till the year 1686, at which time her husband died, and then she made a demand upon Sir Richard in his life-time, but with no effect: and as to Katherine, under whom the appellant Roe claimed, she died in 1680, when he was about three years old: and when Sir Richard died, the respondent Sir John was but a month old; and the appellants brought their bill before he was of age. Besides, the more to hinder any claims from being made, Sir Richard all along concealed the deed of trust; and his will had never yet been proved.—That Sir Richard having taken possession as a trustee, and it not any way appearing that he ever altered the nature of his title, or became a purchaser of the estate, or had any conveyance made to him, it would have been very hard for a Court of Equity to have given him an absolute estate, when he had none in law; and therefore it could not otherwise be, but that a redemption must have been decreed: and if the appellants were really entitled to a redemption, it would be very hard to put it upon such terms as must infallibly render it of no effect, and swallow up the whole estate, viz. by allowing the trustee interest upon interest for all the money by him advanced annually to the end of the account, as in effect it now happened, if this method of accounting should be affirmed.—And it might be considered, that although the yearly rents of the estate at the time of Sir Richard's entry were so small, as [511] by the Master's report was stated, yet, it was a very improveable estate, and appeared to have been soon raised very considerably; the lowness of the rents at that time being occasioned by the ill management of Bressey, while he was in possession; but when it came to be brought into better order, the rents increased almost every year; besides, it was a manor, and had a very good manor-house upon it, and so was really worth much more than would appear according to the then low rental.—It was therefore hoped, that so much of the said decree and report, and the order confirming the same, as compelled the appellants to allow or pay interest upon interest, would be reversed or rectified.

On the other side it was insisted (R. Raymond, S. Mead), that so stale a demand •



as the present ought not to be favoured in a Court of Equity, after above forty years' acquiescence and quiet enjoyment, without the least pretence of title set up by the appellants during all that time; and especially when there was so much reason to presume, from the circumstances above mentioned, as well as from the proofs in the cause, that the respondent's father was an absolute purchaser of the premises; and there was the greater ground for such presumption, since it was hardly to be imagined that Mary Bressey, who was still living, (the respondent Bradshaw,) and was a joint trustee and executor with the respondent's father, and entitled to a moiety of the surplus money, would otherwise have neglected acting in the trust, or have delayed demanding an account for above forty years together. But there was yet further evidence remaining that Sir Richard had an absolute conveyance of the premises; for amongst his papers there was found a receipt dated the 18th of January 1665, signed by Katherine Bressey, under whom the appellant Roe claimed, and who was entitled to a fourth part of the surplus, which takes notice that £10 was paid her in consideration that she would join in the sale of Odston; and there was also an entry made in Sir Richard's book in June 1665, of the like sum of £10 paid to Dorcas, whose children were entitled to the other fourth part of the surplus; so that, although no conveyance was now found, yet it was highly probable there was such a deed, and that the trust was either released, or that the surplus was at that time looked upon to be worth very little, if any thing, when they accepted of £10 a piece to release the same.—That it would have been extremely hard to have decreed the respondent to account in this case, if the Court had not made some provision that if the respondent's father had disbursed more than he had received, he should have interest allowed for such disbursements; and this was most properly to be done by an annual rest, because the respondent and his father looking upon themselves to be real purchasers of the premises, kept no account of the profits; and therefore the respondent was forced to submit to the hardship of being charged by an estimate of the annual value of the premises for near fifty years past; when, during so long a tract of [512] time, it must inevitably fall out that many of the vouchers relating to the account must have been lost; and when it could not be pretended but that there must have been a great loss by the insolvency of tenants and other accidents, which could not now be taken into the case. That if any of the mortgagees or other creditors had brought a bill in equity against the trustees, either to have foreclosed them or to have had a satisfaction of their debts, such debts would have been made a liquidated sum so soon as it should have been reported what was due, which from that time would have carried interest, and so *toties quoties* as any new report should have been made, till the debts were fully satisfied; and it was no new thing in a Court of Equity, to direct an account to be taken by an annual rest, to the intent that some compensation might be made to a person who had been long kept out of his money; as in cases of arrears of annuities, or of mortgagees after a very long possession. And therefore it was hoped that the decree, report, and order for confirming the same, and all the subsequent proceedings, would be affirmed; and that the appeal would be dismissed with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and that the decree and proceedings therein complained of should be affirmed; and that the appellants should pay to the respondents the sum of £20 for their costs in respect of the said appeal. (Jour. vol. 20. p. 435.)

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CASE 4.—JOHN ELLIS,—*Appellant*; JOHN WHINNERY,—*Respondent*  
[9th April 1720].

[A. being indebted to B. and C. executed to them two several bonds in the penalty of £150 each, and soon afterwards they obtained judgments on these bonds for the penalties and costs.] \*\*A. being engaged in the Irish rebellion, his estate became forfeited; and after being granted to the respondent B. was

resumed; and by a statute of 11 and 12 W. 3. vested in trustees to be sold for the use of the public, subject to debts and incumbrances, to be claimed before the trustees, whose judgment was to be final. These trustees settled the debts due to B. and C. at £157 11s. 9d. each, being for the principal sum and costs of the judgment. An act afterwards passed for the relief of A.'s heir, by which the trustees were directed to convey the estate to him, subject to the incumbrances allowed by the trustees B. having purchased C.'s debt at a very inferior price, claimed interest on these two liquidated sums up to the time of payment by A.'s heir; and this was allowed in the Irish Court of Chancery; but the DECREE of that Court was REVERSED.\*\*

William Ellis, of Dublin Gent. (otherwise called Sir William Ellis,) being indebted to the respondent, executed to him a bond, dated the 10th of February 1685, in the penal sum of £150; and in Easter Term 1687, the respondent obtained a judgment in the Court of Exchequer in Ireland, against [513] the said William Ellis, for the said sum of £150 with costs. The said William Ellis being likewise indebted to one William Rothery, did on the same day execute a bond to him in the like penalty; and in Easter Term 1687, Rothery obtained a judgment against him in the Court of Exchequer, for the said £150 with costs. And the said William Ellis being also indebted to his brother the appellant in £1200, he, on the 31st of December 1688, executed a bond to him in the penalty of £2400 for securing the payment thereof.

Ellis being engaged in the Irish rebellion, his estate thereby became forfeited; whereupon King William III. by letters patent, granted the same to the respondent: but by an act of parliament passed in the 11th and 12th years of his reign, intitled, *An act for granting an aid to his Majesty, by sale of the forfeited and other estates and interests in Ireland*, the said William Ellis's estate was resumed, and vested in trustees, to be sold for the use of the public; but subject nevertheless to such debts and incumbrances as should be claimed on or before the 10th day of August 1700, and heard and determined before the 25th day of March 1701, by the said trustees, or any seven or more of them; and their judgment, determination, or decree, was by the said act declared to be final, and to conclude and bind all persons and interests whatsoever.

In pursuance of this act, the respondent claimed his debt before the said trustees; and, on the 12th of November 1700, that claim was heard, when it was adjudged, determined, and decreed, that the same should be allowed; and that the estate of the said William Ellis, vested in the said trustees by his attainder, should be liable to and stand chargeable with the payment of the sum of £157 11s. 9d. to the respondent, his executors and assigns. A like claim was made by Mary Rothery, the widow and administratrix of the said William Rothery; and on the 18th of the said month of November, she obtained from the said trustees a similar decree for the sum of £157 11s. 9d.

In the first year of Queen Anne, the appellant obtained an act of parliament, intitled, *An act for the relief of John Ellis Esq. with relation to the forfeited estates in Ireland*; whereby it was enacted, that the trustees in the said act of resumption named should convey unto the appellant and his heirs, to his and their own use, and at his or their own costs and charges, all and singular the messuages, lands, tenements, and hereditaments, which were granted or mentioned to be granted by his late Majesty's letters patent; and all other the estate of the said William Ellis, *subject to such incumbrances only as were allowed by the said trustees.*

The trustees accordingly, by indenture dated the 7th of March 1702, conveyed the said estate to the appellant, his heirs, executors, administrators, and assigns respectively; according to the respective interests and estates which the said William Ellis had therein, *subject to such incumbrances only as were allowed by the said trustees.*

[514] Besides the debts allowed to be due to the respondent and the said Mary Rothery, there were also claimed before, and allowed by the said trustees, several other debts and incumbrances, amounting in the whole to £10,670 1s. 5d. (over and above £500 allowed to one Susan Smith, for principal on a mortgage, with interest. and the debt due to the appellant); and among these incumbrances there were several bonds and judgments, on the allowance whereof *no further interest was given than the penalty.* But some of the creditors, to the amount of £4000 and upwards,

being mortgagees, whose principal money and interest amounted to more than the value of the lands comprised in their several securities, they were decreed by the trustees to the possession of the lands so mortgaged.

The appellant, being in possession of the residue of the estate, under the above conveyance from the trustees, paid off the rest of the debts and incumbrances affecting the same, and particularly the debt allowed to the respondent, and the other debt allowed to the said Mary Rothery, of which the respondent had become the purchaser for a trifling consideration.

But the respondent apprehending that he was entitled to interest for the said two debts, as allowed by the trustees, thought proper, on the 3d of June 1718, to exhibit his bill in the Court of Chancery in Ireland against the appellant; suggesting, that he had received much more out of the rents and profits of the said estate than was sufficient to discharge all the debts due thereon, with interest; and that he had only paid the respondent several sums on account of interest; and therefore the bill prayed, that the appellant might set forth an account of the rents and profits of the said estate, and of the debts and incumbrances charged thereon; and that he might either account with and pay the respondent the money so decreed by the trustees, with interest for the same; or that the respondent might be decreed to the possession of the said estate, until his demands should be fully satisfied.

The appellant, by his answer to this bill, insisted, that he had with his own money paid, in discharge of those debts, £6381 8s. 7d. and had received no part of his own debt; that the yearly value of the estate was no more than £312 12s. 8d. out of which many allowances were to be made; that he had not received from the estate near sufficient to pay the said debts; and that he had paid the respondent the full of both his said debts, and ought not to be charged with any interest, for that the trustees never intended to allow interest, nor had the respondent, till lately, ever demanded any.

On the 25th of November 1719, this cause was heard; when the Lord Chancellor of Ireland was pleased to decree, that it should be referred to a Master to take an account of the principal and interest due from the appellant to the respondent, upon the foot of the trustees' decree; such interest to be computed at £10 per cent. to the time of making the statute in that kingdom for [515] reducing interest to £8 per cent. and from thence at £8 per cent.; and both parties were to have all just allowances. His Lordship also declared, that if, upon the return of the report, it should appear that the respondent was not satisfied both his principal and interest, he should be decreed his costs; but in case it should appear that the respondent was satisfied his said principal and interest before the filing of the bill, the appellant should be decreed his costs. And upon a re-hearing, on the 5th of December following, this decree was confirmed.

The appellant therefore appealed both from the decree and the order for confirming it; and on his behalf it was argued (T. Lutwyche, R. Raymond), that the Court of Chancery in Ireland ought not to add to or alter the decree pronounced by the said trustees, because the act of Parliament gave no appeal from them to that Court; on the contrary, it was thereby expressly declared, "That the judgment, determination, or decree of the said trustees should be final, and should conclude and bind all and every person and persons whatsoever; even infants, feme-coverts, ideots, etc., and their interests, should be bound and concluded by such judgment, determination, or decree; any law, statute, or custom, or other matter or thing to the contrary notwithstanding: and that such incumbrances, etc., should never afterwards be impeached, avoided, or called in question, by his Majesty, or any person whatsoever." That it manifestly appeared, the trustees never intended to allow the respondent interest; for otherwise they would have decreed interest, as they always did, with particular directions as to what rate of interest, for what time, and for what sum such interest should be allowed. That although the respondent in his claim, and by his counsel at the hearing of it, insisted on principal and interest for the whole sum of the judgment at law and costs, yet the trustees in their decree allowed only the penalty and costs of the judgment, and no interest; which decree was founded on a report of their Master of references, who stated the account specially, and declared, "That in regard the sum really claimed and due for principal, interest, and costs, exceeded the penalty of the bond, being in all £182; he thought fit to

allow no more than what was recovered upon the judgment, viz. the penalty of the bond £150, and costs £7 11s. 9d., in all £157 11s. 9d." That there could be no reason given why the trustees should be supposed to intend an allowance of interest *for the time then to come*; when they had not only not decreed it, but absolutely refused to allow it *for the time then past*: and if they did not intend to allow such interest, it was conceived that the Court of Chancery could not; but that the respondent was, and ought to be bound and concluded by the said decree of the trustees. That the appellant, by his answer to the respondent's bill, insisted that he had not received near so much out of the profits of the estate as he had paid; which was, and ought to be, the chief matter in issue. That the respondent's own witnesses had fully proved this; and that the estate was [516] only £312 12s. 8d. per ann. subject to taxes, outgoing, deficiencies, repairs, etc. and charged with above £7000 the interest whereof amounted to above £700 per ann. besides the appellant's own debt of £2400: so that it was manifest the estate was not sufficient to pay the interest of half the debts charged upon it. That if the appellant had not interposed in favour of such creditors as were not in possession of any part of the estate, they would have entirely lost all their debts, and the whole estate would have been ruined and eat up by a few of the first incumbrancers; the decree therefore ought not to have charged the appellant with the respondent's debt and interest, until either by a verdict at law, or an account before a Master, it appeared that he had received out of the estate sufficient to pay, and wherewith he ought to have paid the respondent's said demands. That the decree and order were directly contrary to the words and true intent of the act of Parliament made for the relief of the appellant, which enacted that the estate should be conveyed to him, *subject to such incumbrances only as were allowed by the said trustees*: and if that exposition of charging the appellant with interest of debts, *where no interest was allowed by the trustees*, should take place, the rest of the creditors, who had received their debts without insisting on any interest, might by the same method compel the appellant to pay them full interest, which would now amount to more than the estate ever was or would be worth; for the interest of the said two small sums of £157 11s. 9d. demanded by the respondent, already amounted to about £550, and the interest on the rest of the debts would amount to about £12,000. That though the Court of Chancery in many cases relieves against forfeited penalties, yet in no case does it allow more interest than the penalty expressed in the bond, recognizance, or other security, any more than it can compel a mortgagor to add more lands to a scanty security; it being in such cases always held, that the lender or creditor is himself the sole judge with what sort of security he will be content; and if he accepts too scanty a security, or suffers the interest to exceed the value, the fault is his only. But in the present case, the respondent had no hardship to complain of; for he had received the full penalty and costs on his own bond, and the like for Rothery's debt, which it was in proof he paid but £30 for; and neither of these sums would ever have been paid but by the appellant's indulgence, and (as was likewise in proof) were really paid by him out of regard to the respondent, and to enable him to carry on an undertaking whereby he was a great gainer. That if the respondent had taken out any execution at law, he could have levied no more than what he had received, viz. *the bare penalty and costs on the judgment*; and, in truth, neither the respondent or any other creditor (except the appellant) had any reason to complain, for they had all received their debts, and the whole loss and hardship fell only upon the appellant, and amounted to thrice the value of the estate: and it was therefore hoped, that the [517] decree and order would be reversed, and the respondent's bill dismissed.

On the other side, it was said (C. Phipps, S. Mead), to be agreeable to the known rules of equity, that when any fixed and certain sum of money is adjudged or decreed by any Court of Law or Equity to be due, the same shall carry interest from the time of its being so decreed to be due. That by the decree of the trustees, the estate of William Ellis stood charged with the payment of the said two several sums of £157 11s. 9d. from the time of pronouncing the said decree; and, from that time, the same was apprehended to be in the nature of a mortgage upon the lands. That the appellant knew the whole of the debts decreed by the said trustees to be due at the time of his obtaining the said act of Parliament in his favour; and he accepted and enjoyed the estate under that act, subject to make good the said decrees; and under the trustees conveyance, subject to the debts decreed due by them. That if the

appellant had not obtained the said act, the estate must have been sold by the trustees, and the respondent's demands would then have been immediately paid; he ought not, therefore, to be in a worse condition by the appellant's taking the estate, than he would otherwise have been.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the said decree, and the affirmance thereof, should be reversed; and that the respondent's bill should stand absolutely dismissed; and that he should pay the appellant his costs, to be taxed by a Master, for and in respect of the said bill and all proceedings thereupon in the said Court of Chancery: and it was further ORDERED, that the said Court should, from time to time, make proper orders for taxing the said costs, and enforcing the payment thereof, according to the course of the Court in such cases. (Jour. vol. 21. p. 300.)

CASE 5.—Lord DUNSANY and others,—*Appellants*; CATHERINE PLUNKETT, Widow,—*Respondent* [24th May 1720].

[Where advantage is made of money secured by a statute staple, interest shall be carried beyond the penalty.]

**\*\*ORDERS** of the *Irish* Chancery **AFFIRMED**.

See Treatise of Equity, lib. 5. c. 1. sec. 2.—And note at the end of this title,\*\* [p. 390, *infra*].

Viner, vol. 14. p. 460. E. ca. 3; 2 Eq. Ca. Ab. 533. B. ca. 1.

On the marriage of Mary, the daughter of Edward Plunkett Esq. with James Woolferston Esq. the said Edward Plunkett and Christopher Plunkett (afterwards Lord Dunsany) his eldest son and heir apparent, on the 26th of August 1665, acknowledged a [518] statute-staple of £2000 to the said James Woolferston, for securing the payment of £1000 as the marriage portion of the said Mary Plunkett.

On the 30th of March 1668, Mr. Woolferston made his will; and thereby gave £920, the residue then due of the said portion, to his wife, to be disposed of to the use of his children; and appointed her his executrix. The testator soon afterwards died, leaving issue George, who died a minor, without issue, and the respondent Catherine; whereupon the said Mary Woolferston, the widow, proved the will, and soon afterwards married Sir Brien O'Neill Bart. father of the appellants Sir Henry O'Neill and Eleanor Evers.

In February 1679, after the death of Edward Plunkett, Sir Brien O'Neill and Dame Mary his wife sued out two extents upon this statute-staple, one directed to the sheriff of Cavan, and the other to the sheriff of Meath: and it appearing by two several inquisitions taken upon these extents, that the said Christopher Lord Dunsany was seised in fee of several lands in the said counties of Cavan and Meath, possession of the same was delivered to Sir Brien O'Neill and Dame Mary his wife, by virtue of two *liberates* sued out for that purpose.

James Plunkett having married the respondent Catherine, he, in the year 1683, exhibited a bill in the name of himself and his said wife in the Court of Chancery of Ireland, against the said Sir Brien O'Neill and his wife, for an account of the money received by them out of the extended lands; to which bill Sir Brien O'Neill and his wife put in their answers, and thereby submitted to account for the profits of the said lands; and accordingly, by a decree made in that cause on the 5th of February 1684, it was referred to three of the Masters of the said Court, to certify how they found the said account.

On the 7th of May 1686, the Masters made their report, and thereby certified, that Sir Brien O'Neill and his wife had, in payment of the debts and funeral charges of the said James Woolferston, and in the maintenance of the said George Woolferston and the respondent Catherine, and in extending the said lands, laid out £543 4s.; and that they craved interest for the same from the respective times of payment, as also an allowance of £220 for the costs of seventeen suits brought against them as executors of the said James Woolferston.

On the 10th of June following, the cause was heard upon this report; when it

was ordered, that the Masters should examine when the said sum of £543 4s. and the other charges were laid out; and that Sir Brien O'Neill and his wife should have interest allowed them from the time of their respective disbursements; and should produce before the Masters the bills of costs in the several suits brought for the said James Woolferston's debts, that the Masters might judge of the expences and the necessity of those suits. But the wars of Ireland coming on soon after, there were no further proceedings in this suit.

[519] In 1690, Christopher Lord Dunsany died without issue; by whose death the extended lands descended to the appellant Randal Lord Dunsany, his brother and heir.

On the 10th of October 1691, Dame Mary O'Neill made her will, and appointed the appellants Sir Henry O'Neill and Eleanor Evers, executors thereof; and both she and Sir Brien her husband died soon afterwards.

The executors duly proved this will, and also obtained letters of administration of the goods and chattels of James Woolferston, unadministered by Dame Mary O'Neill in her lifetime.

Soon after the surrender of Limerick, the said James Plunkett, the respondent's husband, went into France, where he afterwards died; and on the 17th of April 1710, the respondent exhibited her bill in the Court of Chancery in Ireland, against the appellants, for an account and relief touching the said statute-staple.

The appellants Sir Henry O'Neill, Edward Evers, and Eleanor his wife, by their answers to this bill insisted, that Sir Brien O'Neill and Dame Mary his wife expended to the value of the £920 given by James Woolferston's will, before the lands were extended; and that the said Dame Mary their mother was, by the custom of Ireland, entitled to a third part of the said statute-staple; they also said, that in February 1701, they came to an account with the appellant the Lord Dunsany, touching the said statute-staple; and it being computed that the sum of £920 was then due thereon, his lordship did then pay and secure to Sir Henry O'Neill £620, and the remaining £300 to Eleanor; who thereupon released the said statute-staple, and acknowledged satisfaction thereof upon record.

On the 23d of June 1711, this cause was heard before the Lord Chancellor of Ireland; when it was referred to a Master to state and settle the account between the respondent and the appellants, and to make all just allowances; and report any matter he should think fit specially.

Accordingly, on the 7th of February following, the Master made a special report; and thereby certified, that the respondent insisted, that the account should be stated from February 1701, at which time £920 was admitted to be due on the statute-staple; but that the appellants insisted, that the pleadings, depositions, reports, and orders, made in the suit wherein the respondent and her husband were plaintiffs, and Sir Brien O'Neill and Dame Mary his wife were defendants, should bind the respondent; and that the account should be stated on the foot of those proceedings.

The cause being heard on the 15th of the same month of February, upon this report it was ordered, that the £920 which was the balance stated in 1701, should stand as the balance then due on the statute-staple; and that the Master should report how much was paid or disbursed by Sir Brien O'Neill and his wife, Sir Henry O'Neill, and Edward Evers or his wife, on account of [520] the debts of the said James Woolferston; and how much any of them had received upon the statute-staple.

On the 16th of February 1714, the cause was re-heard upon the respondent's petition; when it was ordered, that she should be admitted to make her charge from the beginning, and that the appellants should be at liberty to discharge themselves; and in stating the account, to make use of the proofs, pleadings, reports, and orders, in the former cause, and also in another cause instituted in the Court of Exchequer in Ireland, wherein the said James Plunkett and the respondent were plaintiffs, and Robert Woolferston was defendant: and the appellants were likewise at liberty to make use of the pleadings and proceedings in certain actions brought against Sir Brien and his wife by the creditors of the said James Woolferston, or prosecuted by them against the said creditors. And this order was afterwards confirmed, upon a re-hearing procured by the appellants.

The Master, by his report of the 26th of June 1718, certified that the several sums mentioned in the report of the 7th of May 1686, amounting to £543 4s. and the interest thereof, from the several times the same appeared to him to have been expended, to the 1st of February 1679, when the lands were extended by Sir Brien; together with £205 10s. 4d. expended by him and his wife in several law-suits on account of the said James Woolferston's debts, amounted to £961 5s. 10d.; that Sir Brien had, from the time of suing out the extents, received the interest of the said £920 during his life, and that the said Sir Henry O'Neill and Eleanor Evers received or might have received the interest thereof ever since; that he had therefore charged them with interest for the said £920 from the 1st of February 1679 to the 1st of February 1717; and that the Lord Dunsany was indebted for the said principal sum of £920 and the interest thereof from the 30th of March 1668 to the 1st of February 1679, in £2008 9s. 5d. and for the interest thereof from the 1st of February 1679 to the 1st of February 1717, in £3312, amounting in the whole to £5320 9s. 5d.; which being added to the sum of £82 expended in extending the lands, made the whole due on account of the statute-staple for principal, interest, and costs, on the 1st of February 1717, £5402 9s. 5d. The Master further certified, that the appellant Lord Dunsany had paid to the other appellants, and those under whom they claimed, before the 1st of February 1679, £922 0s. 10d., and since that time £39 5s.; and that he had paid, or ought to have paid them, from the 1st of February 1679, out of the extended lands, £3312 0s. 1d. amounting in the whole to £4273 5s. 10d.; which being deducted from the said sum of £5402 9s. 5d. there remained in the hands of the Lord Dunsany £1129 3s. 7d. The Master then reported specially, that the said James Plunkett, in the year 1688, borrowed £97 of Sir Brien O'Neill; and for securing the payment thereof, gave a bond in the penalty of £194. And that the Lord Dunsany [521] lent the respondent £44, for which she gave him her bond, both which bonds were run out; and that Sir Henry O'Neill likewise lent the respondent £10 in 1703, for which she gave a bond in the penalty of £20.

To this report the appellants filed several exceptions: 1st, For that the Master, in computing interest for the principal sum of £920, charged the Lord Dunsany beyond the penalty of the statute-staple, contrary to the method of calculating interest on specialities; and did not, in stating the account, make a rest at the times of paying and expending the several sums amounting to £543 4s., which was made a fixed or principal sum by the report of the 7th of May 1686. And that the Master ought to have charged the Lord Dunsany with interest only for the balance remaining due of the £920 after such payments and disbursements. 2d, For that the Master ought not to charge the Lord Dunsany with £82 for the charges of extending the lands, he having no proof laid before him to warrant such a charge. 3d, For that the Master did not certify, that in the order of the 10th of June 1686, there was a saving of such right as Dame Mary O'Neill might have to a third part of the £920 by the custom of Ireland, if any such custom should appear to have been then in force. 4th, For that the Master made the Lord Dunsany debtor to the respondent in £1129 3s. 7d. though she did not entitle herself to such demand, either as executrix or administratrix of her husband, or her brother George Woolferston. 5th, For that the Master did not allow the appellants Sir Henry O'Neill and Eleanor Evers, as executors of Dame Mary, the costs of the former cause; the respondent having commenced a new suit, instead of reviving that former cause. And, 6th, For that the Master did not allow interest for the sums of £922 and £39 5s. in his report mentioned, from the times of payment thereof to the time of closing the account.

On the 17th and 18th of November 1718, the cause was heard on these exceptions and the report; when the exceptions were over-ruled, and it was ordered, that the appellants should be allowed the several penalties of the bonds.

The cause being re-heard on the 20th of November 1719, it was ordered, that the appellants Sir Henry O'Neill, and Edward Evers and Eleanor his wife, should stand charged with the sum of £3312 0s. 1d. as what was received, or might have been received by Sir Brien O'Neill and his wife in their lifetime, and the said appellants since their death, out of the Lord Dunsany's estate; and that the sums of £194 and £20 mentioned in the report, should be allowed in the

account between the respondent and the appellants Sir Henry and Edward Evers, and not to the Lord Dunsany; and that the Master should settle the account according to the directions then given, and the directions of the several former orders.

The appellants conceiving themselves aggrieved by these two last orders, brought the present appeal; and on their behalf it [522] was insisted (T. Lutwyche, S. Cowper), that the appellant Lord Dunsany, for a valuable consideration, fairly obtained a release of the said statute-staple, from the legal representatives of the cognizee, having paid £920 for the same; and therefore the Court, after such a length of time, ought not to have decreed any account against him, but, so far as he was concerned, the bill ought to have been dismissed. That the respondent and her husband having filed a former bill, and it not being proved that he was dead, though that fact was put in issue, she ought not to have had any relief upon her present bill. That if the appellant Lord Dunsany had been accountable to the respondent, yet she having consented to take the account from the year 1701, when the £920 was paid to the proper administrators, she ought not to have been released from that consent, but the account should have been taken from that time. That the Master ought not to have computed interest on the principal sum of £920 beyond the penalty of the statute-staple, and therefore the first exception ought to have been allowed. And, lastly, that the sixth exception should also have been allowed, because the Master had not carried on interest upon the sums disbursed by Sir Brien O'Neill down to the time of closing his report, as he ought to have done.

On the other side it was said (C. Talbot, W. Peere Williams), that the respondent was under a necessity of proceeding by original bill in this cause, the Lord Dunsany being no party to the former suit; and that when his Lordship obtained the release of the statute-staple, he had full notice that the respondent was entitled to what was due upon it, the benefit thereof having been given to her and her brother, by their father's will. That it did not appear by the proceedings in the former cause, that before any extent was sued out, Sir Brien O'Neill and his wife administered all that was due on the statute; on the contrary, it appeared by the Master's report in the present cause, that there was due upon the statute, on the 1st of February 1679, £2008 9s. 5d.; and that the whole money expended by Sir Brien and his wife, together with the interest thereof to that time, amounted to no more than £961 5s. 10d. That it also appeared by the report, that the Master had carried on interest for the several particular sums, which made up the sum of £543 4s. from the respective times they were laid out to the 1st of February 1697; and it was also plain that Sir Brien, and the appellants Sir Henry and Eleanor, constantly received the interest of the £920 out of the extended lands, and that the principal and interest due at any one time never exceeded the penalty of the statute. As to the allegation, that Dame Mary was, by the custom of Ireland, entitled to a third part of the money due on the statute, the appellants counsel were so sensible that there never was any such custom, that they waived this matter upon arguing the exceptions; but if there had been such a custom, Dame Mary had no reason to insist upon it; for Mr. Woolferston by his will gave her all his personal estate, and £150 per ann. for her life, out of his real estate; and as to George Woolferston's share of the £920 [523] it survived to the respondent by his death. That by the report, the appellants Sir Henry O'Neill and Edward Evers, were allowed interest for the several particular sums, making up the £543 4s. expended by Sir Brien, from the respective times they were laid out, until Lord Dunsany's estate was extended; and from the time that Sir Brien was put into possession thereof, he received thereout a great deal more than the interest of the said £543 4s. and the appellants were allowed the full penalty of the three several bonds given by the respondent and her husband for the sums lent them: the orders therefore complained of being so just, it was hoped they would be affirmed, and the appeal dismissed with exemplary costs.

WHEN this appeal came on to be heard, the counsel for the appellants, instead of arguing in support of it, acquainted the House that they were willing the same should be dismissed; and the respondent's counsel consenting thereto, it was ORDERED and ADJUDGED, that the said appeal should be dismissed; and the orders therein complained of affirmed. (Jour. vol. 21. p. 458.)



CASE 6.—THE TOWN OF GALWAY,—*Appellants*; HENRY RUSSELL,—*Respondent*  
[1st May 1721].

[A Court of Equity will not carry Interest beyond the penalty of a bond, where the demand is stale, and appears to have been neglected for many years.]

\*\* ORDERS, REPORT, and DECREE in the Court of Exchequer in Ireland  
REVERSED.

See note at the end of this title,\*\* [p. 390 *infra*].

Viner, vol. 14. p. 460. E. ca. 2: 2 Eq. Ca. Ab. 533. B. ca. 2.

The Corporation of Galway being entitled to divers lands, and to several duties and customs arising by trade; they, for supplying part of the army in Ireland, did, before the year 1641, mortgage their charter, customs, and duties, for £3000 or thereabouts, to several persons, who afterwards forfeited on account of the rebellion in 1641. And King Charles II. by letters patent, having granted those mortgages to Elizabeth Hamilton widow, she, by an order of the Court of Chancery in Ireland, obtained a sequestration of all the revenues of the Corporation; and by virtue thereof received great part of her debt.

About the year 1672, Colonel Theodore Russell, the respondent's father, being quartered in and Governor of the said town of Galway, proposed to the Corporation, that if they would elect him Mayor, he would treat with Mrs. Hamilton for her interest in the said mortgages; and would procure for them a new charter. He was accordingly chosen Mayor, and soon afterwards agreed with Mrs. Hamilton for her interest in the mortgages; and like-[524]-wise obtained from his Majesty a new charter for the Corporation.

In this new charter, Colonel Russell procured himself to be named Mayor, and also procured a clause to be inserted therein to the effect following; viz. "That the Corporation should not levy or receive any of the said duties and customs, nor interrupt the Colonel or his agents in the receipt of them, until he, out of the issues and profits, should receive £2500 by him expended in purchasing the said charter, duties, and customs, and also such other sums as he should make appear to have laid out concerning the same; together with £300 for his trouble, over and above his disbursements." And the Lord Lieutenant, Deputy, or Chief Governor of Ireland, and the Privy Council thereof, from time to time, were required to keep Colonel Russell in quiet possession of the said duties and customs; either by annually electing him Mayor of the said town, or otherwise as they should judge expedient, until he was paid as aforesaid: under colour of which clause, and by his power as Governor, he entered into the receipt of all the revenues of the Corporation, of the yearly value of £700 or thereabouts, and procured himself to be continued Mayor and in the receipt of the said revenues, for the space of fourteen years.

In the year 1684, the Corporation petitioned the Government and Privy Council of Ireland, praying that Colonel Russell might account for the said revenues; and thereupon Sir John Topham, Knight, one of the Masters of the Court of Chancery, Richard Coote and John Coghill Esqrs. were, by the Government and Council, appointed auditors of all accounts between Colonel Russell and the Corporation; and they having examined the same, did on the 23d of March 1684, report, that the said accounts appeared intricate; and that by means of the multiplicity of orders of the common council and thosel of the said town, many of them being contradictory to each other, and the Corporation being like to suffer by the arrears of the revenue, which Colonel Russell alleged stood out uncollected; therefore to prevent further detriment to the parties, they, by mutual consent, had come to the following agreement, viz. That the Corporation should, on the 29th of September then next ensuing, pay Colonel Russell £700 in full of all demands whatsoever; and to insure the payment thereof, good and sufficient security, (such as the then next Judges of assize for Connaught circuit should approve of,) should enter into bonds, with warrants of attorney to confess judgment thereon; and that by like security, £115 more was to be secured to Colonel Russell, payable on the 29th of September 1686,

as a gratuity, above what was granted him by charter, and other sums given him for his service; in consideration whereof, Colonel Russell was to quit-claim and release the Corporation of all demands, and was likewise to deliver to them a full schedule and particular of the arrears of rent, and charter duties and customs, which, he alleged, amounted to £402 5s 4d., and which one Dominick [525] Bodkin, his agent, by a note under his hand, bearing date the 26th of March 1685, engaged to justify to be due, or to pay the same; and the Colonel was also to give up to the Corporation the bonds and pledges then in his hands for £144 more: and in case any part of either of the said sums had been received by him, or for his use, he was to discount them out of the £700. And the better to discharge the said £700 the Corporation was to have the full benefit of the revenue from Michaelmas 1684.

This report and agreement were respectively signed by the auditors, and also by Colonel Russell and Richard Plumer, agent for the Corporation; and the same was approved of by the Government and Privy Council, by their order of the 27th of March 1685, and all persons were required to conform thereunto. And accordingly, Thomas Revett, John Gerry, Thomas Yeaden, Thomas Wilson, William Hoskins, Thomas Simcock, Thomas Poole, and Richard Plumer, (being responsible persons,) by the consent of Colonel Russell, and with the approbation of Henry Hern and William Worth Esqrs. the then next Judges for the Connaught assizes, did, on the 16th of April 1685, enter into two several bonds, with warrants of attorney, to Colonel Russell, for payment of the said several sums of £700 and £115, as before mentioned. And the Colonel, on the said 16th of April 1685, did perfect to the Corporation a general release of all debts and demands whatsoever.

Notwithstanding Colonel Russell had sufficient security for his full demand, and had absolutely released the Corporation from the same, yet, being Mayor of the town, he continued the said Dominick Bodkin his agent in the receipt of the said revenue; and on the 25th of October 1685, £300 of the Corporation money was actually placed in the hands of Thomas Revett, one of the said bonds-men, towards payment of Colonel Russell. And he being also continued Mayor of the Corporation until Michaelmas 1686, did, or might have received his said debt of £815 from the said Revett, and out of the said arrears and revenues. The revenue being then of the yearly value of £800 or thereabouts.

But Colonel Russell having the power of the Corporation in his hands, by the assistance of a few of the members, disposed of the said revenue as he and they thought fit; having suspended such as would have opposed him, and granted leases of the Corporation lands to others who assisted him; and being conscious that he was, or might have been fully paid the said £815, and having an intent to increase and renew his demands, and keep the Corporation in his power, he sought out means to avoid the said agreement: and accordingly, on the 14th of May, 1686, he and about nine members more being assembled, entered an order in the corporation book, that the aforesaid release, by him duly perfected, should be cancelled and delivered up to him, and he was thereupon to deliver up the said bonds; which was accordingly done, notwithstanding two of the bonds-men, who were then suspended from being common council-men, were against it; and the £300 [526] in the said Thomas Revett's hands, was thereby ordered forthwith to be paid to Colonel Russell, and the said Bodkin was also to pay him all such sums, as he had in his hands, due to the Corporation; and that Colonel Russell should be left to account with the Corporation from the beginning, for all sums of money by him paid and disbursed for them; allowing him a salary of £200 per ann. for the time he served as Mayor: and having, in like manner, obtained several other orders, allowing him several great sums of money, he on the 28th of June following, to colour his proceedings, had another order entered, confirming all former orders made in his favour; and having thereby compassed his designs, he then restored all the suspended members.

In August following, the Corporation having elected another Mayor, Colonel Russell, on the 5th of October 1686, summoned a full assembly, which he attended, where his proceedings, and particularly those relating to the cancelling the release, were examined; and thereupon the said orders of the 14th of May and 28th of June 1686, and several other orders were, *nemine contradicente*, ordered to be, and accordingly were vacated, as injurious to the Corporation: and at this assembly there were forty members present, though at the former there were but nine.

After the removal of Colonel Russell from the mayoralty in 1686, he petitioned the Government and Privy Council; and the Corporation having complained to them against his proceedings, they were pleased to refer the examination thereof to John Bingham, Robert Miller, Dennis Daly, and Garret Moore, Esqrs, who fully heard all parties; and reported, that the arrear of the Corporation revenues standing out at Michaelmas 1684, the pledges in Colonel Russell's hands, and the revenue of the Corporation from Michaelmas 1684 to Michaelmas 1686, exclusive of the water bailiff's office, amounted to £1439 2s. 5½d., and that Colonel Russell did, or might have received the said £815 clear of all charges.

This report having been laid before the Government and Privy Council, Colonel Russell acquiesced therein till the year 1694; when he applied to the Government and Privy Council, to compel the Corporation to account with him from the beginning, which was refused; but by an order dated the 3d of December 1694, two Masters of the Court of Chancery were appointed to state the account on the foot of the said agreement in 1684. But the Colonel knowing that several members of the Corporation were then living, who could justify the report made by the auditors in 1686, neglected to prosecute this order or make any further demand during the remainder of his life; notwithstanding he lived until the month of November 1700.

But on the 23d of December 1709, about nine years after the Colonel's death, the respondent, as one of his executors, exhibited his bill in the Court of Exchequer in Ireland, against the appellants and the Colonel's other executor, not only for the recovery of the £815 with interest, but also for several other sums: to which bill, the appellants having pleaded the statute of limita-[527]-tions, the plea was, on the 21st of November 1710, argued, and the benefit thereof reserved till the hearing of the cause.

On the 18th of May 1711, the appellants put in an answer to the bill, and thereby (*inter alia*) insisted, that they were not liable to the said debt, the same and all demands on the foot of the mortgage having been released by Colonel Russell as aforesaid, and no corporate act done afterwards to set up the said mortgage; and that the Colonel, having had sufficient security for his demands, ought not to resort to the Corporation. And the cause being at issue, and witnesses examined, and publication passed, the same was, on the 3rd of July 1713, heard and fully debated, when the respondent's said bill was dismissed.

Although the respondent acquiesced under this dismissal till the year 1715, yet on his petition for a re-hearing, the cause was on the 19th and 20th of May 1715, re-heard before Mr. Baron Pocklington and Mr. Baron St. Leger, who differing in opinion, a further day was appointed for the Court to give judgment; and on the 25th of the same month, one of the said Barons declaring he would have the officer to state the account in the cause, before he would give his opinion, no decree was pronounced; but an order was made, that the officer should state the account on the said order of the Government and Council, dated the 3d of December 1694. And he was required to report that, or any other matter which might appear difficult to him, specially.

The appellants having petitioned for a re-hearing, the cause was, on the 28th and 29th of January 1719, re-heard accordingly; when the Court was pleased to affirm the former order to account. But on the 1st of February following, the Court declaring they had re-considered the cause, did then order, that the appellants should account for the sum of £700 only, which appeared to be due to Colonel Russell on the account stated in 1684, and not for the £115 demanded by him as a gratuity.

The respondent, pursuant to the said order and decrees, on the 29th of February 1719, procured the officer's report; whereby the said officer took upon to determine, that the said Dominick Bodkin was agent or receiver for the Corporation, and stated the account on the returns made by Bodkin as such; which was contrary to the order of the 25th of May 1715, directing the account, wherein the said Bodkin was allowed to be agent for Colonel Russell, and to account as such: and the officer did thereby report, without any proof, that Colonel Russell delivered the Corporation a full particular of the arrears, and also the bonds and pledges mentioned in the agreement in 1684, and refused to give the appellants any allowance for the said arrears, bonds, and pledges; or to examine or report the difficulties the appel-

lants laboured under, from the time the Irish papists had, before the rebellion in 1688, dispossessed the protestants of the said revenues, until the reduction of the said town and garrison of Galway in 1691; but charged the appellants with the said £700 and interest at £10 per cent. per ann. for thirty-four years, four months, and eighteen [528] days, whereby a balance of £3000 and upwards was reported from the appellants, which trebly exceeded the sum contained in the bond accepted by Colonel Russell as a security for the £700: neither would the officer, in the said account, allow the appellants the sum of £300 paid into the hands of the said Thomas Revett for Colonel Russell; which, by his own agreement, at the time of cancelling the release, he was forthwith to have received from Revett, and which he did or might have received accordingly: and the officer also refused to allow the appellants £37 15s. 5d. which appeared by Bodkin's books of account, that he did or might have received for charter duties. And although it was admitted, that the rents of the Corporation lands, from Michaelmas 1684 to Michaelmas 1686, amounted to £114, and no impediment appeared to the receiving thereof by Colonel Russell, yet the officer would give the appellants an allowance only of £15 4s. 6d. on account of the said rents; and the said officer allowed Colonel Russell and Bodkin several sums which fell due before Michaelmas 1684 to Michaelmas 1686, and which ought and might have been paid out of the revenue received before Michaelmas 1684: he also allowed them several sums alleged to have been expended for the repair of the citadel and dwelling of Colonel Russell, and several other sums which were no Corporation charge; and several sums were abated for rent, though no charge was allowed the appellants for the rents of the lands so abated.

The appellants therefore, on the 11th of May 1720, took several exceptions to this report; which being heard on the 2d and 21st of June 1720, before Mr. Baron St. Leger; the substance of the first exception was, that by the said order of the 25th of May 1715, and which was confirmed on the 1st of February 1719, it was declared, that the said Dominick Bodkin was agent to Colonel Russell, and the officer was required to allow the appellants what the Colonel or his agent did receive of the sums in the said order mentioned; whereas the officer reported Bodkin to be receiver for the Corporation and the obligors, and reported facts, and stated the account on the returns made by Bodkin, as agent for the appellants, contrary to the proofs in the cause: but this exception was over-ruled, notwithstanding the said former orders, and the evidence of several witnesses, who proved Bodkin to have been agent for Colonel Russell in the years 1684, 1685, and 1686, and the Court refused to direct an issue to try that fact, though the appellants counsel insisted on the same, at the peril of costs.—The substance of the second exception was, that the officer reported, that Colonel Russell did deliver to the Corporation a full particular of the arrears of £402 5s. 4d. allowed due by the agreement in 1684, and also the said bonds and pledges for £144, then remaining in his hands, which were then agreed to be delivered to the Corporation; though it was not so much as alleged by the respondent in his bill, or any wise proved in the cause, that the same were so delivered, but the contrary appeared.—And the substance of the eighth exception was, that [529] though it appeared to the officer by the proofs in the cause, that Colonel Russell and Bodkin, as well before as after the perfection of the said securities, continued in receipt of the said revenues, whereby the Corporation could not receive any part of the said arrear of £402 5s. 4d. or any of the said securities for £144; all papers relating to accounts being, by the said order for cancelling the release, to be given up to the Colonel, and the said Bodkin being thereby to pay him all monies in his hands due to the Corporation; yet the officer refused to allow the appellants the said sums, or any of them: and notwithstanding the respondent did not produce any proof, that the said particulars of the arrears, and the pledges were delivered up to the Corporation, or that the said Corporation had received the same; but by the proofs in the cause it appeared, that the Colonel and Bodkin were in receipt of the said Corporation revenues; yet, both the said exceptions were over-ruled.—The substance of the fourth exception was, that the officer had made no allowance for the time the papists dispossessed the protestants of the said revenue, or for the time of the rebellion; but had charged the appellants with £10 per cent. per ann. for thirty-four months and eighteen days; it was therefore ordered, that the appellants should have an allowance of two years in-

terest only; notwithstanding the interest computed, trebly exceeded the sum for which the bond was entered into, and that Colonel Russell and the respondents did not make any demand of the said debt for fifteen years.—The substance of the fifth exception was, that the officer refused to allow the appellants the sum of £300, in the said Revett's hands, in trust for Colonel Russell, which, by the said order of council procured by him for cancelling the said general release, was, by his own agreement, to be forthwith paid to him, and which he did or might have received, several dealings having passed between him and Revett; but, on the contrary, gave Bodkin credit for the same against the appellants, contrary to the order of reference; and notwithstanding the appellants counsel offered to try it at law, whether Colonel Russell did not receive the £300 from Revett, by an issue to be directed for that purpose, and at the peril of costs; yet the exception was over-ruled.—The substance of the seventh exception was, that though the officer found the rents of the Corporation lands, from Michaelmas 1684 to Michaelmas 1686, to amount to £114; yet he gave the appellants an allowance only of £15 4s. 6d. for the rent which appeared to be an arrear due at Michaelmas 1686, and was recovered by Russell in his own name in March 1687; and which was a proof that he did, or might have received all former rent and arrears; yet this exception was also over-ruled. And the substance of the several other exceptions was against an allowance of £71 13s. 8d. for mending the steeple and bells, which was twice charged; and other sums for the repair of the citadel and dwelling-house, and other purposes, which were no Corporation charge; and also against an allowance of rent abated, where no credit was given to the appellants for the rent: but these several [530] exceptions were likewise over-ruled, and the officer was directed to amend the said double charge, and make up his report accordingly. And the said officer having, in pursuance thereof, on the 23d of June 1720, made up such amended report, did thereby report remaining due to the respondent from the appellants, on the 16th of February 1719, for the said sum of £700 and interest, £2973 12s. 6d.

On the 25th of June 1720, upon motion of the respondents counsel, but without giving the usual day for excepting, the Court was pleased to confirm the said report absolutely; and decree to the respondent the sum of £2973 12s. 6d. and interest for the said £700 to that day, making together £2997 8s. 1d. with interest; and also decreed an injunction, to put the respondent in possession until the said sum with interest, and £78 19s. 10d. costs of suit, should be paid.

From the said several orders and decrees of the 25th of May 1715, 1st of February 1719, and 21st and 25th of June 1720, the appellants appealed; insisting (T. Lutwyche, S. Mead), that the dismissal of the respondent's bill on the 3d of July 1713, ought, upon the re-hearing on the 25th of May 1715, to have been affirmed; and no account directed, in regard no demand had been made for fifteen years; and that there had been no transactions between the Corporation and Colonel Russell since 1686, when the Auditors reported, that he was or might have been paid; and therefore, upon the circumstances of this case, it was humbly apprehended, that the appellants ought to have had the benefit of the statute of limitations. That the Colonel having taken sufficient security for more than his full demand, and having absolutely released the Corporation, he could not re-assume the same, without a corporate act regularly made; the Corporation not being bound by any order made by him, or any common-council of the town, in manner aforesaid, as not being a corporate act or under the Corporation seal. That the security so given for the £815 was not insolvent, nor was Colonel Russell, by any corruption or fraud of the Corporation, forced to give up his said securities; but the same was done upon his own application, and when he was in full possession of all the revenue of the Corporation; on the contrary, his proceedings in relation thereto, were carried on and prosecuted in a very unfair and illegal manner. That the respondent's demand, if any, lay against the obligors, and he ought to have sued them, or at least have made them parties to his bill; so that they might have been thereby obliged to account either with the respondent or the Corporation, for what they had received of the said revenues, towards paying the sums for which they stood security. That if the respondent was entitled to an account, he ought not to have had an allowance of more than the sum for which the bond was entered into; and especially in the case of so stale a demand, which appeared to have been

neglected for fifteen years: and the appellants ought to have had credit for the £300 in Revett's hands, which Colonel Russell, on cancelling the security, agreed [531] to take, and which he either received, or might have compelled Revett to have paid; and for the £402 5s. 4d. arrear, and the £144 due on the pledges, which the Colonel or his agent Bodkin did or might have received. That in regard the Colonel, from November 1694 during his life, never prosecuted any account for his demand, nor did the respondent after his death, till December 1709, commence or prosecute any suit for the same; it was apprehended, that no interest ought to have been decreed him for that time; or at least, that the interest ought to have been mitigated, and not decreed at so large a rate as £10 per cent. for so long a time as thirty-four years and upwards. That the appellants ought to have had credit for the rent of the Corporation lands; there not appearing to have been any obstruction to prevent Colonel Russell's receiving such rent. And that several of the sums allowed the respondent by the report, to discharge Colonel Russell of the sums he received, ought not to have been admitted; because those payments no way related to the Corporation, nor was there any corporate act to justify his paying the same: it was therefore hoped, that the said orders and decrees would be reversed, and the respondent's bill dismissed.

On the other side, it was said (R. Raymond, S. Cowper) to be well known, that in 1686, King James II. was modelling all the corporations in Ireland, and putting in popish magistrates; that the obligors being protestant magistrates of the town of Galway, and in possession of the town's revenues, in order to enable them to pay the debt to Colonel Russell, for which they had given their bonds; it was apprehended, (as it afterwards happened) that they were soon to be turned out of the magistracy, and papists put in their places; they therefore desired Colonel Russell to deliver up their bonds, on their delivering up his release; which was accordingly done by an order of common council of the 14th of May 1686, made with the unanimous consent of the Corporation, and confirmed by a subsequent order of the 18th of the same month. That the giving this security by the magistrates of the town was evidently done for the better securing to Colonel Russell his debt, and the more speedy payment of it, which was to be in twelve months time; and though such bonds were given, the debt still remained unpaid; and no injury was done to the town by Colonel Russell's delivering up these securities; for the debt which was to be paid by the town to the bonds-men, while the bonds remained in force, was to be paid to the Colonel, after those bonds were delivered up. That the bonds to Colonel Russell being entered into on the 5th of April 1685, the Corporation, by an order of the 4th of May following, empowered Revett and the other bonds-men to receive the revenues, by virtue of which order Revett received £300 of those revenues; but when the bonds were delivered up, in ease of the bonds-men, and not in ease of the town, the Corporation from thenceforth became Colonel Russell's debtors; so that it was not in his power to compel Revett to pay him this £300, nor did he in fact ever receive it. That Colonel Russell was an infirm [532] man, much afflicted with the stone, and actually died under the operation to be cured of it; and after his death, the respondent had great difficulties and many suits with his mother-in-law, before he could get possession of the said securities: and these were the reasons why the Corporation was not prosecuted for the said debt sooner than the year 1709. That as to the allowances made to the respondent by the report, the objection was too general, those sums being fifty in number, so that it was impossible for the respondent to be prepared to answer them; but if the appellants had given notice what particular sums they objected to, as in fairness they ought to have done, the respondent would have been able to give a very full and satisfactory answer thereto. And therefore it was hoped, that the complaints of the appellants would appear frivolous and vexatious, and that the decrees and proceedings would, in consequence, be affirmed, and the appeal dismissed with costs.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the said orders, report, and decree, and all proceedings thereupon, should be reversed: and it was further ORDERED and ADJUDGED, that the respondent's bill in the Chancery of the said Court of Exchequer in Ireland, should be dismissed. (Jour. vol. 21. p. 509.)

CASE 7.—JOHN KIRWANE,—*Appellant*; Sir WALTER BLAKE,—*Respondent*  
[27th June 1721].

[Interest may be carried beyond the penalty, where the bond is only taken as a collateral security.—By marriage articles the Lady's father was to pay her portion at different times, and in different sums, towards disincumbering the husband's estate; the father advanced money to the husband, and also maintained the wife and child for some years; the money so advanced, together with an allowance for the maintenance, shall be added to the foot of the account, but shall not carry interest.]

\*\* ORDERS and DECREES of the Irish Court of Exchequer AFFIRMED.  
See the note at the end of this title,\*\* [p. 390 *infra*].

Viner, vol. 13. p. 552. ca. 9: vol. 14. p. 458. ca. 10: 460. ca. 4.  
2 Eq. Ca. Ab. 533. ca. 3: \*\* 531. c. 10, 11: 482. c. 18.\*\*

By articles, bearing date the 5th of August 1687, made between the respondent, Dame Mary his mother, and Robert French his uncle, of the one part, and the appellant and Anne Kirwane his daughter of the other part; it was, *inter alia*, agreed that a marriage should be had between the respondent and the said Anne the appellant's daughter; that the appellant should pay as a marriage portion with her £1400, which was to be disposed of and laid out in redemption of mortgages and incumbrances on the respondent's estate, by the direction of himself and the said Dame Mary and Robert French; and that the said £1400 should be paid [533] in manner following, viz. £600 on or before the 20th of August 1687, £300 on or before the last day of August 1688, £300 on or before the last day of August 1689, £100 on or before the last day of August 1691, and £100 on or before the last day of August 1692: and for better securing the four last sums, making £800 for the uses mentioned in the articles, the appellant perfected to Denis Daly, Esq. one of the trustees therein named, four several bonds of equal date with the articles, payable at the respective days aforesaid, with warrants of attorney to confess judgments thereon.—And after reciting that the respondent was under age, and therefore incapable by law of securing a jointure to the said Anne; it was agreed that the appellant might lay out and apply the several sums aforesaid, as they should become due, in redemption of mortgages due on the following lands, agreed to be settled on the said Dame Anne for her jointure; viz. the lands of Cloneen, lying in the barony of Carra and county of Mayo, mortgaged for £650; the lands of Kigalagh in the said barony and county of Mayo, mortgaged for £230; the town and lands of Kinalagh in the barony of Killmaine and county of Mayo, and Ballidonough in the half barony of Ross and county of Galway, mortgaged for £330; and might procure assignments of the said mortgages in the names of trustees, in trust for the respondent and Anne Kirwane, and the heirs of the respondent, until he should come to full age.

The marriage took effect on the 10th of August 1687, and on the same day the appellant, in pursuance of the articles, paid to Patrick Bodkin, in part of the mortgage of £650 on the lands of Cloneen, the sum of £500. And in 1688 the appellant paid £300 in discharge of a mortgage on the respondent's estate.

In the month of June 1688, the respondent attained his age; and in January following he perfected a settlement of his estate on the said Dame Anne and the issue of the marriage, in pursuance of the said articles.

The war breaking out in Ireland, a pretended Parliament under King James II. sat in Dublin, and passed an act for repealing the acts of settlement in that kingdom; whereby the appellant was dispossessed of his estate, which he had purchased under the said acts of settlement; and the respondent going into the army, application was made to him by the appellant's Lady, insinuating, that if the respondent should happen to perish in the war, the bonds passed to the said Dennis Daly, would be put in suit against the appellant, which he was not then able to discharge; whereupon the respondent deposited those bonds in the appellant's hands, and the same were afterwards cancelled by him or his Lady.

The troubles continuing in Ireland, and the appellant and his family removing to France, the respondent was prevailed upon to let his Lady and daughter go

along with them; where they stayed above three years, much against the will of the respondent, who was very impatient to have them over. The appellant, however, [534] declared, that the respondent should be at no manner of expence for them while they were abroad; but that he would provide them with all manner of necessaries.

In some time after the appellant returned from France; when the respondent frequently applied to him to discharge the incumbrances affecting the respondent's estate, according to the marriage-articles, which the appellant, for a considerable time, refused to do; but at length, being much importuned thereto by the respondent, he, instead of a compliance, delivered the respondent an account, wherein he charged him with several small sums of money lent, for which he took the respondent's note; and also with several hundreds of pounds paid the respondent in brass money, which, at the time of payment, was not worth above twelve pence a pound, in discharge of the portion covenanted to be applied in redeeming incumbrances on the respondent's estate as aforesaid.

The respondent finding himself much oppressed by being obliged to pay the money becoming due yearly on the mortgages, which ought to have been discharged by the appellant out of the said portion; and having in vain applied to him to perform the articles, the respondent, on the 31st of December 1711, filed his bill in the Court of Exchequer in Ireland, against the appellant and others, for a specific performance of the said marriage-articles; but being afterwards advised, that in regard he was the only tenant for life of the said mortgaged lands, and his two sons had remainders in tail in them, it was proper that they should be before the Court; he therefore soon afterwards filed a supplemental bill, to which his said sons were made parties.

The appellant, by his answer, confessed the marriage-articles; but said, that as a further security that the money should be applied to the uses therein mentioned, there were bonds passed by him to Dennis Daly, Esq. and that the respondent gave him up the said bonds in consideration that he had lost his estate by the act of repeal: he then set forth several payments which he had made to the respondent and his order; enumerated several presents given by him to the respondent and his Lady, and several benefits they had received by his bounty, particularly that he maintained the appellant's Lady and daughter three years and upwards in France, without any obligation on him so to do, but in friendship to the respondent, as he was married to the appellant's only daughter, to whom he grudged nothing that was in his power to give.

The appellant finding on a stricter enquiry, that a great part of the portion remained unpaid, he, in February 1712, preferred a cross bill against the respondent; insisting, that the said several benefits and presents should be applied in discharge of the said portion; and that the respondent delivered up the said bonds to him to be cancelled.

The respondent, by his answer to this cross bill, absolutely denied that he cancelled the bonds, or gave them up to the appellant to be cancelled; but affirmed, that he deposited them in the appellant's hands in case he should miscarry in the war; and to prevent their being put in suit against the appellant when he should be in no condition to discharge them.

Both causes being at issue, witnesses examined, and publication passed, were heard on the 10th of February 1714; when the Court ordered, that the Chief Remembrancer should audit and state the account between the parties, and report what payments or satisfaction had been made since the articles, to the respondent, or to any and what person, and when and on what account; and also, whether the incumbrances or any of them, in the said articles mentioned, were paid off and discharged, and when and by whom.

Several matters appearing difficult to the said officer, he, on the 8th of June 1716, made a report, consisting of several special points; which coming to be heard on the 27th and 29th of June 1716, and afterwards to be re-heard on the 25th of February following; and it appearing by one of these special points, that the appellant had paid the respondent and his creditors several small sums, amounting to £110 5s. 10d. which the appellant insisted ought to go towards discharging the bond of £300 payable the last of August 1668; the Court was pleased to order the



officer to enquire and ascertain when the several payments in the said point were made by the appellant to the respondent; and whether there was any interest, and how much, due to the respondent from the appellant at the time the said payments were made; and in case any interest should happen to be due at the time of such payments, the same were, in the first place, to go in discharge of such interest; and whatever the said payments should amount to, over and above such deductions for interest, the overplus was declared to bear interest; and when it should appear that as much interest became due to the respondent for the said portion, the interest in proportion of the payments made by the appellant to the respondent was to cease; and the value of the presents made to the respondent and his Lady by the appellant, was to be allowed as so much money paid to the respondent: and all other points in the said special report, as to the payments, were to be under the same directions, and manner and method of accounting.

Another of these special points, concerning an allowance craved by the appellant for maintaining the respondent's Lady and daughter in France for three years and three months, viz. from July 1691 to October 1694; and the same being opened and debated, it was ordered, that the appellant should be allowed £40 per ann. for the maintenance and expences of the respondent's Lady, her child, and servant, for the time they were in France; but that no interest should be allowed for the same, and it should be brought in and stand at the foot of the account, when made up, as a charge against the respondent:—But this point coming to be re-heard on the 20th of November 1717, and the respondent in-[536]-sisting, that he had done several services for the appellant and his family, particularly, in preserving his estate when he was in France, procuring a reversal of his attainder, and getting a pass for him and his family to come over into Ireland, the respondent desired he might be considered for those services; whereupon the Court directed, that an issue should be tried at the bar of the said Court by a Jury of the county of the city of Dublin, to try what the appellant deserved for meat, drink, lodging, and cloathing of the respondent's daughter, from July 1691 to October 1694; and also what the respondent deserved for the services which he did for the appellant and his family, from the beginning of the year 1691 to the end of the year 1700; and the respondent was to be allowed whatever sums of his money should appear to be in the hands of Simon Kirwane at the time the respondent's Lady was in France.

Pursuant to this order a trial was had, and the Jury found that the appellant deserved, for the said maintenance, £160; and that the respondent deserved for his said services, £40. And the cause coming to be heard upon this verdict on the 12th of July 1718, the Court ordered, that the respondent should be allowed the said sum of £40; and that the appellant should be allowed the said sum of £160; both which sums were to be added to and stand at the foot of the account to be made up in the causes, and struck out of the balance of the said account.

On the 24th of May 1720, the officer made his report, and thereby certified, that about the 31st of August 1691, Simon Kirwane, the appellant's only son, had 800 livres of the respondent's money in his hands, which was then worth about £60 sterling; and which sum, according to the order made on the thirteenth point, the officer allowed to the respondent.—To this report the appellant took exceptions, and the report and exceptions were heard on the 5th of July 1720, when most of the exceptions were over-ruled; but, in regard Mr. Stanton the appellant's attorney, offered to abide by the respondent's answer to personal interrogatories, as to the 800 livres, it was ordered, that he should be obliged to answer personal interrogatories as to those 800 livres, and that the appellant should be concluded thereby.

On the 5th of December 1720 the officer stated the account, and on the 1st of February following the causes came to a final hearing; when the appellant's counsel made several objections to the report; but, being all over-ruled, the Court was pleased to decree the appellant to pay the sum of £1319 11s. 8d. with interest from the time of confirming the report, and with full costs; and directed the officer to compute the interest for the principal sum, from the time of the last calculation in his report to the time of confirming the same; and to add it to the said sum of £1319 11s. 8d. and the respondent was to make up his decree for the same accordingly.

From these several orders and decrees of the 10th of February 1714, 25th of

February 1716, 12th of July 1718, 5th of July [537] and 1st of February 1720, the appellant appealed; and on his behalf it was urged (T. Lutwyche, C. Phipps), that it was above twenty-two years from the time the respondent gave up the bonds to the time of his making any legal demand of the portion; and that considering this length of time, the circumstances of the case, and the several transactions between the appellant and respondent, the Court ought not to have decreed any account to be taken, but should have dismissed the respondent's bill. That by the known method of accounting in equity, where money appears to be paid exceeding the interest due on any principal sums, the overplus of the money so paid is applied to sink so much of the principal sums then due: but although it appeared by the several reports in these causes that the appellant had paid £243 7s. 6d. when only £500 principal could be due, and before any interest thereof was due; yet, by the method of accounting directed by the order of the 25th of February 1716, and pursued in the reports, the £500 was kept entire, and interest only given the appellant for such payments until the interest of the £500 discharged those payments and the interest thereof; which was in effect giving the respondent interest upon interest for his stale demands: whereas, such payments ought to have been applied in discharge of the principal then due, or the account should have been kept separate, and the appellant allowed the sums so paid with interest, at the close of the account. That the appellant ought not to be charged with £60, the value of the 800 livres in Simon Kirwane's hands, that article not being given in charge or mentioned in the special report; nor any exception taken by the respondent to that report for want of such charge, or ever mentioned in the causes till the order of the 20th of November 1717; besides, Simon Kirwane fully proved, that the same was transmitted and paid to the respondent and his Lady. That the appellant ought to have had an allowance of the £160, (expended on the respondent's Lady from 1691 to 1694,) from October 1694, with interest for the same from that time; it appearing, that the same was then expended: and therefore, the order of the 12th of July 1718, directing the same to be placed at the foot of the account without any interest, ought not to have been made. That if the appellant was to be charged with the £60 for the 800 livres in Simon Kirwane's hands, he ought not to be charged therewith from August 1691; but, in such case, the same ought at least to be deducted out of the £160 allowed to be expended on the respondent's wife from 1691 to 1694. That the order, confirming the report of the 5th of December 1720, was apprehended to be contrary to the forms of the Court, and against the rules of equity; the sum therein reported due being more than the penalty of the unsatisfied bonds given up: neither did the order of the 29th of June 1716, decree more than that the said bonds should bear interest as if they had not been given up and cancelled; and the Court having ordered that the respondent's children should not be affected by the allowances made to the appellant amounting to £661 19s. the appellant [538] ought to be allowed the same against the respondent in the usual way of accounting. That interest at £10 per cent. was decreed for the £500 for twenty-nine years and a half, which ought to have been moderated; in regard the respondent made no legal demand for twenty-two years, and because in the year 1704 interest was reduced to £8 per cent. That by the order of the 1st of February 1720, full costs were decreed against the appellant, whereby the respondent and his agents had it in their power to load the appellant with excessive charges: that full costs are never decreed but where the party commits manifest fraud or makes an unconscionable defence, which the appellant had been no way guilty of; on the contrary, it appeared in the progress of these causes, that twelve out of the fifteen special points, and also the several re-hearings and exceptions, were occasioned by the respondent's refusing to allow the several payments made by the appellant, and which were afterwards adjudged for him, except the particulars now complained of: and therefore the appellant insisted he ought not to be charged with costs; at least, not with the distinction of full costs.

On the other side it was said (S. Mead, C. Talbot) to be clear, that the marriage-articles remained, in a great measure, unperformed on the part of the appellant; in whom a confidence was thereby reposed to apply the portion in discharge of the incumbrances on the estate, which was to be settled to the uses mentioned in the articles, but which it was not pretended he had done. That as the appellant was to

lay out the portion in redemption of the mortgages, of which his daughter and the issue of the marriage, as well as the respondent, were to have the advantage; he could not, in justice, apply the trivial sums lent to the respondent, for some of which he took the respondent's notes, and the rest he charged to his account in his books, in discharge of the said portion. That Simon Kirwane was the appellant's only son, and agent and manager for him in France; and it appeared by Simon's books, that he charged what sums or effects he paid or received from the respondent, to the appellant's account. That the appellant, in his answer, swore, that he furnished the respondent with an account of all the payments made in part of the portion in 1696; but nothing concerning the respondent's wife's maintenance appeared in that account, nor did the appellant, by his said answer, insist on any allowance for such maintenance; on the contrary said, that neither he or his Lady ever charged it to the respondent's account, or even intended to mention it, had he not been provoked by the respondent's usage of him: for which reasons, as well as because the respondent's Lady and daughter went to France, upon the invitation of the appellant's Lady, and were detained there three years against the respondent's will; the respondent apprehended, that he had more reason to complain of any allowance at all having been made to the appellant on that head, than the appellant had to complain that the allowance was no larger. That the respondent did not ground his demand upon the bonds, which were [539] a collateral security only, but preferred his bill against the appellant to compel him to perform his trust according to the marriage-articles; and it was by the appellant's neglect, and a great misfortune to the respondent, that the interest of the portion had swelled to so large a sum. As to the reduction of interest in Ireland, the act, passed for that purpose, related only to money lent from the year 1704, but did not affect the interest of any securities entered into before that time. That though the appellant was intrusted by the articles to apply the portion in redeeming mortgages, affecting some particular lands which were to be settled on his own daughter, and though the respondent had often applied to him to execute that trust, yet the appellant, so far from complying with these reasonable requests, had obliged the respondent to commence a suit against him, and by frivolous delays had kept the respondent at law for upwards of nine years; and therefore was justly condemned in full costs of the suit.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the orders and decrees therein complained of, affirmed: and it was further ORDERED, that the appellant should pay to the respondent the sum of £60 for his costs in respect of the said appeal. (Jour. vol. 21. p. 554.)

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CASE 8.—Dutchess Dowager of MARLBOROUGH,—*Appellant*; EDWARD STRONG and another,—*Respondents* [28th February 1723].

[Mew's Dig. viii. 158.] .

[Where excessive prices are charged for work on account of slow and precarious payment, no Interest ought to be allowed; for Interest is only allowed to supply the want of prompt payment.]

See note at the end of this title, [on p. 390 *infra*].

Another point of this case is thus stated in 5 Vin. 533, ca. 36, tit. Contract and Agreement: "Earl Godolphin (the Lord Treasurer of her Majesty Queen Anne) agrees with builders before the act made for building Blenheim at the expence of the Crown; and recites, that he made such agreements at the instance and desire of the Duke of Marlborough. The Duke is bound by such agreement, and liable to pay for the work done after the statuta as well as before." See 2 Eq. Ab. 19. ca. 11. S.P.

\*\* ORDERS of the Court of Exchequer REVERSED.\*\*

Viner, vol. 14. p. 458. ca. 11. 2 Eq. Ca. Ab. 531. ca. 13.

Her Majesty Queen Ann, as a reward for the services done by the late Duke of

Marlbrough to the public, and particularly in memory of the victory obtained at Blenheim, gave directions to build a house, at her own expence, for the Duke at Woodstock, which was to be called Blenheim: and her Majesty gave orders to the Lord Treasurer Godolphin, by several warrants under her Sign Manual, to issue money to John Taylor Gent. to be paid over by him for defraying the charge of the works, according to such directions as he should from time to time receive from Samuel Travers Esq. her Majesty's then Surveyor-General. In pursuance also of her Majesty's pleasure, the Lord Treasurer appointed her own officers, viz. Sir John Vanbrugh to be surveyor of the works, and Mr. Boulter and Henry Joynes, and after Mr. Boulter's death, Tilleman Bobart, together with the said Joynes, joint-comptrollers and clerks of the works.

Pursuant to these warrants, several sums of money were from time to time issued into the hands of Mr. Taylor, and by him paid towards carrying on the said works, according to the order of Mr. Travers, without the intervention of the Duke; who, not apprehending himself liable to pay for the same, never had or inspected the bills of the respondents, or any other of the workmen; but the bills remained in the hands of the workmen after they had been inspected by the Queen's officers, and were delivered to Mr. Taylor upon the payment thereof.

In this manner the building was carried on, at the expence of her Majesty, till the first of June 1712, when her Majesty thought fit to put a stop to it; and at which time, there was an arrear due to the workmen, artificers, and others employed in the said building.

On the 15th of June 1713, an estimate was laid before the House of Commons of the debts which were owing to the several heads of expence of her Majesty's civil government at Midsummer 1710, amounting to £511,762, one of the heads whereof was, *To the building at Woodstock*, by estimation, £60,000; and upon this estimate, a bill was brought into the House, and passed into an act, intituled, *An act for enabling her Majesty to raise £500,000, for the uses of her civil government, to be applied towards payment of such debts and arrears owing to her servants, tradesmen, and others, as are therein mentioned.*

In the first year of King Geo. I. an act passed, intituled, *An act for enlarging the fund of the Governor and Company of the Bank of England, and for satisfying an arrear for work and materials at Blenheim, incurred whilst that building was carried on at the expence of her late Majesty, etc.* which takes notice, that the building at Blenheim, and making the gardens and other conveniencies thereto, had been begun and carried on accordingly at the expence of her said late Majesty, and that the charge thereof had been borne by her Majesty out of the revenues appointed for the uses of her civil government; and then goes on thus, viz. "For the clearing of any doubt that might arise, whether the debts which then remained unsatisfied to artificers and others, for work performed and materials delivered upon account of the building and works aforesaid, whilst the same were carried on as aforesaid, ought to be satisfied out of the arrears of her Majesty's said revenues, due at the time of her demise, and the monies then remaining of the said £500,000, by the aforesaid act authorized to be raised; it is thereby declared, that all the debts which then remained unsatisfied to artificers and others, for [541] work performed, and materials delivered on account of the said building and works on or before the 1st day of June 1712, when her Majesty first caused the payments on account of the said building to be stopped, ought to be, and the same are thereby accordingly directed and enacted to be paid out of the monies then remaining of the aforesaid sum, by the last mentioned act authorized to be raised, and out of the arrears of the said revenues granted to her Majesty for the uses of her civil government as aforesaid, due at the time of her demise, in such and the like manner, and by such proportions only as other her Majesty's debts were or ought to be paid."

In pursuance of this act, King Geo. I. by his letters of privy seal, dated the 14th of September 1715, authorized and commanded the Lords Commissioners of the Treasury, that out of the monies then remaining in the receipt of the Exchequer, of the said £500,000, and also out of the arrears of the revenues granted to her said late Majesty for the uses of her civil government, due at the time of her demise; they should issue any sum not exceeding £30,000 to the said Mr. Travers, to be applied and paid over by him towards discharging such debts as remained un-

satisfied to the artificers and others, for work performed and goods and materials delivered upon account of the said building and works, on or before the 1st of June 1712; according to such bills and accounts thereof as should be examined and allowed by William Lowndes sen. James Craggs sen. and William Sloper, Esqrs., who were thereby appointed to settle and adjust the demands of the artificers and others, relating to the said works at Blenheim.

Under this authority, Mr. Lowndes, Mr. Craggs, and Mr. Sloper settled and adjusted the demands of the artificers and others, and particularly of the respondents, and ordered a third part of their respective demands to be paid; and £16,000 or thereabouts, having been issued into the hands of Mr. Travers, pursuant to the said letters of privy seal, he paid several of the said artificers and others a third part of their respective demands; and particularly, in January 1715, he paid the respondents £2144 11s. and £741 17s. 2d. which they accepted, and for which they gave a receipt to Mr. Travers as so much received of him, pursuant to the said letters of privy seal, out of the arrears and remains of her late Majesty's revenues.

But in Easter Term 1718, the respondents exhibited their bill in the Court of Exchequer against the Duke of Marlborough and the said Sir John Vanbrugh, setting forth, that the house and buildings at Blenheim were erected at the Duke's expence; and that the Lord Treasurer Godolphin, by an instrument in writing, dated the 9th of June 1705, had appointed the said Sir John Vanbrugh, at the request and on the behalf of the Duke, to be surveyor of the said works and buildings; and thereby authorized him to make contracts for work and materials; and that Sir John Vanbrugh had accordingly entered into an agreement in writing with the respondents, dated the 10th of May 1706, whereby the respondents agreed to perform the masons work in the said building at the rates and prices therein mentioned: and the bill charged, that they entered upon the work, and continued in the same till August 1712, upon the credit of the Duke of Marlborough; and that they, from time to time, made out their bills, and the same were cast up, stated, and signed by Sir John Vanbrugh, Henry Joynes, Tilleman Bobart, and William Jefferson; and that there remained due to them the sums of £7314 16s. 4d. and £50. The respondents therefore prayed by their said bill, that the Duke might be decreed to pay the said two sums, together with interest for the said £7314 16s. 4d. from the time they received the third part of their debt from Mr. Travers, in January 1715; and that if Sir John Vanbrugh did not act in the premises on the behalf of the Duke of Marlborough, that then the said Sir John Vanbrugh might be decreed to pay their said demands and interest.

The Duke of Marlborough put in his answer to this bill, and said he knew not by whom the respondents bills, or the works and materials therein mentioned, were signed, measured, and stated, but that he never signed or allowed their bills or accounts. And the cause being at issue, came on to be heard upon the 21st of February 1720, when the Court declared, that the Duke of Marlborough was bound by the instrument signed by the late Earl Godolphin, appointing Sir John Vanbrugh surveyor of the works and buildings aforesaid, and empowering him to make contracts with artificers and workmen to be employed about the said buildings; and also by the contract made by the said Sir John Vanbrugh with the respondents in pursuance thereof, and ought to pay what remained due to them by virtue thereof; and therefore ordered and decreed, that the Duke should account with and satisfy the respondents for what remained due to them for the said building pursuant to the said contract; the taking of which account was thereby referred to the Deputy Remembrancer, who, for the better discovery and ascertaining what was due thereupon to the respondents, was to be armed with a commission for examination of witnesses, for proving any particular matters relating to the said account; and if, upon taking the said account, any special matter should arise before the said Deputy Remembrancer, he was to report the same to the Court: and the consideration of interest for what should, upon the said account, appear to be remaining due to the respondents, was reserved till the coming in of the report: and if it should appear to the Deputy Remembrancer, that there had been any *stated account* of any of the matters in question, the same was not to be unravelled; but the Deputy Remembrancer should, in his report, compute interest for the *balance* of such stated account, notwithstanding that the consideration, whether such interest

should be allowed or not was reserved as aforesaid.—This decree was afterwards affirmed by the House of Lords upon an appeal.

The Deputy Remembrancer accordingly made his report on the 7th of June 1722, and thereby certified, that the Duke of Marl-[543]-borough was, in May 1710, indebted to the respondents in £1300 12s. 10d. for Burford stone, before that time by them delivered at Blenheim, for the service of his Grace; and that the same was stated and allowed by William Jefferson, the proper officer appointed for that purpose in May 1710, to be then due to the respondents; and therefore the Deputy computed interest at £5 per cent. for that sum, from the 9th of May 1710.—That the Duke was in June 1710 indebted to the respondents in the further sum of £1598 13s. 6d. for Burford stone, before that time by them delivered at Blenheim for the service of his Grace; and that the said sum was stated and allowed by the said Jefferson, the proper officer appointed for that purpose as aforesaid, in the said month of June 1710, to be due to the respondents; and therefore the Deputy computed interest for that sum, after the rate aforesaid, from the 9th of June 1710.—That the Duke was in September 1710, indebted to the respondents in the further sum of £1793 11s. 1d. for masons work done by them at Blenheim for the service of his Grace, and that the same was stated and allowed to be due to them by Sir John Vanbrugh, Joynes, and Bobart, the proper officers appointed by his Grace for that purpose, in September 1710; and therefore the Deputy computed interest for that sum, at the rate aforesaid, from the 9th of September 1710.—That the Duke was on the 10th of March 1710, indebted to the respondents in £4947 4s. 5d. for masons work done by them at Blenheim for the service of his Grace, and that that sum was stated and allowed to be due to them by the said Sir John Vanbrugh, Joynes, and Bobart, the proper officers appointed for that purpose by his Grace, on the said 10th of March 1710: and upon the whole matter, the Deputy reported the Duke to be indebted to the respondents in £12,229 13s. 2d. but whether the interest before computed ought to be allowed, he left to the judgment of the Court.

But as to the sum of £50, which the respondents demanded by their bill, and which they swore, in their answer to the Duke of Marlborough's cross bill, to be due to them on a particular account therein mentioned, their answer was falsified in that particular; for it was proved, and they were, on the contrary, reported indebted to the Duke of Marlborough on that account £87.

The Duke, in his life-time, took the following exceptions to this report: I. For that the Deputy had allowed the respondents the several sums aforesaid, for Burford stone delivered, and masons work done; whereas there was not sufficient evidence in the cause, that such stone was delivered, or such work done by the respondents.—II. For that the Deputy had certified, that the said two first sums for Burford stone, were stated and allowed by the said Jefferson, the proper officer appointed for that purpose; whereas the said Jefferson was not appointed for any such purpose, either by the Duke of Marlborough or the late Earl Godolphin, neither had Sir John Vanbrugh, Joynes, and Bobart, or any of them, jointly or severally, any power or autho-[544]-rity to depute or appoint the said Jefferson for the purpose aforesaid, nor was any appointment of the said Jefferson produced before the Deputy.—III. For that the Deputy ought not to have computed interest for any of the sums in his report mentioned, in regard they did not in their nature carry interest; nor was there any account stated of the matters in question, within the intention of the said decree; and for that the Deputy had computed interest from the year 1710, without taking notice in his report, that the respondents by their bill only prayed interest from January 1715, for the money claimed to be then remaining due to them; and the bills (if any) then examined and allowed by Mr. Lowndes, Mr. Craggs, and Mr. Sloper, were so examined and allowed by virtue of his Majesty's letters of privy seal, in pursuance of the said act of parliament of the first year of his reign; without the allowance or privy of the Duke of Marlborough, or any authority from him, and without seeing any of the former accounts, or any vouchers whatsoever, and without any proof that the work therein mentioned was done, or the materials delivered.

Before these exceptions or the special matter of the said report came on to be argued, the Duke of Marlborough died; having made his will, and thereof appointed the appellants and the Dukes of Montague and Bridgwater executors; but the appellants only proved the will, and acted in the said executorship.

The cause being revived, was heard upon the said report and exceptions on the 17th of June 1723, when the Court thought fit to over-rule the first and second exceptions; and on the 20th of the same month, the cause came on upon the third exception, when one of the Barons being absent, and the rest of them divided in opinion, it was ordered, that it should be referred back to the Deputy Remembrancer to review his report upon the subject matter of the said third exception; and to state specially to the Court, the interest of the several principal sums, by the said report certified to be due to the respondents, and to compute the same from the respective times the said principal sums became due to the respondents in the year 1710, and also from the 9th of January 1715.

The Deputy Remembrancer made his report accordingly on the 3d of July 1723, and certified, that the principal and interest, computed from 1710, amounted to £12,289 15s. and that the same, computed from the 9th of January 1715, amounted to £9850 11s. 11d. On the 14th of November 1723, the cause came on again to be heard upon this second report, when the Barons were again divided in opinion; but at last the Court declared, that no interest ought to be allowed to the respondents on account of the said bills of Burford stone, stated in May and June 1710; and therefore ordered, that the Deputy should review his said second report in those particulars, and rectify the same; and should compute interest at £5 per cent. on the said other bills of measured work from the 9th of January 1715.

[545] Pursuant to this last order, the Deputy made his report on the 14th of December 1723, and thereby certified to be due to the respondents £9044 17s. 5d.

From these orders of the 17th and 20th of June, and 14th of November 1723, the appellants appealed; and on their behalf it was argued (T. Reeve, C. Talbot), that in a case so circumstanced as the present, where the Duke of Marlborough never apprehended himself to be liable to pay for the said building, and consequently could not think himself concerned to look after the contracts or the execution of them, nor had any of the accounts, receipts, or vouchers, relative to the building, the respondents ought to be held to the strictest and clearest proof that the nature of their demands was capable of; whereas on the contrary, it was apprehended, that the proof made by the respondents was such as ought not to be admitted in any case whatever.

For as to the two first sums of £1300 12s. 10d. and £1598 13s. 6d. for Burford stone, the only evidence produced to support these demands, was two bills, the first dated May 1710, and the other June 1710; in which the Duke was made debtor to Edmund Bray Esq. and Edward Strong, for the quantities of Burford stone therein mentioned; and at the bottom of each bill was the following subscription, but without any date, viz. "The above mentioned stone was received into the works, by your humble servant, William Jefferson." And then Jefferson proved his name set to the said bills to be of his writing.

This evidence the appellants apprehended to be not only very insufficient, but of dangerous consequence to be admitted. I. For by these bills, the Duke was made debtor to Mr. Bray and Mr. Strong for the stone delivered, but in what proportions they were entitled did not appear; nor could a payment of the bills to the respondents discharge the appellants from any demand which Mr. Bray might make against them, even for the whole money due on those bills. II. Though Jefferson swore that he was clerk of the works, and signed the bills by an authority from Sir John Vanbrugh and Joynes, yet no such authority was produced, nor would the same, if produced, have been valid; for, in truth, Jefferson was not a clerk of the works, but only a labourer in trust, to call the other workmen to their duty; Joynes and Bobart being appointed by the late Earl Godolphin joint-comptrollers, i.e. clerks of the works; which was an office personal to themselves, and could not, even with the concurrence of Sir John Vanbrugh, who was only surveyor, be delegated by both or either of them, to Jefferson or any other person. III. If Jefferson's certificate, that the stone was delivered, and his proving his hand to that certificate, without any proof of the delivery of the stone, should be allowed, the consequence would be the most mischievous imaginable; for by the same rule he might certify, that ten times more stone was delivered, and yet he could not be indicted for perjury, because his evidence, that he signed the certificate was true, though the matter of the certificate itself was false: besides it was more than [546]

probable, that Jefferson did not receive all the stone which he had certified to be delivered; because it was not only proved, that he was sottish and careless, and frequently absent from his business, but also, that one Ange received stone into the building at the time the stone was mentioned in Jefferson's certificate to be delivered.

And as to the two bills of measured work for £1793 11s. 1d. and £4947 4s. 5d. there was no evidence that the work mentioned in either of those bills was actually done; but only that the bills were signed by Sir John Vanbrugh, Joynes, and Bobart, and which, for the reasons above mentioned, ought not to be admitted. Besides, it was proved in the cause, that Bobart never made up, prized, or adjusted any of the workmen's bills; but that they were so done by Sir John Vanbrugh and Joynes, without him, although by Lord Godolphin's warrant, Bobart was equally intrusted in that business with Joynes: and the reason of making Bobart and Joynes joint-comptrollers was, that they might be a check upon Sir John Vanbrugh, and upon one another, as appeared from the warrants themselves. That Bobart, in his deposition on the respondent's behalf, had owned, that only some of the prices of the work charged in the said bills, were pursuant to the contract; and that the rest were allowed by him and Sir John Vanbrugh and Joynes; whereas it was apprehended, that none of these persons had power to allow greater prices than were at first contracted for, as there was no power, there was certainly no reason for so doing; it being proved in the cause, that the prices allowed by the contract were a *third part*, or more, *greater* than those which were paid by the Duke after he took upon himself the charge of the said building.

That no interest ought to be allowed for these two last bills: I. Because it was apprehended, that by the balance of a stated account, mentioned in the decree, must be understood a balance resulting from an account of receipts on the one side, and work done or materials delivered on the other; but no such account was ever stated or made up in this case by any of the officers appointed by Lord Godolphin; nor had any of those officers any power from his Lordship to state accounts. II. Because nothing more was produced as a stated account, in order to found a demand of interest, than the said two bills signed by Sir John Vanbrugh, Bobart, and Joynes, in 1710; and it was admitted, that no demand was ever made upon the Duke of Marlborough by the respondents, for the money pretended to be due to them, till after payment was stopped by the Crown; nor was there any evidence in the cause, that any such demand was made at all: and after signing those bills, viz. in October and December 1711, several sums, amounting to £1554 5s. 10d. were admitted by the respondents to have been received from Mr. Taylor, in part of a running account. III. Because the respondents themselves never apprehended that there was any stated account till 1715, when the same was adjusted by Mr. Lowndes, Mr. Craggs, and Mr. [547] Sloper, the commissioners appointed by the King's letters of privy seal; and so it appeared from the tenor of their bill in the Exchequer, wherein they set out, that at that time there was so much stated to be due to them by the said commissioners, of which they received a third part from Mr. Travers, and prayed interest for the residue, from the time of paying that third part: but it could not be pretended, that any account stated by the said commissioners pursuant to the said privy seal, and founded upon the said act of parliament, and to which appointment the Duke was no party, could be binding or conclusive to the appellants; and especially since it was proved in the cause, that even that account was allowed upon the credit of Joynes, and upon his allegation that it was true, without seeing any of the former accounts, or without any proof that the work was done or the materials delivered:—But indeed, the respondents counsel were so candid as to give up that matter on arguing the exceptions. IV. Because, as the allowing or not allowing of interest is generally discretionary, and depends upon circumstances; so, besides the reasons already mentioned, there was another manifest reason for not allowing it in this case; namely, because the respondents had charged such extravagant rates for their work, in consideration of the slow and precarious payments from the Crown: and the allowing interest besides, was giving them a double recompence; an extravagant price in consideration of delay, and interest too for such delay; which interest made it equivalent to prompt payment, and so, in effect, there was no delay; and yet the excessive prices were allowed only in consideration and upon supposition of delay.—That all the bills and vouchers, and all the receipts



for money paid to the respondents and the other workmen, on account of the building, were in the hands of the officers appointed by the Lord Treasurer Godolphin; and the Duke was obliged to commence a suit in Chancery, (which the appellants had, since his death, revived,) in order to have those receipts, etc. delivered up, that they might be able to ascertain the demands of the several workmen: and though the respondents had singled out and demanded the money due on the aforesaid four bills in 1710, yet it appeared in the cause, that they had received several bills alleged to be due since that time; and particularly a bill of £1153 19s. 3d. alleged to be due in January 1711; which was not easily to be accounted for, unless part of the money now demanded was included in those subsequent bills; but which, for want of the former bills and vouchers, the appellants were not able to make out. And it was observable, that Joynes, upon whose credit and allegation the commissioners adjusted the said debt in 1715, gave in a state of the debt under his own hand, and proved in the cause, amounting to £34,581 5s. 7d. after which no more work is pretended to have been done; and yet the state of that debt, laid before the said commissioners by Joynes in 1715, and allowed by them, amounted to £44,947 0s. 6d.; so that, besides paying a third part more in the prices, the debt was raised above a fourth part [548] more in the whole. And therefore it was hoped, that the said several orders would be reversed and set aside; and that proper directions would be given for ascertaining what, if any thing, really remained due to the respondents.

On behalf of the respondents it was said (T. Bootle, S. Strange), that as to the objection to the prices charged in the bills, because the work had since been carried on by other persons at lower prices; it might very reasonably be, when there remained little to be finished, and which could be done by men living and settled in the neighbourhood; whereas, when the buildings were first begun and carried on by the respondents, they were under the necessity of procuring a great number of workmen from London, and other distant parts of the kingdom, to leave their families at a great expence, and this upon account of the extraordinary expedition which was required from them in carrying on the said works; but the prices charged by the respondents *were such as they contracted for*; and though several persons made proposals, nobody would undertake the business at lower rates at that time. As to the first exception, which the Court over-ruled, it was sufficiently proved in the cause, that the several works mentioned in the bills were done and the stone delivered by the respondents; that the several bills thereof were stated and allowed by the proper officers appointed by the Duke, or those acting on his behalf for that purpose; and that this allowance was as effectual as if signed by the Duke himself. As to the second exception, which was likewise over-ruled by the Court; it was also proved in the cause, that William Jefferson was appointed clerk of the works, and that his proper and constant business was to take an account of materials brought into the works, and certify the same to the pay-master monthly; that Jefferson made out the two bills in this exception mentioned, among many others which were paid to the respondents, and thereby certified under his hand, what quantities of stone the respondents had brought into the works, and at what prices, in the months of May and June 1710; and the prices therein charged appeared to be the same as were agreed for by the contract between Sir John Vanbrugh and the respondents: that this being the method prescribed by the Duke, or those who had full power to act on his behalf; and having for several years been followed by all persons concerned in the works, and many thousand pounds having been paid pursuant thereto, the same ought, after so great a length of time, to be allowed. And as to the third exception, it was conceived, that by the order of the 14th of November, the appellants had had sufficient advantage from this exception; the interest of the two sums due for stone delivered in 1710, being now totally deducted, and the interest of the other two bills for work done in the said year 1710, being computed only from the 9th of January 1715, to the respondents loss of £3000, which that interest amounted to: and as to the two bills for work, on which interest was allowed, the respondents humbly insisted on the justice of that allowance; those bills appearing to be signed and allowed by the [549] Duke's agents in the following manner, viz. September 1710, *measured and cast up* per Henry Joynes, Tilleman Bobart; and then under written, *This bill, according to the several prices*

*agreed on per contract, amounts to (mention the sum) allowed per J. Vanbrugh, Henry Joynes, Tilleman Bobart. This was apprehended to be a stating of accounts within the intention of the decree, especially as it was provided by the contract, that the respondents should have frequent measurements and stating of accounts; nor was it pretended that the accounts were ever stated in any other manner: that the respondents demand of interest in this case was founded upon great justice and reason, in consideration of the length of time they had been out of their money, viz. from the year 1710, and more particularly, as the very contract itself provided, that the respondent should have such frequent measurements, stating of accounts, and advance of money thereon, that they should not expend of their own money above £500 at any time, the better to enable them to carry on and finish the said work. And since the appellants, after so much canvassing of this affair, had not been able to shew the least error in any of the said bills, the respondents submitted that, as the strongest evidence of the fairness of their demand, and of the care with which their bills were settled by the Duke's agents; and the same being thereby stated and reduced to a certainty, it was hoped they would carry the interest which had been allowed, and which was but a small part in comparison of the whole.*

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the said several orders therein complained of should be reversed: and the House being of opinion, "that the four bills in question for Burford stone delivered, and work done at Blenheim, ought not to be taken as stated accounts, within the meaning of the decree in the said cause:" it was therefore further ORDERED, that the parties should forthwith go to an open account touching the particulars contained in the said four bills, and any satisfaction received for the same, or any part thereof: and the said Court of Exchequer was to cause an account to be taken accordingly: in taking whereof, the Deputy Remembrancer was to examine into the truth and reality of the said particulars, and into the rates and prices thereof, whether such rates and prices were agreeable to the contracts made by Sir John Vanbrugh, or the persons appointed by the late Earl Godolphin for that purpose, as to such part of the said particulars as fell within such contracts; and as to such part as did not fall within the said contracts, whether the same were reasonable: and the Deputy was likewise to see whether the said particulars, or any of them, were comprised in any other bills of work or materials, which had been paid off and discharged; and what should be found to remain due and unsatisfied to the respondents the appellants were to pay: and for the better taking the said account, the said Court was to cause the parties to be examined upon interrogatories, so far as should be necessary, touching the matter of the said account, and for the [550] discovery of all accounts, books, vouchers, papers, and writings, touching or relating to the said buildings at Blenheim, and any money paid or satisfaction given for or on account of the same, and to compel the respective parties in this cause to produce upon oath, before the said Deputy Remembrancer, all such of the said accounts, books, vouchers, papers, and writings, as were in their, or any of their respective custody or power; and that the said Court of Exchequer should give such further directions, pursuant to this order, as should be just. (Jour. vol. 22. p. 270.)

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CASE 9.—Countess Dowager of KILDARE,—*Appellant*; RICHARD HOPSON,—*Respondent* [5th February 1734].

[Mew's Dig. vi. 1367; viii. 156. See *Cooke v. Stevens* (1898) 1 Ch. 162.]

[A. being indebted to B. in £800 on a stated account, entered into articles for the payment of this debt by instalments, of £80 per ann. A. afterwards, by deed, created a term of years for the payment of his debts out of the rents and profits of his estate, but not by sale or mortgage. Only two of these

instalments being paid, a bill was brought for recovering the rest; and on a question, whether they carried interest, it was held they did; and they were accordingly decreed to be paid, with interest at £4 per cent. An executor retaining a large part of testator's personal estate, during the pendency of divers suits touching the validity of some of his debts, shall be chargeable with interest for the annual balance in his hands.]

**\*\* DECREE of Chancery AFFIRMED, with some variation.**

See note at the end of this title [p. 390 *infra*].\*\*

The Earl of Ranelagh being indebted to Sir Charles Hopson, upon a stated account, in £800 by articles of agreement, dated the 10th of August 1705, obliged himself, his heirs, executors, and administrators, to pay to the said Sir Charles Hopson, his executors, administrators, and assigns, the said sum of £800 by quarterly payments, after the rate of £80 a year, until the same should be fully satisfied, the first payment to be made at Michaelmas then next; and on that condition Sir Charles Hopson agreed to take his said debt by such quarterly payments.

The Earl, in part performance of these articles, made three payments of £40 each, amounting to £120; the last of which payments was in February 1706; and this was all the money ever paid by the Earl or any other person towards satisfaction of the said £800.

By indentures of lease and release, dated the 20th and 21st of December 1708, made between the Earl of the one part, and the Duke of Ormond and others, trustees therein named, of the other part; the Earl conveyed to the trustees and their heirs all his Irish estate therein mentioned, of £4000 a year and upwards, to the use of the trustees, their executors and assigns, for 200 years from the death of the Earl, in trust, that out of the rents, issues, and [551] profits of the premises, and not by sale or mortgage thereof, they should pay the several debts and incumbrances therein mentioned, and particularly to the said Sir Charles Hopson, the yearly sum of £80 pursuant to the said articles.

In April 1710, Sir Charles Hopson died, having made his will and appointed John Churchill, Nicholas Goodwin, and Thomas Woodford, executors thereof; Churchill and Goodwin proved the will, Woodford refusing to act, and thereby became entitled to the residue of the said £800. But before they received the same, or any part, viz. in January 1711, the Earl died, leaving Mary, Countess Dowager of Ranelagh, his widow, and three daughters, his co-heirs, namely, the appellants and Lady Frances, who afterwards intermarried with the Earl of Coningsby; who thereupon took possession of all the said Irish estate, and received the rents and profits thereof, which would have been sufficient to discharge all the debts due and charge thereon. But there appearing other charges and demands upon the premises, which were to be satisfied in preference to the said debt of £800 due to Sir Charles Hopson, particularly one annuity of £1600 payable to the Countess of Ranelagh for life, besides £40 a year for stables, etc. no part of the arrears of the said £80 a year was ever paid to the executors of Sir Charles.

The two acting executors being dead, and Mr. Woodford refusing to act, letters of administration, with the will annexed, of Sir Charles Hopson, were granted to the respondent his son, whereby he became entitled to the remainder of the said £800.

The respondent, for several years after the death of Sir Charles Hopson his father, was an infant, and knew nothing of the said debt, or how it was secured, or where, or to whom to apply for a satisfaction of the same; but having at last received full information and obtained the said articles, the respondent, on the 12th of February 1729, exhibited his bill in the Court of Chancery, against the appellants and others, in order to have a satisfaction of £680 which remained due, and the interest thereof.

To this bill, the appellants and the other co-heirs appeared, and put in their answers; the appellants thereby admitting the justice of the debt, and the articles and deed of trust executed by the Earl of Ranelagh, for securing the payment of the same, in such manner as aforesaid, and that they were ready to pay the said £680: but whether they ought to pay interest for the same, they submitted to the judgment of the Court.

On the 30th of October 1733, the cause was heard before the Lord Chancellor King, when his Lordship decreed, that it should be referred to the Master to compute interest for £80, part of the said £680, from Christmas 1706 to Christmas 1707, and so for every succeeding year yearly, until the same should be paid, and in like manner to compute interest for each and every other £80, part of the £680 yearly from the time the same respectively became due until the same should be paid, and for the last sum of £40, remainder of the said £680, from the time the same became [552] payable until the same should be paid, and that such interest should be computed at the rate of £5 per cent. per ann. And it was further ordered, that the Master should tax the respondent his costs. And the appellants and the defendant Lady Frances Coningsby having admitted, that they had been in possession of the trust estate charged with the payment of the debt claimed by the respondent, and that the rents and profits thereof were sufficient to pay all the debts charged thereon by the deed of trust, it was further ordered and decreed, that the said defendants should pay to the respondent the said sum of £680, together with the interest for the same, and also his costs, to be taxed by the Master.

From so much of this decree as related to interest and costs the present appeal was brought; and on behalf of the appellants it was insisted (J. Willes, N. Fazakerley), that the debt due to the respondent was not in its nature such a demand as ought in a Court of Equity to carry interest, especially as there was no default in the Earl of Ranelagh, or his representatives, in paying the same as stipulated by the articles. That as the appellants were entire strangers to the respondent, and to all other the representatives of Sir Charles Hopson, they could not pay the money before any demand was made; and as they, upon the very first application, submitted to pay it, it was an extraordinary hardship upon them to be charged both with costs and interest, which augmented the debt to above double the principal sum. That the respondent, by his bill, had only claimed the benefit of the trust term of 200 years, and by the deed creating that term, no provision was made for paying the respondent's demand, other than so far as regarded the principal; and as the term was subject to other large incumbrances, it would in a particular manner affect the other creditors, should the respondent's demand of interest be established; for, by that means, the other incumbrancers must necessarily be postponed, and perhaps wholly defeated of their just demands, the rents and profits of the estate being but barely sufficient to satisfy the debts charged thereon, without interest. If however the respondent should be held entitled to interest, he should resort to the personal estate of the Earl, and for that purpose ought to have brought his representative before the Court, but which he had not done; and therefore it was hoped that the decree, with respect to interest and costs, would be reversed.

In support of the decree it was contended (D. Ryder, J. Strange), that the whole £800 was originally due on a stated account, so long ago as August 1705, and that the accepting it by instalments was a favour granted by Sir Charles, which the Earl could not in justice demand; and as those future times of payment were settled by articles, interest ought of course to run upon the delay of payment from those times. That the articles entered into by the Earl of Ranelagh bound his heirs to the due performance of them by payment of £80 a year, till the £800 was paid; and therefore, by virtue of the articles, the Earl's assets, real as well as personal, were liable to answer interest for the nonpayment of every £80 [553] as it became due according to the articles. That the Earl's conveyance of his estate to trustees for 200 years, to commence from his death, was a further security for payment of the £80 a year; and there being sufficient to answer interest as well as principal, it was but reasonable that it should be answered to the creditor who first made a composition to have the debt paid according to the articles; and if he could not have it so paid, it was but just that the interest should be answered, there being a fund sufficient to do it; and as to the costs, they were a necessary consequence of the right.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be affirmed; with this variation in that part of it directing the computation of interest, viz. that instead of £5 per cent. the interest should be computed at the rate of £4 per cent. only. (Jour. vol. 24. p. 453.)

CASE 10.—Earl of LINCOLN,—*Appellant* ; POULTON ALLEN,—*Respondent*  
[16th February 1768].

[Mew's Dig. vi. 1367. See *Cooke v. Stevens* (1898) 1 Ch. 162.]

[Under what circumstances an executor or trustee shall be chargeable with interest for the money in his hands.]

\*\* DECREE of Lord Camden, C. VARIED.

See note at the end of this title [p. 390 *infra*].\*\*

The Earl of Torrington by his will, dated the 30th of March 1716, directed, that all the debts due by him at the time of his decease should be fully paid; and then gave to the Earl of Lincoln, the appellant's father, for life, all his freehold estates whatsoever; but subject, so far as his personal estate should fall short, to the payment of his debts, legacies, and annuities; with remainders to his first and every other son in tail male; remainder to Greenwich Hospital for ever. And after several legacies and annuities for the life of each annuitant, he gave all his personal estate to Sir William Gifford, Colonel Sidney Godolphin, Mr. George Clark, and Blackburne Poulton, their executors and administrators, and made them executors, upon trust and confidence in them reposed, to see his will duly performed; and for their trouble therein he gave them £300 a-piece.

The testator died on the 14th of April 1716, and all the executors joined in proving his will; but Blackburne Poulton, who had been his attorney and solicitor in all his affairs, took upon himself to be the sole acting executor, and received of the Earl's personal estate, immediately after his death, much more than sufficient to pay all the debts, legacies, and annuities, so that the contingent charge on the real estate did not take place; but on Lord Torrington's death, it came to the Earl of Lincoln as tenant [554] for life only, who died on the 7th of September 1728, leaving George his eldest, and the appellant his only other son, both infants: whereupon George, then Earl of Lincoln, became tenant in tail male; and, on the 30th of April 1730, he died under age without issue; upon whose death the appellant, then but ten years old, became tenant in tail under the limitations of the will, but not as heir of his father, from or through whom he derived no interest in the Earl of Torrington's estate.

The largest debt due by the testator at his death was a sum of £1000 with interest thereon, being a portion by him given in marriage with his relation Margaret Herbert, to Henry Hussey Esq. and secured by a mortgage and bond from the testator, in 1705, to one William Lilly, in trust, to be laid out in land, to the use of the husband and wife for life, and if she died without issue, to the sole use of Mr. Hussey.

Lilly the trustee, without Mr. Hussey's consent, and in breach of his trust, soon after assigned his mortgage to Lady Wynersal, and she to others, whereby a contention arose in the Earl of Torrington's lifetime, between the assignees and Mr. Hussey, concerning the right to the mortgage money; and therefore his Lordship brought a bill of interpleader in the Court of Chancery, making all the claimants parties, but died before the money was paid into Court.

In 1716, Poulton received in money, of the testator's personal estate, £7858, being above £2000 more than sufficient to have paid all the debts, legacies, etc., and ought therefore, in performance of the testator's will, which directed that all his debts, etc. should be fully paid, to have discharged the above mortgage as soon as possible; but, in manifest breach of his trust, he purposely omitted doing so, under pretence that he could not safely part with the money, because there were several claims to it; whereas he might, and it was his duty to have immediately revived the testator's bill of interpleader, and paid the money into Court, whereby his testator's assets would from that instant have been discharged from the debt; and the enormous waste of the personal assets, by an accumulation of interest on this mortgage, which he and the respondent, his representative, suffered to run on at £6 per cent. for thirty-two years after the testator's death, would have been prevented.

In 1716, Mr. Hussey brought his bill in Chancery against the executors, and the

several claimants under Lilly's assignment, and also against the Earl of Lincoln, the appellant's father, for payment of the mortgage-money; and Poulton, in his answer thereto, admitted assets in his hands.

Poulton died in 1745, having detained this specialty debt in his hands nine and twenty years, leaving the respondent, with two others since dead, his executors, whereby the respondent became the Earl of Torrington's personal representative.

The respondent and his co-executors held the same conduct as their testator Poulton, not paying Mr. Hussey one farthing of prin-[555]-cipal or interest, although his wife was then dead without issue, and the whole money his own, and although he had born the burthen of a Chancery suit near thirty years; so that he was under a necessity of bringing another bill against the respondent and his co-executors, who not only set up the same defence which Poulton had done, namely, that they could not safely pay the money because of the different claims thereto, but went further, for by their answer they denied assets of Lord Torrington, which Poulton had admitted twenty-nine years before; and by these and other contrivances kept this mortgage money in their hands till the 24th of January 1746, when the cause being heard before the Lord Chancellor Hardwicke, he decreed them to pay the whole principal, and interest at £6 per cent. out of Lord Torrington's personal estate, if sufficient, but if insufficient, reserved the consideration of how much should be paid out of the real estate; and the respondent not admitting assets, an account thereof was ordered to be taken by the Master; who afterwards reported, that the executors had received above £5000 of the personal estate more than sufficient to have paid all his specialty debts in a due course of administration.

In proceeding before the Master, the respondent would bring in no account of the assets come to his and the other executors hands, till compelled by interrogatories, to which he put in an answer of no less than 364 sheets; and by artfully avoiding to insert in such accounts any totals of the receipts and payments, and blending them together in one schedule, he rendered it difficult to come at a discovery of the precise sum in their hands; whereupon Mr. Hussey obtained an order, dated the 10th of March 1747, that the respondent and his co-executors should pay him £1000 in part satisfaction of his demands, without prejudice; but the respondent persisted still to the very last moment in opposing Mr. Hussey's getting to the end of his suit; for even after the Master's report of the 18th of June 1748, of the great surplus of the personal estate, more than sufficient to pay the Earl of Torrington's specialty debts, and all other demands whatsoever, the respondent put him to the expence of a further hearing; when he was decreed to pay the whole principal, interest, and costs, then increased to £3905 16s. 4d. of which £1910 was for 32 years interest accrued after Lord Torrington's death, and after Poulton's receipt of assets more than sufficient to pay all his Lordship's debts, legacies, and annuities whatsoever.

The respondent being thus condemned for his and his testator Poulton's culpable misbehaviour as executors and trustees, in treble the sum of the original debt, acquiesced till Trinity Term 1756, when he thought fit to file a bill in the Court of Chancery against the appellant; suggesting, that by his and his co-executors having, under the above decree, been obliged to pay Mr. Hussey £1000 for principal, and £2905 16s. 11d. for interest and costs on his mortgage, Lord Torrington's personal estate was become deficient to the amount of £1730 9s. 10d. which he prayed that [556] the appellant might be decreed to pay out of the real estate, or that a sufficient part thereof might be sold for that purpose.

The appellant by his answer insisted, that the Earl of Torrington's personal estate, come to the hands of his executors, was much more than sufficient to have paid all his debts, legacies, and annuities, and that if there now was any deficiency, it arose from the executors own misconduct in not pursuing a due course of administration as they ought to have done: but being a total stranger to all these transactions, and the management of his interest from 1730, when he became a party to Hussey's suit, being totally left to Poulton, as his father's had been before, and not having a single paper or account relative to these matters, but such as the respondent had thought fit to give, and which it was impossible to surcharge or falsify after a run of forty years, the appellant therefore was under the necessity of filing a cross bill against the respondent, for an account of Lord Torrington's personal estate, debts,

and legacies; without which it was impossible to defend himself against this unexpected demand.

Both causes were heard on the 20th of January 1761, before the Lord Keeper Henley, who, as the respondent's demand depended on the *quantum* of Lord Torrington's personal estate come to the hands of his executors, and their conduct in the course of administration; referred it to the Master to take an account of the personal estate, debts, legacies, annuities, and funeral charges, reserving the consideration of the merits and costs till after the Master should make his report.

The Master by his report, dated the 24th of February 1763, certified, that a surplus of £1531 17s. had come to the hands of the executors, more than sufficient to pay all the legacies, funeral expences, and annuities, allowing four months interest on the £1000 mortgage, accrued after the Earl of Torrington's death. This report was absolutely confirmed; but the respondent afterwards insisting on several allowances which the Master had not made him, the appellant, in hopes of avoiding farther litigation, consented that it should be referred back to the Master to review his report.

Accordingly, the respondent demanded before the Master an allowance of several small sums, amounting to £139 16s. 11d., which the appellant, for shortening the inquiry, consented to allow, without proof, no witness having been examined in the cause. The respondent then craved an allowance of £1910 as an increase of interest after the testator's death, on Mr. Hussey's mortgage, which the Master conceiving not to fall within the direction of the decree for him to allow, he made his second report dated the 15th of July 1766, thereby certifying, that there then remained in the executors hands, of the personal estate, more than sufficient to have paid all the debts, legacies, funeral expences, and annuities, the sum of £1510 14s. 11d.; and, by consent of both parties, he also certified, that on the 17th of October 1716, the executors laid out £2000, part of the personal estate in bank annuities; and on the 8th of December 1722, sold out £400 part thereof, to pay, as the respondent alleged, two simple contract debts of that amount to Lord Tyrconnell and Mr. Herbert, although the executors then had in their hands, over and besides the £2000 Bank annuities, a sum of £1500 and upwards, lying dead at no interest, more than sufficient to have paid these two debts; and for the further information of the Court, the Master, in a schedule to his report, set forth an account by way of annual rests, shewing the particular sums of the personal estate which remained in the hands of the executors unapplied in a course of administration, at the end of each year from 1716 to 1748, which also shewed what part of such unapplied sums were placed out at interest, and what remained dead in the executors hands.

In taking these rests and examining the papers brought in by the respondent before the Master, it appeared, that besides disputing the payment of the £1000 mortgage for 32 years, Poulton had also disputed the payment of most of the testator's other principal debts, as well as legacies; and particularly, 1st, he disputed payment of the legacies of £720 given to Ann Barry, afterwards married to John Taverell, obliging her and her husband to bring a bill for recovery thereof, and after keeping the money in his hands several years, he was forced to pay them their principal and interest, with costs. 2d, He put Hannah and Sarah Berry, legatees, one of £100 and the other of £50, to the like expence and delay, and was also forced to pay them with interest and costs. 3d, The like by Jabez Wood, a legatee of £300, and paid with interest and costs. 4th, He disputed a debt of £500 due to Richard Graham, and put him to bring his action, pleaded the statute of limitations, and refused to admit assets, so that Graham was forced to bring a bill for a discovery of the personal estate; and after being kept out of his money near seven years, Poulton thought fit to pay his whole debt with costs. 5th, He also disputed payment of a debt of £200 due to Lord Tyrconnell, obliging his Lordship to bring a bill which ended in a decree against the executors for this whole debt, with £118 3s. 4d. for costs of suit. 6th, Poulton also disputed several other debts and legacies, besides an annuity, and brought divers bills against creditors and legatees; and for such suits so occasioned and so instituted by him, the respondent insisted before the Master upon an allowance of £1448 for Poulton's bill of costs, as an attorney and solicitor, in prosecuting and defending them; though evidently of his own creation, for his own profit, and to a shameful waste of the assets, as appeared even by the respondent's account of them.

The original and cross causes were heard upon the Master's report, by the Lord Chancellor Camden, on the 17th of December 1766, when the respondent alleged, that however Lord Torrington's executors might be guilty of neglect in not procuring a discharge of Mr. Hussey's debt, yet that the appellant's father and himself were no less so in not compelling the executors to discharge the personal estate by payment of that debt, and therefore [558] the real estate remained chargeable with the £1910 interest accrued thereon after Lord Torrington's death; as also with another sum of £61 5s. 9d. claimed by the respondent as a loss the executors were said to have sustained by the bankruptcy of Messrs. Noroot. But the appellant insisted, that the real estate ought not to be charged with either of these sums, and that the executors were themselves chargeable with interest for all such money as they held in their hands without making any interest thereof, as they should have done, by investing the whole, as they did a part only, in Bank annuities. Whereupon his Lordship was pleased to declare, that the sum of £1910 paid for interest of £1000 being the debt of the testator Arthur Earl of Torrington, ought, so far as his personal estate should be deficient, to be made good out of his real estate; and ordered, that it should be referred back to the Master to review his report, and that the respondent Poulton Allen, the personal representative of the testator, should be allowed in his account the said sum of £1910, and also the sum of £61 5s. 9d. claimed as a loss which the executors of the testator sustained in the year 1729, by the bankruptcy of Messrs. Noroot; and that the Master should inquire into the several bills of costs claimed to be due to Blackburne Poulton, as attorney and solicitor, in prosecuting and defending divers suits brought against or by the said Blackburne Poulton and his executors, and see how far these suits were proper or improper, and state the same with his opinion thereon to the Court; and that the Master should tax the bills of costs in such of the said suits as he should find were properly prosecuted or defended. And his Lordship reserved the consideration of subsequent costs and further directions until after the Master should have made his report.

From this decree Lord Lincoln appealed; contending (C. Yorke, A. Forrester) that the Earl of Torrington's will directed his debts, legacies, and annuities to be fully paid; that he left, as appeared by the Master's reports, personal assets by about £1500 more than sufficient to discharge them all, and which actually came to the executors hands. That the schedule annexed to those reports proved the large sum annually remaining in their hands unapplied, from 1716 to 1748; although it was their duty instantly to have applied the estate in payment of the creditors, legatees and annuitants. The reality of Mr. Hussey's debt was not disputable; nay it was expressly admitted, whoever might be entitled to the money, under the several assignments which had been made of it. That the executors, and especially Poulton the acting one, and an attorney, must know, if he knew any thing, that by bringing the money into Court in a cause then depending, or by filing a bill of interpleader he would have put an end to the growing interest of £6 per cent. But instead of doing so, and even after admitting assets in his hands sufficient to discharge the debt, he suffered it to run on at interest for near 30 years in his own time, and the executor, the respondent, for about three years more, evidently from no other motive than that of jobbing the money for his own [559] purposes. This was clearly a *devastavit*, and notorious breach of trust, and the interest accrued by these means after the testator's death, was not his debt but the debt of his executors, incurred by their own wilful default; and which by no rule of justice could be thrown upon the appellant, since that would be making one man pay the debt of another. The testator indeed made his real estate a subsidiary fund for the payment of his debts, legacies and annuities; but that was only supplying a deficiency of his personal estate left at his death, and not a subsequent deficiency arising from the mismanagement of his executors, which they alone were answerable for. That Poulton's unjustified and shameful waste of his testator's assets further appeared from his leaving some one debt or legacy undisputed, and driving the creditors and legatees into suits for recovering their right, which ended in an accumulation of interest and payment of costs, all falling upon an estate much more than sufficient, if duly applied, to discharge these honest demands. This was a second proof of the original intent of the testator of parting with a shilling till compelled by legal means, and in the mean time making an undue and private advantage of the money.



The argument of there being no dishonesty but only neglect in Poulton, which must ultimately charge the appellant, was by no means admissible. Gross negligence in an executor or trustee, and such at least there was in the present case, is dishonesty; which he, and he alone, is bound to make good. But surely Poulton's whole conduct savoured more of dishonesty than neglect: he had been the Earl of Torrington's attorney and agent, was one of his executors, totally confided in by his co-executors, and by the Earl of Lincoln, to whom he also became attorney and agent, as he afterwards did to the appellant; had large assets in his hands, and was solely intrusted by all parties with the care of their interests. Thus circumstanced, his duty was, by a faithful and speedy discharge of the testator's debts, legacies, and annuities, to have answered the expectations of all. Instead of this, he let the largest debt run on upon frivolous pretences, paid nobody but by compulsion, and when forced to discharge Lord Tyrconnell's and Mr. Herbert's debts, of only £400, having then £1500 lying in his hands without interest, (to the estate at least, whatever it might produce to himself,) did it by selling part of £2000 Bank annuities bearing interest. Such a conduct needed no comment, and rendered the large balance of unadministered money lying annually in his and the respondent's hands, from 1716 to 1748, very justly liable to interest according to its *quantum* at those several periods. That no neglect could be imputed to the late Earl of Lincoln, or to the appellant, nor could any such imputation charge him with the consequences of Poulton's misconduct. The contest was not between Lord Torrington's creditors and his executors, nor between his legatees or annuitants and his executors, nor between any of them and his devisee of an estate, secondarily liable to their demands; but between the representative of an [560] executor, whose testator and himself had shamefully wasted the first testator's personal assets, and the devisee of his real estate, attempted to be charged with the deficiency occasioned by themselves. What principle of equity could warrant this it was hard to discover, especially as there was not the least ground for this charge of neglect, unless a most shameful abuse of confidence reposed could produce that consequence, and entitle the injuring party to satisfaction from the injured; or unless it could be supposed that the late Lord Lincoln was bound to bring a bill against his own solicitor and agent as soon as he had employed him, for compelling him to do his duty; an idea totally inconsistent with the unlimited confidence which his Lordship reposed in him. How Poulton answered that trust was already stated; and nothing appears more odious in a Court of Equity, than an undue advantage taken by an attorney or agent of the confidence reposed in him by his employer, the latter being in their mutual transactions generally off his guard; whence such a breach of trust is of itself deemed evidence of the greatest fraud. Lastly, that the £61 5s. 9d. claimed by the respondent as a loss sustained by the executors in 1729, thirteen years after Lord Torrington's death, by the bankruptcy of the Norcots, was by the decree charged upon the appellant's estate, without the least proof of that bankruptcy, or this consequential loss.

On the other side it was said (W. de Grey, A. Wedderburn), that the several claims and disputes touching the mortgage for £1000 were such, that there was no one point of time from Lord Torrington's death, when the executors could with prudence and safety to themselves, or to the appellant, or his late father, have paid the principal and interest due thereon. That the appellant's late father never desired or directed the payment of this mortgage, but, on the contrary, was a party to all the suits relating to it, and approved of the several measures taken in disputing and defending the same, and acted therein by the advice of counsel, and never complained of any delays in the executors. But if any delay had happened, application might have been made to the Court for redress, but no such was made; and the appellant himself had been a party to the several proceedings touching this mortgage ever since the year 1738.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that in the decree complained of, after the word "consideration," the words "of interest for the annual balance kept by the said Blackburne Poulton in his own hands," should be inserted: and that with this variation, the decree should be affirmed.\* (MS. Jour. *sub anno* 1767-8, p. 198.)

\* This cause was probably afterwards compromised; for upon searching the

[561] CASE 11.—RAWSON HART BODDAM and others,—*Appellants*; JOHN RYLEY and others,—*Respondents* [27th February 1787].

[Mew's Dig. x. 580.]

[Under what circumstances a Court of Equity will not give either interest or costs upon the balance of accounts respecting transactions in India.]

**\*\* DECREE** of Lord Chancellor Thurlow, CONFIRMED.

This case is cited in the Treatise of Equity to the following points; "The position, that a stated account ought to carry interest is true as to accounts regularly stated by and between the parties, in which case there is an implied contract on the part of the debtor to pay; but does not extend to cases where there is no settlement or acknowledgment by the debtor." Treat. Eq. lib. 5. c. 1. sec. 4.—"The Court will not decree *Interest upon Interest*, by reason of a custom in a foreign country in which the contract was entered into." Treat. Eq. lib. 5. c. 1. sec. 6.—This latter point does not clearly appear either on the present report, or in that in 2 Bro. C. R. 3.

See the general note at the end of this title [p. 390 *infra*].

Contracts are to be adjudged according to the Law of the place where such contracts are made, and therefore in all cases interest must be paid according to the Law of the country where the debt was contracted, and not according to that where the debt is sued for. Treat. of Eq. lib. 5. c. 1. sec. 6; cites *Ekms v. East India Comp.* 1. P. Wms. 396; title Costs (in this work), case 5.

Mr. Fonblanque in his note on the above passage cites Huber, in his *Pralectiones*, who having illustrated the general rule, proceeds to state, that the place in which the contract is entered into, is not to be so precisely regarded, that if the parties in their contract take another place into their view, that place shall not be considered in preference. For every one is understood as having made the contract in that place, in which he has bound himself, that the payment shall be made—in *quo ut solveret se obligavit*. See 2 Burr. 1077, *Robinson v. Bland*; *Stapleton v. Conway*, 3 Atk. 727. See also the stat. 14 Geo. 3. c. 79, as to mortgages on lands in Ireland and the West Indies, allowing the legal interest of those places to be taken in England on such securities; and the case of *Duvar v. Span*, in which it was held that the above statute relates solely to securities *on land*; and accordingly where A. contracted with B. for the sale of an estate in the West Indies, and it was agreed that part of the purchase money should remain secured by the bond of B. and C. and that bond was afterwards cancelled and another executed in England by B. and D.; reserving £6 per cent. interest, (in the same manner as the former one,) the Court of King's Bench held this bond to be usurious. 3 Term Rep. 425.

**\*\* 2 Bro. C. R. 3. and see 1 Bro. C. R. 239.\*\***

In the year 1755, Samuel Hough and John Spencer, both then residing at Bombay in the East Indies, and both now deceased, entered into a copartnership and joint trade as merchants at Bombay in India, for their joint and equal benefit, and at their equal risque as to profit and loss; which trade was managed and carried on under Hough's direction, so long as he continued at Bombay, Spencer chiefly residing at Surat.

In November 1760, Hough left Bombay and came to England, where he arrived and continued till his death, which happened in September 1764. In the lifetime of Spencer, and upon Hough's quitting Bombay, the stock and goods belonging to the partnership, and all their outstanding debts and concerns, devolved to and fell under the direction and management of Spencer, and so continued until his death, when the same came under the direction, care, and management of his executors in India.

Register's book, no subsequent proceedings are to be found; except an order for delivering out books and papers, which had been brought in before the Master.—*Note of Mr. Brown.*

[562] After Hough's departure from Bombay, Spencer, at his request, received and paid several sums in India on his account, independent of the joint trade, the accounts respecting which were never settled by them; and at Hough's death there was also a long account open and unsettled between them, relative to their said joint trade.

Samuel Hough, by his will, appointed the respondents Martha Ryley, Laurence Sullivan, Esq. deceased, and the respondent John Moffat, executors, who proved the same.

John Spencer died in December 1766 in India, having by his will given all he possessed to his two children the appellants, John Spencer and Adriana Nugent; and appointed the appellants Rawson Hart Boddam, Nathaniel Stackhouse, and John Cleugh, executors in India, who proved the will there; and the said Laurence Sullivan, Edward Norton, and Thomas Lane, executors in England. But Edward Norton died without proving the will, and Laurence Sullivan and Thomas Lane renounced. Whereupon Catharine Norton, widow, obtained letters of administration with the will and codicil annexed, for the use and benefit of his son John and daughter Adriana, until one of them attained twenty-one.

The appellant Sarah Williams, on the 4th of July 1785, obtained other Letters of administration of Spencer's personal estate in England, with his will and codicil annexed, for the use and benefit of the appellant John Spencer his son, and one of the residuary legatees, then residing in Bombay.

The respondents, the executors of Hough, in March 1765, by letter of attorney, empowered the appellant Boddam, and Cecil Bowyer, to collect and get in Hough's debts, and settle his affairs in India, and Bowyer afterwards dying, the said Laurence Sullivan, and the respondent John Moffat, in March 1768, sent another letter of attorney to the appellant Boddam, and Daniel Draper, for the same purposes; at which time they were not aware the joint trade account, then open and unsettled between Hough and Spencer, was of such length and magnitude as it afterwards appeared to be.

In 1775, the appellants exhibited their bill in Chancery against the respondents, stating, that the appellant Boddam, and the said Daniel Draper, by virtue of the letter of attorney from the respondent John Moffat and the said Laurence Sullivan, had settled and adjusted with the appellant Nathaniel Stackhouse, the only other surviving executor of Spencer in India, all accounts relative to the joint trade, entered into and carried on by Hough and Spencer in India, from the 31st of July 1760, the time the same were settled by Hough and Spencer, up to the 31st of July 1768, and that such accounts were regularly signed by Boddam, Stackhouse, and Draper, and had since been transmitted to England, by which there appeared to be due from Hough to the joint trade 184,699 rupees, one pee, and thirty-seven raes, Bombay currency, being £23,086 sterling; that it appeared from the same accounts, that the joint trade was then indebted to Spencer in 209,020 rupees, three pees, and thirty raes, being £26,427 sterling: and that upon the whole [563] there was due from Hough, or his estate, to Spencer, 209,020 rupees, three pees, and thirty raes, or £26,427 sterling, which sum was alleged by the bill to remain due with compound Bombay interest thereon, agreeable to the custom and rate of interest at Bombay. The bill also stated, that on the 31st of January 1770, Samuel Hough was indebted to Spencer, on a private India account, in 28,789 Bombay rupees and thirty-seven pees, or £3598 12s. 9d. sterling, and that the same remained due with compound Bombay interest thereon: and that it was not only the constant and invariable custom at Bombay, in all mercantile concerns upon debts in general, to allow annually compound interest at nine per cent. but that the same mode of computation and allowance had been uniformly pursued by Hough and Spencer, and that all accounts settled between them were settled accordingly, not only in the joint trade but in their private concerns. Therefore the bill prayed, that the monies due to the appellants Boddam, Stackhouse, and Williams, as the personal representatives of Spencer, on the joint trading and private India accounts, might be paid to them with compound Bombay interest out of Samuel Hough's assets.

To which bill, the said Laurence Sullivan, and the respondent John Moffat, put in their answer, wherein they admitted, that the appellants Boddam and Stack-

house, the surviving executors of John Spencer in India, had transmitted to the appellant Williams, as Spencer's representative in England, an account, purporting to be an account of the dealings and transactions between Spencer and Hough, relating to their joint trade and concerns, from the 31st of July 1760 to the 31st of July 1768; and that the several books, containing such account, appeared to be signed by the appellants Boddam, Stackhouse, and the said Daniel Draper, and that it thereby appeared, that such sums were due from Hough's estate to the joint trade, and from the joint trade to Spencer, as stated in the bill; but that it appeared to them, from an examination of such accounts, that there were many errors, mistakes, omissions, and wrong charges therein, to the prejudice of Hough and his estate, besides the articles of interest and compound interest: and the respondents said, they never meant or intended, as appeared by a letter from the respondent Moffat to Boddam and Draper, set forth in such answer, that Boddam, who was an executor of Spencer, as well as attorney to Hough's executors, should settle, adjust, and sign the accounts between Spencer and Hough, or their estates, so as to be binding or conclusive upon Hough's executors or his estate, and the respondents hoped that such accounts should not be considered as settled or conclusive, but be considered as remaining open and unsettled. And they said, that a great part of the considerable balance made to be due upon the said accounts to Spencer or his estate, was composed or made up, not only of India interest at nine per cent. per ann. but of compound interest at the same rate, upon the balances alleged to be due to Spencer from Hough, and the said joint trade from year to year. And although [564] they believed that India interest was nine per cent. and that it was customary in India, in many cases, on settling accounts at the end of every year, to charge compound interest; and although they believed, that the joint trade and the parties concerned therein, had both received and paid India interest and compound interest, in respect to some of their transactions relating thereto; and notwithstanding they believed that Spencer and Hough, in settling their accounts from year to year, had, by their mutual consent, paid and allowed to each other India interest, and also compound interest; yet they submitted to the Court, whether compound interest ought to be charged or allowed in any case, without the assent of the party who was to be charged therewith; and that even the charge of simple India interest could not be supported, unless upon debts which in their nature carried interest, or by the consent and agreement of the party to be charged therewith; and with respect to the accounts of the joint trade and concerns, although in the books and accounts so transmitted to England, no interest was charged annually, or from year to year as usual, from August 1762 to July 1768; yet, that on the 31st of July 1768, compound interest was charged in one single article or item for all those years, notwithstanding Hough was not then at Bombay, and died in the year 1764, without having signified in any manner his consent for paying or allowing interest or compound interest. And they further said, that it also appeared by the transmitted accounts, that in the article of credit given to Spencer for 209,020 rupees, three quarters, and thirty raes, the sum of 100,010 rupees or thereabouts, part thereof was an article of compound interest only, and that 56,000 rupees and upwards, part of the balance of 184,699 rupees, one quarter, and thirty-seven raes, as stated and alleged by the bill, was made up of compound interest only; and with regard to the interest so charged, they submitted it to the Court, whether such interest ought to be allowed or paid to Spencer or his estate, for any balance that should appear due to him, as the same arose wholly, or chiefly, by Spencer's not keeping his books regularly made up, entered, and transmitted from year to year as he ought to have done; for that, if he had been regular in keeping his books, and had transmitted his accounts yearly as he might and ought to have done, Hough might have settled the same, and thereby have saved the large sums in the accounts, charged for interest and compound interest, or the greatest part thereof. They also said, that if John Spencer was to be allowed India interest and compound interest, it would be a very great hardship, and very injurious to Hough's estate, more especially as the greatest part of Hough's fortune had almost ever since his death been vested in the funds, and making such interest only as could be produced from the public stocks and funds; and they insisted, that as being executors in trust for infants, they should not have thought themselves

warranted in settling or adjusting the said accounts, and allowing such interest as is therein charged and allowed, but under the direction and in-[565]-demnity of the Court. But they were willing and desirous that the several accounts depending between the estates of Spencer and Hough should be taken and settled, and the balances paid in such manner as the Court should direct.

The answer put in by the other respondents John Ryley and Martha his wife was nearly to the same effect.

In March 1776, the respondents exhibited a cross bill against the appellants, which was nearly to the same effect as their answers to the appellants bill, and praying that the settlement of accounts made by Boddam, Draper, and Stackhouse, between the estates of Spencer and Hough might be set aside, or declared to be not binding or conclusive on Hough's executors, and that the accounts between Hough and Spencer or their estates might be opened, and that the same might be taken and settled under the direction of the Court.

Whereto the appellants put in their answers, insisting that the accounts signed by Boddam, Draper, and Stackhouse, were binding and conclusive against Hough's executors, and ought not to be opened or questioned, except as to any errors which could be proved by the respondents. To these answers the respondents took exceptions, which were referred to a Master, by whom several of the exceptions were allowed, and the answers were accordingly reported insufficient: but to this report the appellants excepted; and on the 31st of July 1778, and the 15th of December following, the exceptions came on to be argued before the Lord Chancellor Thurlow, on the last of which days it was by consent ordered, that it should be referred to John Hunter Esq. to take the accounts between the personal representatives of the said Samuel Hough, and the personal representatives of the said John Spencer, except only the demand of interest made by the representatives of Spencer, which was reserved; and that each side should produce to the said John Hunter, as he should direct, all vouchers and writings relating to the said accounts in their custody or power: and it was ordered, that the matter of the exceptions should stand over in the mean time.

The said John Hunter, on the 9th of January 1781, made his report, and thereby certified, that he had proceeded to take the accounts between the personal representatives of the said Samuel Hough and the personal representatives of the said John Spencer, and had carefully examined the same in the presence and with the assistance of the representatives concerned, and that he found and accordingly exhibited the three following accounts: No. 1. containing the account of Samuel Hough with the joint trade of Hough and Spencer, balance due by Hough 88,283 rupees, one quarter, twenty raes.—No. 2. The account of John Spencer with the joint trade of Hough and Spencer, balance due to John Spencer 71,616 rupees, one quarter, and sixty-five raes.—No. 3. The late Samuel Hough's private India account with John Spencer, due from Hough 14,454 rupees, one quarter, and ninety-five raes.

[566] On the 25th of April 1781, the exceptions to the Master's report came on again to be argued, and the respondents then waving so much of their exceptions as related to the matter of the account, referred to the said John Hunter. It was ordered that so much of the exceptions to the Master's report, as related to that matter, should be allowed, and the rest of the exceptions to the report were also allowed.

Both causes being set down, came on to be heard together before the Lord Chancellor, on the 6th, 7th, and 10th of December 1781, on the last of which days his Lordship ordered the same to stand over, that he might consider them and give his opinion: and on the 24th of March 1783, the causes stood for judgment, when it being suggested, that there were several debts from the partnership trade of Spencer and Hough which remained unpaid, it was, by consent, ORDERED and DECREED, that it should be referred to one of the Masters of the Court, to take an account of what was due to the creditors from the joint trade, and to compute interest on such of the debts as carried interest. And it being agreed by all parties, that there was a mistake in Mr. Hunter's report, it was ordered that he might be at liberty to attend the Master and rectify such mistake. And it was further ordered, that the Master should enquire what was the value in sterling

money of the rupees mentioned in Mr. Hunter's report, at the time the accounts were closed in such report.

In pursuance of this decree, the Master made his report, dated the 24th of May 1785, and certified that he had caused advertisements to be published in the *London Gazette*, for the creditors of the joint trade to come in and prove their debts; but that no person had come in before him to prove or claim any such debt, except the appellants William Williams and Sarah his wife in her right, as she was administratrix of George Norton deceased, with his will annexed: and the Master found, that there was, on the 31st of July 1760, due from the joint trade to the said George Norton, 15,808 rupees, two quarters, and two raes; and on the 31st of July 1761, the further sum of 502 rupees, two quarters, and eighty-four raes: and on the 31st of July 1762, the further sum of 503 rupees, one quarter, and twenty-three raes: and on the 31st of July 1763, fourteen rupees, three quarters, and sixty-nine raes, which two sums amounted together to 518 rupees, ninety-two raes, and which he found then remained due from the joint trade to the said Sarah Williams, as the administratrix of the said George Norton; but he did not find that there was any other debt due from the joint trade: and the Master, by his report further certified, that he had been attended by the said John Hunter, who had delivered in to him two several accounts, marked 1, and 2, and by the first of which he found, there was due from the estate of the said Samuel Hough to the joint trade of Hough and Spencer, a balance of 91,274:0:82 raes, instead of 88,283:1:20 raes, as mentioned in the said John Hunter's re-[567]-port; and that by the account marked 2, there appeared to be due from the joint trade to the estate of the said John Spencer, a balance of 74,607:1:27 raes, instead of 71,616:1:65 raes, as mentioned in the said report of the said John Hunter: and the Master further certified, that he had enquired what was the value in sterling money of the rupees mentioned in the said John Hunter's said report, at the time the accounts were closed in such report and the exhibits referred to; and he found, on the 31st of July 1768, each rupee was in England of the value of 2s. 3d. sterling; and that, therefore, the said balance of 91,274:0:82 raes, was, on the 31st of July 1768, of the value of £10,268 6s. sterling, and that on the same day the said balance of 74,607:1:27 raes was of the value of £8393 6s. 6d. sterling. And the Master further certified, that the 14,454:1:95, the balance of the account No 3, mentioned in the said John Hunter's said report, were, on the 11th of February 1763, when such account closed, of the value of £1806 16s. sterling.

On the 31st of October 1785, the causes came on to be heard before the Lord Chancellor, on the Master's report, for further directions and costs, when it was ordered and decreed, that it should be referred to the master to set a value on the rupees reported due to the representatives of the said George Norton deceased, from the joint trade of Hough and Spencer, at the respective times the debts were contracted. And it was further ordered, that the sum of £8393 6s. 6d. certified by the Master's report, to be due from the joint trade of Hough and Spencer to the estate of Spencer, should be deducted out of the sum of £10,268 6s. certified to be due from Hough to the joint trade: and the court declared, that the sum of £1874 19s. 6d. the residue of the said sum of £10,268 6s. ought to be divided into moieties; and that the sum of £937 9s. 9d. being one moiety thereof was to be considered as belonging to the estate of the said Samuel Hough, and the sum of £937 9s. 9d. the other moiety thereof, was to be considered as belonging to the estate of the said Spencer; but that such moieties were liable, in the first place, to answer what should be found due to the said George Norton from the joint trade, or so far as the same would extend to satisfy the same; and, if deficient, that the deficiency ought to be borne equally between the estate of Hough and the estate of Spencer: and, it appearing to the Court that, pursuant to an order dated the 16th of April 1777, the sum of £10,000 was paid out of the funds and cash in the bank, standing in the Accountant General's name, in trust in the cause, Hough against Ryley, being part of the estate of the said Samuel Hough, to the representatives of the said John Spencer, on account of the demands of the said John Spencer on the said Samuel Hough's estate, and which said demands appeared by the said report to consist of the said sum of £8393 6s. 6d. due from the joint trade, and the sum of £1806 16s. due from the said Samuel Hough to the said John Spencer on the

private India account, making together £10,200 2s. 6d. It was further [568] ordered, that the representatives of the said John Spencer should be at liberty to apply to the Court for the payment of the sum of £200 2s. 6d. the residue thereof, and for the payment of the residue of the said sum of £937 9s. 9d. before declared to belong to the estate of the said John Spencer, in case the same should be more than sufficient to answer their moiety of the debt due to the said George Norton after his said demands should be satisfied, and his Lordship did not think fit to give any interest on the several balances as they stood in the Master's report, or to give any costs on either side.

The appellants, conceiving themselves aggrieved by the last decree, so far as the same did not give interest on the respective balances due from Hough, to the joint trade of Hough and Spencer; and from the said joint trade to Spencer, and from Hough to Spencer on the private account; and so far as the same had not given the appellants any costs, appealed therefrom, alleging (G. Hardinge, J. Scott, J. Mitford), that it was proved by the deposition of Mr. Hunter, that it is the custom at Bombay to charge and allow interest in all mercantile concerns between merchant and merchant, and on debts in general; and that the usual interest is three quarters per cent. per month, which is something more than £9 per cent. per annum; and that all accounts are made up in that manner annually, when the interest is added to the principal, and then interest is calculated upon the balance. All mercantile transactions therefore at Bombay must be considered as carried on upon the faith of this custom; and, without any express agreement for that purpose, the parties must be considered and bound by the custom. But in the present case, the acts of the parties amounted to an express agreement to conform to the custom; for Hough made up and stated the partnership accounts in this manner to the 31st of July 1759, and claimed, and was allowed interest on the annual balances against the joint estate. The same mode of settlement ought therefore to have been pursued to the conclusion of the accounts; and accordingly, in the only subsequent account, made up in the life time of the parties, the balance being against Hough, he was charged with interest according to the custom before observed. That the charge of interest according to the custom having been once adopted by the parties, unless it was continued throughout the accounts, extreme injustice would be done to the estate of Spencer. During the period from the 24th of August 1755, to the 31st of July 1759, the balances being in favour of Hough, he was allowed interest on them. From the 31st of July 1759 to the 31st of July 1760, the balance being against him, he was charged with interest; but (if the decree should remain unaltered) from the 31st of July 1760, the balance being regularly against Hough, he was not charged with interest; at the same time the joint trade was charged with interest upon the debts due from it, (except that due to Mr. Spencer,) from the 31st of July 1760, and the partnership was allowed interest upon all the debts due to the partnership, (except that due from Hough,) from the [569] 31st of July 1760, and Hough was allowed a moiety of the interest received for the debts due to the partnership; Hough therefore, in this mode of settlement, would receive all the benefit which could arise to him from the custom of charging interest, and would not be himself charged with interest after the 31st of July 1760; and Spencer, whose money had been applied to pay partnership debts, carrying interest, would not receive any benefit of the custom from the 31st of July 1760. That the injustice with respect to Spencer's estate attending the adopting the custom of the country, in stating the accounts to the 31st of July 1760, and deserting it from that time, appeared more fully when it was considered, that, from the 31st of July 1760, the joint trade was constantly indebted to Spencer. It seemed impossible to give a reason for allowing interest to Hough from the joint trade, whilst the balance was in his favour, and not allowing interest to Spencer when the balance was in Spencer's favour. The advance by Spencer, upon which the balance was due to him, was beneficial to the partnership to the extent of the interest claimed; for it appeared by the accounts, that great part of the balance due to him after the 31st of July 1760, arose from his having in the years 1761, 1762, and 1764, paid rupees sixty-two thousand five hundred and fourteen and two quarters, principal money, besides rupees eight thousand five hundred and thirty nine and three quarters, for interest due from the partnership to the East India Company's bank at Bombay, which debt carried interest at £9 per cent.

But, independent of the custom in India, and the agreement of the parties expressed by the mode adopted by both in making up the accounts stated in their life time, the general custom of merchants was in favour of the demand of interest. That if interest was not to be allowed throughout the accounts, in the same manner as in the accounts stated to the 31st of July 1760; yet, upon the balances stated in the account made up to the 31st of July 1760, which were adopted and proceeded upon by Mr. Hunter, simple, either at £9 per cent. the Indian rate, or at £5 per cent. the rate in England, it was submitted ought at least to be allowed. For the account being signed by Spencer and sent to Hough, and Hough having acknowledged the receipt of it by the letter of the 5th of April 1762, in which he made no objection to the statement, but on the contrary adopted it and reasoned upon it, the account must be considered as equivalent to an account settled and signed by the parties: if not, the account to the 31st of July 1759, settled and signed by Hough, was the last settled account, upon which a still larger balance appeared due to Spencer; and that the balance being due upon the account signed, interest was due upon it at £5 per cent. at least, according to the custom of this country, and therefore upon so much as remained due on the 31st of July 1760; and after giving the proper subsequent credits, interest ought to have been allowed. And if interest ought not to be allowed on the balance stated in [570] 1760, yet as accounts were regularly settled and signed by the attorneys for the respondents to the 31st of July 1768, interest ought to have been allowed from that period; for the respondents had, by consent, been let in to falsify and surcharge that account; yet the liberty to falsify and surcharge ought not to extend to give a further benefit by delaying payment, without allowing interest for the delay. That the not allowing interest from the 31st of July 1768, appeared still more objectionable, when it was considered that the decree directed the rupee to be valued on that day, (when it had fallen in value from 2s. 6d. to 2s. 3d.) because the accounts were on that day supposed to be closed; so that the estate of Spencer was made to suffer the loss by the decrease in value of the rupee, because the accounts were supposed to be closed on the 31st of July 1768, and yet was not allowed the usual consequence of closing accounts; viz. interest upon the balance appearing upon the close.

The principal ground insisted upon, in answer to this demand of interest, was, that Spencer did not keep regular books of the partnership transactions, and that his want of regularity occasioned difficulty in making up the accounts; of this there was no evidence in the cause. A narrative by Mr. Hunter had been introduced to give colour to this assertion; and it had been insisted, that as it was referred to him to take the accounts, except the demand of interest, this narrative was to be considered as evidence. In answer, it was perhaps sufficient to say, that such narrative would not amount to evidence, and that it was not referred to him to state any facts, but merely to state the accounts: and that his narrative was therefore perfectly foreign to the cause. If it had been referred to him to state facts, the parties should have been at liberty to lay before him evidence upon which he might report; but his narrative was prepared without any communication with the appellants. It should be remembered too, that Hough left the books a year and a half in arrear when he left India, and that Spencer was generally absent from Bombay from that time till his death, and during great part of the time was in active public employ, particularly as Governor of Bengal. With respect to the private account between Hough and Spencer, the balance in favour of Spencer was principally occasioned by his transferring forty thousand rupees, at Hough's request, to the account of Governor Hutchinson: for this transfer Hough received the value in England, either in money or stock. And the nature of the transaction appeared to have been, that Hough agreed to give Governor Hutchinson money in India that bore £9 per cent. interest, instead of stock in England equal in value to the capital sum. Spencer therefore, in this instance, at the request of Hough, charged himself with interest at £9 per cent. on the balance of this account, to enable Hough to receive from Governor Hutchinson, in England, money or stock of the value of forty thousand rupees. Until therefore the payment of that balance it was highly reasonable that Hough should be charged with India interest upon it. [571] He must have paid Governor Hutchinson £9 per cent. on the amount of this balance, if Spencer had not charged himself with it; and he would therefore gain a most unreasonable advantage by his contract with Governor Hutchinson to the



injury of Spencer. Indeed it could not be supposed that Spencer would have consented to have charged himself with interest at £9 per cent. on this sum, unless he had understood that he was to be allowed like interest on it in his account with Hough; and the nature of this transaction shewed clearly that the allowance of Indian interest on the balances of accounts was the contract between the parties, and a term upon which they dealt. And in a letter of the 12th of April 1782, Hough tells Spencer that, as the funds with which he meant to furnish him to make up the forty thousand rupees would fall short by ten thousand seven hundred and twenty rupees, Spencer might either receive the sum from his attornies, or debit him in account. It also appeared from this letter that Hough had at that time money in India, which of course produced Indian interest. To this private account even the objection raised by the narrative of Mr. Hunter about the irregularity of accounts did not apply; the assertion of that gentleman did not extend to this private account. That upon both accounts the appellants offered to try the question of interest at law. The right to demand interest in this case was a legal right, not a matter in the discretion of a Court of Equity; and when a party claiming a legal right offers to try it before the proper tribunal, it has been usual for Courts of Equity to direct that mode of trial. Besides, if the objection arising from the irregularity of books could be made a ground for refusing interest, a jury of merchants was the proper resort to try the fact. And with respect to costs, it was clear that a very large balance was due from Hough's estate to Spencer's; that Hough's executors, having authorised persons in India to settle the accounts afterwards, quarrelled with the statement which these persons had made, and that they finally compelled the executors of Spencer to resort to a Court of Equity to obtain payment. Unless gross misconduct is imputable to the persons to whom the balance is due, the costs of a bill for an account seem of course to follow the balance; and with respect to the private account the balance was indisputable. And the bill brought by Spencer's executors so far could be considered only as a bill by a creditor for payment of the debt due out of assets; in which case it was apprehended there was no instance of refusing costs to the creditor.

On the other side it was said (C. Ambler, J. Mansfield), that the appellants had in vain attempted to entitle themselves to their original demand either as to principal or interest; the demand was enormous. When the circumstances under which the principal was claimed, were discovered, they appeared to be a complete bar to the latter, compound Bombay interest was asked for, upon pretended balances made up long after Mr. Hough's decease, and long after the de[572]-termination of the partnership, from books full of the grossest errors, without any examined and settled accounts between the parties, any notice that such interest would be expected, or mutual consent to allow it previous to, or at the time of Mr. Hough's departure from India. It must be admitted likewise, as proved, that the intricacy and confusion in the accounts from which the state of the transactions between the parties was to be deduced, was occasioned by the default and negligence of Mr. Spencer himself and his executors; the former kept no accounts, made no entries after Mr. Hough's departure from Bombay, but left his books a blank from the year 1758, as appeared from his executors letter to Mr. Sullivan, when they requested an accountant from England to arrange and make them up from the confused minutes and papers left behind him at his death. The manner in which they were afterwards formed by his executors from Governor Bouchier's books, equally inaccurate, only increased the confusion, by adding his errors to their own. The consequent delay of payment therefore was not imputable to Mr. Hough's executors, whose caution was necessary, and was entitled to favour in a Court of Equity, inasmuch as they were deprived of all materials and vouchers from which they could collect what was really and fairly due from their testator. That the reference to Mr. Hunter, which was by consent, was an acknowledgment that the accounts ought to be put to the test, and liquidated under a new examination, and not to be taken in the original shape and extent without further investigation. Mr. Hunter's report shewed the propriety of the reference, and justified the conduct of the respondents in disputing the original demands. The documents upon which the pretended accounts were founded, had been set aside as fallacious: the supposed balances had been shewn to be erroneous, and, in consequence, the amount of them had been ex-

ceedingly reduced by him. The respondents were now for the first time authentically informed what was the sum their testator owed. Had they, in compliance with the appellants exorbitant requisitions, paid more, they must have injured their testator's family, or borne the loss themselves. What pretence then was there to call for interest upon such a demand, which had only been withheld by the trustees of the deceased till it could be made out and ascertained what was due to them! During the course of which investigation the sum of £10,000 was paid to the representatives of Spencer by the respondents, under an order of the Court so long ago as the 16th of April 1777. And after failing in every other part of their case but the common right to an account; what pretence had the appellants to ask for costs, which are in the discretion of the Court, and are often influenced by the conduct of the parties? It was submitted, that such discretion could not have been more equitably exercised than in the present instance; and that all circumstances considered, the respondents might have asked for costs themselves with a much [573] better grace than the appellants could now pretend to be aggrieved by the refusal of them.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed. (M.S. Jour. Sub anno 1787. p. 124.)

SOME OBSERVATIONS on several of the preceding Cases have been reserved for this place, in order to introduce a short statement of such part of the law of Interest as will connect many of those cases with each other.

In the Treatise of Equity, lib. 5. where much useful information on the subject is collected by Mr. Fonblanque, *Interest* is considered as the *common measure of damages*, where the contract is for *money*, sec. 1.

As to the cases in which Interest is allowed in Equity it is said to be given not only upon a note payable on demand; (*Osborne v. Hosier*, 6 Mod. 167;) but even for demands due by covenant; 14 Vin. 458. c. 16. But this latter seems doubtful, as the demand is not in such case *liquidated*. See 2 Salk. 623. and note to Case 1, of this title *Interest*. To what is there said may be added, that it is admitted that interest is not allowed in Equity; (though it may at law in the shape of damages; *Eddowes v. Hopkins*, Doug. 361, 376); on *book-debts* or *simple contract debts*, prior to the confirmation of the Master's report of such debts; though the real estate be devised for payment of debts. See *Dolman v. Pritman*, 3 Ch. Rep. 36. *Barwell v. Parker*, 2 Vez. 363: *Bath (E) v. Bradford (E)*, 2 Vez. 587: *Lloyd v. Williams*, 2 Atk. 108: *Shirley v. Ferrers* (Lord), 1 Bro. C. R. 41; but see *Carr v. Burlington*, (Cosa.) 1 P. Wms. 228: *Maxwell v. Wattenhall*, 2 P. Wms. 27, *contra*; the authority of both which cases is however questioned by Mr. Cox in his notes on them.

Though interest is not generally allowed on rents and profits, or on arrears of an annuity, yet it will be allowed on the latter if secured by a recognizance or other specialty. See *Legat v. Searl*, Gilb. Rep. 142: *Newman v. Aveling*, 3 Atk. 579: and on this principle it appears to have been allowed, in the case of annual instalments of a debt secured by specialty, and not punctually paid. See Case 9 of this title.

A difference has been taken, in case of goods sold and delivered, between bare notes and penal securities; because in the former the parties have not extended the bargain beyond the bare sum in the note; but in the latter, although there was a profit in the sale, yet the Court will not dispossess the possessor of the security without a common amends, *i.e.* the legal interest for the time of his forbearance; for the penalty is presumed without any agreement for that purpose to be inserted for that end; Treat. Eq. lib. 5. c. 1. sec. 2: But where excessive rates are allowed for the work in respect of slow payments, we have seen that no Interest shall be allowed; for it is only allowable to supply the want of prompt payment. *Ante* Case 8.

Whenever the debt is carried beyond the penalty of the security, it is always for a defendant, upon the maxim that he who will have equity must do it; as where the party has been delayed by injunction of the Court of Chancery or the like. See 1 Vern. 349: 1 Salk. 154: Hard. 136: 3 Atk. 517: Show. P. C. 15. But never for a plaintiff, any further than the defendant could be charged at law; because the plaintiff has chosen his own security, and therefore must abide by it. Besides a man can have no more than his debt; and the penalty is the utmost of the debt. See 2 Vern. 509: 1 Vern. 342: 3 Bro. C. R. 492; 496.

Unless there be some special circumstances in the case, the rule above stated from the Treatise of Equity, seems most agreeable to the current of authority. There are however cases in which the penalty has been exceeded without special circumstances. See *Elliot v. Davis*, Bunb. 23: *Lonsdale (Ld.) v. Church*, 2 Term Rep. 388. Of circumstances where the Interest is carried beyond the penalty, Case 7 of this title affords one instance, where a bond was only a collateral security; and Case 5 another, where advantage was made of the money; which latter is consistent with the principle that those who retain money in their hands and convert it to their own use, without the consent of the owners, are bound to pay Interest, although not demanded, as a punishment for what, under such circumstances, may be considered as knavish and fraudulent dealing; on which principle Courts of Equity proceed in charging executors and trustees with Interest on trust property. See Treat. Eq. lib. 2. c. 7. sec. 6; and Cases 9, 10, of this title. An instance where Equity will not carry Interest beyond the penalty is afforded in Case 6, where no demand had been made for several years. [See 1 Coop. Ch. 209: *Knipe v. Blair* (1900) 1 I.R. 372.]

As to the cases of Interest being made principal, see more fully this work, under title Mortgage.

With respect to the discretion used by the Courts in directing, mitigating, or denying Interest, see Treat. of Eq. lib. 5. c. 1. sec. 5. and Cases 1, 2, 3, of this title.

[574]

## JOINT TENANTS

CASE 1.—Earl of BINDON and others,—*Appellants*; Earl of SUFFOLK and others,—*Respondents* [3d February 1707].

[Mew's Dig. xv. 1379. See *In re Smith's Trusts* 1878, 9 Ch. D. 120.]

[J. S. being entitled to a debt of £20,000 due from the Crown, devised the same to six of his relations *equally to be divided between them, share and share alike; and if either of them die, to the survivors or survivor of them*. All the legatees survived the testator, but before the debt was recovered, one of them died: held, that the legatees were joint-tenants, and that the representative of the legatee dying, was not entitled to any part of this legacy.]

\*\* DECREE of Lord Chancellor Cowper, REVERSED.

But see the case of *Stringer v. Philips*, determined at the Rolls Michaelmas 1730; where, in case of £100 given by will to several, equally to be divided between them and the survivors and survivor of them, it was held, that the devise made them tenants in common; the words *survivors, etc.* being to be understood of such of them as should be living at the testator's death: See 1 Eq. Ab. 292. c. 11.; Cox's P. Wms. 1. 97. in n. See also the cases of *Barker v. Gyles*, 2 P. Wms. 280: *Haws v. Haws*, 3 Atk. 524: 1 Vez. 14: *Stones v. Heurtley*, 1 Vez. 165: *Rose v. Hill*, 3 Burr. 1881: *Salisbury (E) v. Lambe*, Ambl. 383. cited by Mr. Cox.

In the case of *Barker v. Gyles*, (see *ante* title Devise, ca. 25.) which was a devise of *lands* to A. and B. and the survivor of them and their heirs, equally to be divided betwixt them (share and share alike), it was determined that A. and B. were joint-tenants for their lives, and had several inheritances. See 2 P. Wms. 280.

In Lord Harcourt's MSS. Table, the reason of the determination of this case is alleged to be, that the word survivor must signify something, and therefore it shall be construed, if any of them die before the money received. It is there also stated, that this was considered as a *desperate debt* due from the crown. See the Case; and the reports in Viner, cited in the margin.\*\*

1 P. Wms. 96. 2 Eq. Ca. Ab. 535. c. 3: Viner, vol. 8. p. 389. ca. 20,  
in n: vol. 14. p. 487. ca. 16.

James Earl of Suffolk being seised in fee of Audley-End house, together with

the park and lands thereunto belonging, by deed and fine in October 1660, conveyed the same to King Charles II. in consideration of £50,000 whereof only £30,000 were paid, and the remaining £20,000 were ordered to be paid out of the revenue of the *hearth-money*.

On the 10th of July 1688, the said Earl James made his will; and thereby, after taking notice that the said £20,000 still remained unpaid, he gave and devised the same in the words following, viz. "I do hereby give and devise the said £20,000 unto my brothers George Howard and Henry Howard, and unto Henry Howard, Edward Howard, Charles Howard, and Diana Howard, sons and daughter of my said brother Henry Howard, equally to be divided between them, share and share alike; and if either of them die, to the survivors or survivor of them." [576] And he appointed the respondents Anne Countess Dowager of Suffolk his wife, and Henry Earl of Suffolk his brother, together with Richard Newman Esq. executors of his said will. But before any part of this £20,000 was paid, the revenue of *hearth-money* was taken away by act of Parliament.

The said George Howard succeeded his brother Earl James in his honour; and, having survived him about three years, died intestate, before any part of this money was received; whereupon administration of his estate was first granted to Mary Coppinger widow, the administratrix of Ralph Coppinger deceased, who was a principal creditor of Earl George; but this administration was afterwards revoked, and a new one granted to the respondent Margaret Davies, who was one of Earl George's daughters.

On the 21st of November 1701, King William, in consideration of a release of the said £20,000 from the surviving executors of Earl James, and at the nomination of the respondent Henry Earl of Suffolk, and of the appellants, granted the said Audley-End house, park, and lands to Peter King and Thomas Marriott Esquires, upon the following trusts; viz. in the first place, for saving harmless the surviving executors of Earl James against all claims and demands of the administrators, or other representatives of Earl George, for or in respect of the said £20,000 or any part thereof; and for making satisfaction to such administrators, or other representatives of Earl George, *in case they should appear to have right to any part* of the said £20,000 and subject thereto, as to one fifth part of the premises, in trust for the respondent Earl Henry and his heirs; as to another fifth part, in trust for the appellant, the Earl of Bindon and his heirs; as to another fifth part, in trust for the appellant Edward Howard and his heirs; as to another fifth part, in trust for the appellant Charles Howard and his heirs; and as to the remaining fifth part, in trust for the appellant Lady Diana, the wife of the appellant John Pitt, and her heirs for ever.

The Earl of Bindon having contracted with the several other parties, for the purchase of their respective proportions of the said premises, exhibited his bill in Chancery against them and the trustees King and Marriott, and also against Margaret Davies, the personal representative of Earl George, in order to have a proper conveyance executed to him of the premises, free from all incumbrances; and, that he might be quieted against the claim of the defendant Davies, who insisted on being entitled, as the administratrix of Earl George, to a sixth part of the £20,000.

On the 7th of June 1707, the cause was heard before Lord Chancellor Cowper, who declared his opinion, that the devise in Earl James's will took place in point of interest immediately on his death, Earl George surviving him; and that the defendant Davies, as the administratrix of Earl George, was well entitled to a sixth part of the said £20,000, and therefore decreed interest to be computed on such sixth part, from the time that the plaintiff had possession of the premises; and upon his paying to the said [576] defendant Davies one sixth part of the said £20,000 with interest as aforesaid; it was ordered, that the several defendants should execute a conveyance of the said premises to the plaintiff; but, in default of such payment, it was ordered, that the plaintiff's bill should stand dismissed, with costs to be taxed.

From this decree the plaintiff appealed; and on his behalf it was argued (S. Dodd), that the words of the devise [*if either of them die, to the survivors or survivor of them*] containing no limitation of time, within which such dying to entitle the

survivors was to happen, the time ought to be construed as largely as any reasonable sense of those words would bear; and therefore, it was most reasonable and proper to understand them, to relate to the dying of any of the legatees, before the debt should be recovered or received. That some survivorship was evidently intended, as well as an equal division, there being express words for both; and it was but reasonable, that both should refer to the same time, i.e. the time of payment, for the £20,000 could only be divided when paid; and so the sense of the testator would be this, *as soon as the £20,000 can be got, it shall be divided amongst my brothers, etc. and the survivors of them*; or, *amongst my brothers, etc. or such of them as shall be then living*. That there was no other time to which this survivorship could be referred, except the time of the testator's death; and that could not be, because it would make the clause of survivorship entirely useless, for of course those who died before the testator, would be excluded without this clause; and it was natural to suppose, that the testator might reasonably intend a kindness to the persons named, if they should live to receive it, which he would not give to a representative, who might be a perfect stranger to, and without any merit from the testator. And if the clause of survivorship should be understood to relate to a dying of any of the legatees in the testator's life-time, it would be making the will provide for a contingency before it was a will; which would be unreasonable and void, as it was only a will from the time of the testator's death.

On the other side it was insisted (G. Pouncefort), that Earl George, by surviving the testator, became entitled to one sixth part of the said £20,000, and that the clause of survivorship was only intended to prevent the share of any legatee, who might die in the testator's life-time, from falling into his general estate, and by that means coming to those, whom he never meant to have any part of it.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree should be so far reversed, as it related to the allowance of the sixth part of the said £20,000 and interest, and to the account to be taken of such interest, and to the dismissal of the plaintiff's bill with costs, in case he should make default in paying the said sixth part and interest. And it was further ordered, that the trustees should forthwith execute conveyances of the premises in question to the appellant, the Earl of Bindon and his heirs, or to such others as he should appoint. (Jour. v. 18. p. 444.)

[577] CASE 2.—THOMAS HALL,—*Appellant*; RICHARD DIGBY and others,—*Respondents* [18th February 1735].

[Mew's Dig. vi. 328, 330, 1395.]

[A. by his will gives several legacies to his children, and appoints his two eldest sons joint executors; but makes no express disposition of the residue of his personal estate.—Held that this residue belongs to the executors as joint-tenants; and that one of them having died without making any severance, the whole survives to the other.—Where two executors are joint-tenants of the residue of the testator's personal estate, their employing part of it in trade for their mutual benefit, does not amount to a severance as to the whole.]

**\*\*DECREE of the Court of Exchequer in Ireland REVERSED.**

This was by no means the earliest case in which the first part of the question, as above stated, was determined; for it had been previously held, that residuary legatees, as well as executors, are Joint-tenants, unless the testator uses some expression which converts their interest into a tenancy in common: and if one dies before a division or severance of the surplus, the whole that is undivided will pass to the survivor or survivors. 2 P. Wms. 347, 529: And see 3 Bro. C. R. 455.

In *Perkins v. Baynton*, it was determined, that a money-legacy to two, (not executors,) *jointly and between them*, was not a joint-tenancy: and in that case it was said, that there was no case of a *residue* given to persons *not executors*, where they had been considered as joint-tenants. 1 Bro. C. R.

118. In the case of *Jolliffe v. East*, a legacy to two sisters, "to be equally divided between them when they should arrive at the age of 21," was held to be a tenancy in common. 3 Bro. C. R. 25.\*\*

The said James Clarke, deceased, had issue six sons, Luke, Augustine, Toby, James, John, and Richard, and two daughters, Mary and Ann, whom he severally provided for in his life-time, particularly Luke, although he had disoblighed his father by marrying against his consent.

Clarke having carried on a considerable trade as a merchant, by which he acquired a competent fortune, and being also seised of a small real estate, on the 27th of September 1712, made his will; and thereby, after directing payment of his debts, and giving pecuniary and other legacies to each of his children, and without making any express disposition of the residue of his personal estate, he constituted and appointed his two eldest sons, Luke and Augustine, executors.

On the 2d of October following the testator made a codicil, whereby he gave several other legacies; and on the 12th day of the same October he died, without otherwise altering his said will.

Amongst other of the testator's effects, Luke and Augustine, upon his death, possessed themselves of a small vessel, called the *Mary-Ann* galley, then in the harbour of Dublin; but no immediate opportunity presenting itself for the sale thereof, they thought proper, in the mean time, for the improvement of the testator's assets, and for the benefit of all parties interested therein, to let her out to freight; and accordingly accepted of an offer made to them for that purpose by Mr. Lynch, a merchant, who [578] hired her on a voyage to Bourdeaux in France, with directions, that the money to arise out of such freight might be there invested in the purchase of some casks of brandy, which were to be brought to Dublin by the said ship on her return homeward, in order to be sold and carried to the credit of the testator's estate.

Soon afterwards, the executors, in order to settle the accounts of the testator in his trade, wrote circular letters to his several correspondents both at home and abroad, to call in their respective accounts; but declined proving the will till they should first know the exact state of his affairs, and thereby determine with some certainty how far his estate would exceed or fall short of the whole amount of his debts and legacies.

But before that could be ascertained, and before the return of the said vessel to Dublin, Luke Clarke died in June 1713, possessed of a considerable personal estate, leaving Barbara his wife, and Adam his only son and heir, and the respondent Ann his daughter; having first made his will, and thereby, without taking notice of any claim to the residue of the testator James Clarke's personal estate, he bequeathed to the respondent Ann £600 for her portion, payable at her day of marriage, with interest until payment; and of his will appointed the said Barbara his wife sole executrix, who afterwards proved the same, and possessed herself not only of all the said Luke Clarke's own personal estate, but also of such part of the assets of the said James Clarke as came to the hands of Luke, and had not been applied by him towards the discharge of the testator James's debts and legacies.

After the decease of Luke Clarke, the appellant Augustine solely proved the will of the testator James, his father, and proceeded to get into his hands the testator's assets, and to apply the same in discharge of his debts and legacies.

The respondent Ann having, in 1726, intermarried with the respondent Richard Digby, they, in 1728, exhibited their bill in the Court of Exchequer in Ireland, against the said Augustine Clarke and others; praying that a moiety of the residue of the testator James Clarke's personal estate, after payment of his debts and legacies, might be considered as the right and property of the said Luke Clarke, and be decreed to be a fund in the hands of the said Augustine, for payment and satisfaction of the £600 legacy bequeathed to the respondent Ann by the said Luke her father; and for this purpose the respondents suggested an agreement, entered into between Luke and Augustine, for an equal division of the residue of James Clarke's estate; and insisted, that though there had not been any such agreement, yet that a moiety of such residue ought, by the custom of merchants, to have survived to the representatives of Luke Clarke, in regard he and Augustine had traded together

with part of the assets, by letting out the said sloop to freight in the manner already mentioned, and in that respect should be considered as merchants trading in partnership.

[579] To this bill Augustine put in a full answer, and thereby denied the pretended agreement between him and Luke, or that there ever was any sort of partnership between them, or that they ever traded with any part of the assets otherwise than as aforesaid; and therefore, as to that part of the bill which sought a discovery of the testator's assets, Augustine, instead of entering into a particular account thereof, admitted sufficient in his hands to answer any just demands which the respondents had on the testator's estate.

The cause being at issue, several witnesses were examined on both sides, and publication having been duly passed, the same came on to be heard before the Barons of the said Court of Exchequer, on the 26th of November 1733, and was further heard on the 3d and 5th of December following, and on the 23d of February 1734; when the Court were pleased to decree, that the respondents Richard Digby and Ann his wife should have and recover the £600 legacy, with interest for the same from the death of the said Luke Clarke, to be paid out of the assets of the said James Clarke the grandfather, but without costs.

From this decree Augustine appealed; and soon afterwards dying intestate, the appellant, as his administrator, revived the appeal. In support of which it was argued (N. Fazakerley, W. Hamilton), that Luke and Augustine Clarke, being joint executors, were jointly interested; and that Luke dying in the life-time of Augustine, the whole survived to him, and the rather, as Luke never proved the testator's will: that nothing appeared to have been done which could amount to a separation of their interests, for though it had been attempted to make them in the nature of partners in trade, yet there was no evidence to support it; the only colour of proof was, the instance of letting the *Ann* galley to freight; but this, it was apprehended, could not amount to a severance of the joint interest; and if by possibility it could be deemed such a severance as would prevent a survivorship, yet it extended to no other part of the testator's personal estate, and therefore it was hoped that the decree would be reversed.

On the other side it was contended (D. Ryder, J. Strange), that Luke and Augustine became entitled, not by virtue of any express gift of the residue, but from the apparent intention of the testator, in making them joint executors; and therefore there was nothing to make them joint-tenants of the residue, so as to entitle the survivor to the whole. That amongst merchants and joint traders, the law of survivorship does not prevail, and their carrying on a trade together with the testator's estate, was putting it upon the foot of a partnership, and was, in effect, an actual receipt of each of their shares. The decree therefore was right, and ought to be affirmed.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed, and that the bill exhibited in the Court of Exchequer by the respondents Digby and his wife, should be dismissed. (Jour. vol. 24. p. 592.)

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[580] CASE 3.—Sir ROBERT STAPLES and others,—*Appellants*; MARY MARGARETTA MAURICE, Spinster,—*Respondent* [19th January 1774].

[Mew's Dig. vi. 328: xii. 950.]

[Lands are settled to the use of the husband and wife for their lives, remainder to the heirs of both their bodies. The children of this marriage are joint-tenants, and if any one dies before severance, his share shall survive to the others. There is nothing hard, severe, or unreasonable in the law of joint tenancy, there being always an equal chance of survivorship in all the joint-tenants. If any of them have a bad opinion of their own lives, they may sever; but if the joint tenancy be not severed, it is an evidence of

intention in the party to submit to the chance of survivorship, or of that supineness and neglect to which the law affords no assistance.]

\*\* DECREE of the Court of Exchequer in Ireland REVERSED.

Formerly joint tenancy was favoured by the Courts of Law, because it was more convenient to the lord, and more consistent with feudal principles: but those reasons have long ceased, and a joint tenancy is now every where regarded, as Lord Cowper says it is in Equity, as an odious thing. See 1 Salk. 158.

Sir Robert Staples Bart. being seised in fee of lands in the county of Londonderry, and possessed of other lands by virtue of certain leases under the sees of Armagh and Londonderry respectively, for terms of years renewable on payment of fines, in the year 1682, entered into a treaty of marriage with Mary Vesey, one of the daughters of Dr. John Vesey, Archbishop of Tuam; and previous to the marriage, by articles dated the 12th of March 1682, executed by the Archbishop and Sir Robert, in consideration of the marriage, and of a marriage portion of £1000 it was covenanted, that after payment of the last £500 part of the portion, Sir Robert Staples, his heirs, executors, or administrators, should lay out £2000 in the purchase of lands of inheritance, to be settled to the use of Sir Robert Staples for life, with remainder to the said Mary for life; remainder *to the use of their heirs of both their bodies*. And it was also thereby covenanted, that the leases for years, and all the chattels real and personal, whereof Sir Robert was then possessed, or should afterwards acquire, by renewal of leases, purchase, or otherwise, should be to the use of and in trust for the said Sir Robert Staples, during his natural life; and after his decease, *to the use of and in trust for the children of the said Sir Robert, begotten on the body of the said Mary Vesey*; in consideration whereof, Sir Robert Staples did thereby give, grant, and assign over unto the Archbishop, his executors and administrators, all his right, title, and interest, of, in, and to the said lands, and other the tenements so demised and in lease to him, in trust for and to the uses, intents, and purposes aforesaid; and did thereby covenant not to surrender, alien, or otherwise dispose of the same, so as to defeat or any way disappoint the interest thereby granted.

[581] Soon after the execution of these articles, the marriage took effect, and Sir Robert Staples afterwards received the marriage portion of £1000.

On the 21st of November 1714, Sir Robert Staples died, possessed of the lands held by leases from the sees of Armagh and Londonderry respectively, which he had from time to time renewed in his own name, and also seised in fee and possessed of a considerable real and personal estate, leaving the said Lady Mary Staples his widow, and issue by her three sons, John, Alexander, and Thomas, and one daughter, Mary, who, upon the death of Sir Robert their father, became entitled, by virtue of the marriage articles, to the said leasehold interest in joint-tenancy.

Sir Robert Staples, by his will dated the 8th of November 1714, devised to his son John (afterwards Sir John Staples) all his estate both real and personal, during his life, he performing his will, and after his death, to the heirs male of his body; and if the said John should have no heirs male, then his said estate to descend to his son Alexander, during his life, and to his heirs male, with like remainder to his son Thomas: and after reciting, that he was then possessed of several lands under the said sees, he willed, that the said leases should be in the possession of his executors and overseers, until they and his wife, or his heirs in possession, should think fit to renew the same.

After the death of Sir Robert Staples, Lady Staples his widow, who was appointed sole executrix of his will, proved the same, and permitted her son, Sir John Staples, to enter upon and possess the said leasehold lands, and delivered to him the leases whereby they were held from the sees of Armagh and Londonderry, in order to renew the same, and perform every thing agreeable to the marriage articles.

Sir John Staples, by three letters dated respectively the 6th, 11th, and 29th of January 1714, and written by him to his mother, acknowledged the receipt of the leases, and that one of them had been renewed in his own name, but upon the trusts of the marriage articles and his father's will; and by an instrument under his hand and seal, dated the 10th of February 1714, reciting, that he had renewed and taken



a lease of several lands in the see of Armagh in his own name, he declared that he would not dispose of or otherwise alien the said lands, but that the same should always be subject to and disposed of as the said Sir Robert by his will had directed, and likewise according to the tenor of the marriage articles of the 12th of March 1682.

Mary, the daughter of Sir Robert Staples, and who married the Reverend Theodorus Maurice, died about the year 1722, in the lifetime of her husband, leaving issue David Maurice and the respondent Mary Margaretta, to whom the said David Maurice in his lifetime, by an instrument in writing under his hand and seal, assigned all his personal estate. Theodorus Maurice, after the death of his wife Mary, took out administration of her goods and effects.

[582] In September 1730, Sir John Staples died, in possession of the said leasehold premises, leaving Lady Mary Staples his widow and administratrix, and Mary and Isabella his daughters and only issue.

Alexander and Thomas Staples, upon the death of their brother Sir John, became, for the first time, acquainted with the contents of the articles of the 12th of March 1682, which had before been concealed from them; and they then resolved to commence a suit for the recovery of the said leases. But before the suit was instituted, Theodorus Maurice, who was the administrator of his late wife Mary, and the father of the respondent, in order to save the expence and avoid the trouble of becoming a party to such suit, executed an instrument in writing, or assignment, dated the 4th of March 1730, whereby, after reciting the settlement of the said leasehold interests, and the assignment thereof by the late Sir Robert Staples to the Archbishop of Tuam, by the marriage articles of the 12th of March 1682, as before mentioned; the subsequent marriage, and the death of Sir Robert Staples in 1714, leaving Dame Mary his widow, three sons, and one daughter, Mary, who married the said Theodorus Maurice; and also reciting, that the said Sir Robert Staples, at the time of his decease, was possessed of and entitled unto two considerable leases held from the sees of Armagh and Londonderry, which leases were bound by and subject to the uses and trusts in the said articles; and that Mary, the wife of the said Theodorus, was since dead; and that he had taken out administration to her, and was advised, that after an allowance for such portion as he received with his said wife, he, as administrator to her, was entitled to a share of the said leases, having heard or been informed of the contents thereof; and reciting, that as the circumstances of the children of Sir Robert Staples and Dame Mary, who were then living, and the representatives of such of them as were dead, then stood, the said marriage articles could not, as it was apprehended, be set up, and the benefit of them derived to the children then living, and the representatives of such of them as were dead, without a decree of a Court of Equity; and that the said Theodorus Maurice, as well from his own disposition as his want of health, was unwilling to engage himself in such a suit, and was desirous to prevent the children which he had by the said Mary his late wife from being involved after his death, in the difficulties and expences which must necessarily attend such a prosecution, the said Theodorus Maurice, in pursuance of such his resolution, and in order to preserve his children from the burthen and expence of suits, either in Law or Equity, concerning the premises, and to secure to them the benefit of the said articles in a way and manner less expensive, and in consideration of £10 paid to him by the said Alexander Staples, (then Sir Alexander Staples,) assigned and set over unto the said Sir Alexander Staples, his executors, administrators, and assigns, all the right, title, interest, claim, and demand, of, in, or to all such leases which the said Sir Robert Staples, or any person or persons in trust for him, or for his use at [583] the time of his death, held, possessed, or enjoyed, under the sees of Armagh and Londonderry, which had since been renewed in the name of any other person or persons, with or under the said several sees; as also all benefit, right, title, interest, property, claim, or advantage whatsoever, which he the said Theodorus Maurice in his own right, or in the right of any other person or persons whatsoever, could have or demand, by, from, or under the said articles of agreement; to hold the said assigned premises unto the said Sir Alexander Staples, his executors, administrators, and assigns, subject to the payment of such sum of money by him or them to the children of the said Theodorus Maurice by his late wife Mary, then living, as three persons therein named, or the survivors or survivor of them, should,

when it was decreed, or otherwise settled and determined, that the said leases ought to go and be distributed among the children of the said Sir Robert Staples and Dame Mary, determine, order, and appoint; due consideration being had of the marriage portion already received by the said Theodorus with the said Mary his late wife, and of the expences which the said Sir Alexander Staples should be put to and sustain in the prosecution and establishment of the said right, under the said marriage articles, and of all other equitable allowances which ought to be made to him. But no determination, order, or appointment, was ever made in pursuance of this instrument.

In 1731, Theodorus Maurice died, having made his will, and appointed Sir Alexander Staples, Edward Maurice Clerk, and Mary Drelincourt, executors thereof; but Sir Alexander Staples and Edward Maurice only proved the same.

On the 5th of February 1731, Sir Alexander Staples and Thomas Staples, the then surviving children of Sir Robert Staples, exhibited their bill in the Court of Exchequer in Ireland against Dame Mary Staples, the widow and executrix of Sir Robert, Dame Mary Staples, the widow and administratrix of Sir John, and Mary and Isabella, the daughters of Sir John; praying, that the leasehold interest under the see of Armagh might be decreed to the plaintiff; and that Dame Mary, the widow and administratrix of Sir John, might account for the rents and profits of the said leasehold interest, from the time when Sir John possessed himself thereof, and for a sum of £750, being the consideration received by him for the other lease under the see of Londonderry.

In February 1733, the cause came on to be heard, but was then adjourned over, on a doubt being conceived by the Court, whether the articles of 1682 were sufficiently proved; and there was afterwards a reference in the cause, relative to the personal assets of Sir Robert Staples, which depended for several years, and at length ended without any award.

Lady Staples, the widow and executrix of Sir Robert, died intestate; and administration of her effects, and also administration of the effects of Sir Robert, unadministered by her, was granted to Alderman Hans Baillie.

[584] Sir Alexander Staples and his brother Thomas afterwards severed the joint tenancy, and in July 1741 Sir Alexander died; leaving the appellant Sir Robert his only child and heir, having in his lifetime made his will and appointed Dr. William Vesey and his brother Thomas Staples executors thereof.

On the 5th of February 1742, Thomas Staples filed his bill of revivor and supplement against Lady Staples, the widow of Sir John Staples, Mary Staples his surviving daughter, Dr. Vesey, Thomas Jackson, Edward Maurice, Hans Baillie, and the appellant Sir Robert; and soon afterwards Lady Staples and her said daughter Mary filed a cross bill, praying to be decreed to the said leasehold estate held under the see of Armagh.

In December 1752 both causes were heard, and in the original cause it was decreed, that Thomas Staples and Sir Robert Staples were entitled to the leasehold interest held under the see of Armagh, discharged from the £2000 agreed to be laid out in a purchase by the articles of 1682, and that the representatives of William Vesey should assign the same; and also that an account should be taken of the rents and profits and renewal fines of the leasehold interest held under the see of Londonderry, from the death of Sir Robert Staples, until the same was sold by Sir John Staples, and an account of the three fourths of £750 received by Sir John Staples for that lease, with interest from the time of the sale; and such part of the cross bill as sought any part of the Armagh lease, and to charge the same, or the three fourths of the £750 for which the Londonderry lease was sold, with an annuity of £150 a year to Dame Mary Staples, was dismissed.

This decree was regularly inrolled, but the respondent, who was the only surviving child and issue of Theodorus Maurice and Mary his wife, afterwards, on the 13th of November 1761, filed her bill in the said Court of Exchequer against the appellant and the said Thomas Staples, the then surviving executor of Sir Alexander Staples, and also against Folliot Warren Esq. and Mary his wife, who was the daughter and administratrix *de bonis non* of Sir John Staples, and the said Hans Baillie and others, praying an account of the rents and profits of the said leasehold interests, held under the sees of Armagh and Londonderry respectively, from the

time of the death of Sir Robert Staples, and of such parts of the personal estate of Sir Robert as came to their hands, or for which they had received compensation; and that the respondent might be decreed to a share thereof and of the said leasehold interests, and that the former decree of 1752 might be set aside, as against the respondent, as having been obtained by fraud.

The appellant and the said Thomas Staples put in their answer to this bill, and thereby insisted, that they were not accountable to the respondent for any of the matters claimed by her bill; and particularly, that the respondent's mother having died in the lifetime of Sir John Staples, her share in the leasehold lands of Sir Robert Staples survived to Sir John, Alexander, and Thomas Staples, [585] and that the joint tenancy was not severed until after the death of Sir John Staples; and they further insisted, that the question concerning the right of survivorship among the children of Sir Robert Staples, was determined by the decree made in the year 1752; and they claimed the like benefit of that decree, as if they had pleaded it in form.

In August 1762, and before any further proceedings were had in this cause, the defendant Thomas Staples died, having first made his will, and thereof appointed Grace Staples his wife, and John Staples his eldest son, executors, who duly proved the same, and against whom the cause was afterwards duly revived.

On the 11th of May 1772, this cause was heard before the Barons; and after several days hearing, stood over for judgment until the 20th of July 1772, when the Court were pleased to decree, that the respondent was entitled to one fourth part of the leasehold interest held under the see of Armagh, and that an injunction should issue to put her into possession of the same; and that the respondent was entitled as against the appellants Grace and John Staples, as executors of Sir Alexander and Thomas Staples, to one fourth part of what Sir Alexander and Thomas Staples respectively made or received out of the said leasehold interest, from the time of their entering into possession or receipt of the rents, after the death of Sir John Staples, to the time of their respective deaths; and that the respondent was also entitled as against the appellants Sir Robert Staples, Grace Staples, and John Staples, to one fourth part of what they respectively made or received out of the said leasehold interest, since the respective deaths of Sir Alexander and Thomas Staples, credit being given for one fourth part of all renewal fines, and other charges attending such renewals.

From this decree the appellants appealed, insisting (A. Wedderburn, J. Dunning, W. Selwyn), that all the children of Sir Robert Staples were clearly joint tenants of the leasehold estate, settled on them upon the marriage of their father; they had the same interest accruing to them all, by virtue of the same deed or conveyance, namely, the articles of 1682, and which vested in them all at one and the same time, upon the death of Sir Robert in 1714. That the estate having all the properties of a joint estate, a right of survivorship was the regular and legal consequence; and therefore Mary, the respondent's mother, dying in 1722, without having severed the joint tenancy, her share in this leasehold estate accrued to Sir John, Alexander, and Thomas, the then surviving joint tenants. There is nothing hard, severe, or unreasonable in the law of joint tenancy, there being always an equal chance of survivorship in all the joint tenants; and wherever that equality does not subsist, as between a corporation and a private person, there can be no joint tenancy. If any of the joint tenants have a bad opinion of their own lives, they may sever the joint tenancy and destroy the right of survivorship, by a deed granting their respective shares in trust for themselves, or may enter into covenants not to take advantage of each other by sur-[586]-vivorship. But if the joint tenancy be not severed, it is an evidence of intention in the party to submit to the chance of survivorship, or of that supineness and neglect to which our law affords no assistance. That the settlement by the articles of 1682, had the effect of that clause which is usually inserted in almost all marriage settlements; i.e. that the shares of children dying before the age of twenty-one, when they may sever the joint tenancy, shall go to the survivors. Lastly, that no argument or inference could be drawn from any supposed fraud in this case, against the appellants: and if any fraud was imputable to Sir John Staples, in the concealment of the articles, the injury arising from it was not peculiar to the respondent's mother, for Sir Alexander and Thomas Staples were equally defrauded by such concealment.

On behalf of the respondent it was argued (E. Thurlow, A. Forrester), that marriage articles are considered by Courts of Equity as minutes of the intent of the several parties, to be afterwards carried into execution by a formal settlement; the intent however, is the leading and capital rule. Hence it is, that though in case of contrariety between articles and a settlement actually made before marriage, the latter shall prevail, because a new agreement is presumed; yet where such settlement is made after marriage, it shall be controlled by the articles, and their import shall prevail. That in the present case, there could not be the least doubt of the intent of the several parties to the articles of 1682. The portions thereby created for the children, were clearly meant as separate and distinct interests in each child, for the maintenance of each, and of the children he or she might have. But this very natural and rational intent was totally overturned by the notion of a joint tenancy, which let in a mischief never dreamt of by the parties; for if the two younger brothers and the sister had all died in Sir John Staples's lifetime, leaving ever so many children, he, the heir of the father, and taking a considerable real estate as such, would, by the mere chance of survivorship, have carried off the whole of the father's real and personal estate, and the families of the younger brothers and sister would have been left to beggary. That joint tenancy, originally applicable to land rights only, and derived from feudal principles, calculated for the support of military tenures long since abolished, is now constantly discountenanced in Courts of Law and Equity; every parent in providing for his children, whether by will, by articles, or by settlement, is naturally supposed to have in view, not only his own immediate children, but their posterity also; and that the provision he is making for his children be such as may enable them to marry, and provide for a wife and their issue. And if this holds in wills, where even children are considered only as volunteers, *a fortiori* must it do so in marriage articles, under which they are considered as purchasers for the most valuable of all considerations. And had a recent application been made to a Court of Equity, for carrying these articles of 1682 into execution, the provision thereby made for the children, [587] would certainly have been decreed to them not in joint tenancy but as tenants in common.

But further: no man, though innocent, can be permitted to reap the benefit of another's fraud, to the prejudice of a stranger. Sir John Staples was guilty of a most flagrant fraud in concealing the articles of 1682, and by that means possessing himself of the whole leasehold interests. Mary the respondent's mother was, to the time of her death, ignorant of her right. She left two children unprovided for; and had she known of her interest in these leaseholds, under the articles of 1682, she would certainly have taken the necessary steps to prevent survivorship, (if there was a pretence for it,) and by a prudent partition have secured a provision for her children: but Sir John's fraud prevented her from doing so. Sir Alexander and Thomas endeavoured to avail themselves of that fraud, and appropriate to their own use what was intended as a provision for Mary and her children: a Court of Equity therefore ought surely to interpose and do for Mary's children what she undoubtedly would have done for them herself, had she not been prevented by the grossest of frauds. Nor was her husband's assignment after her death any bar to, but, on the contrary, a strong inducement to such interposition. In the first place, it was but conditional, that an award should be made by three persons particularly named, which they never made, and so the condition was never performed. In the next place, it proved Sir Alexander and Thomas Staples's own conviction of their sister's right to a fourth of these leaseholds and other their father's personal estate, for otherwise, their applying for and obtaining this assignment was merely nugatory. But that it was applied for and obtained with a fraudulent view, appeared from their immediate subsequent conduct; for Sir Alexander, though he had signed the instrument which admitted his sister's right, yet in the bill which he and Thomas filed, they artfully introduced the right of survivorship, a right inconsistent with that, which by the instrument they had acknowledged, in hopes of obtaining a decree founded on that claim, and then set up that decree in bar of the right of their sister and her representatives. After Sir Alexander's death, this fraud was carried on still more perniciously by his surviving brother Thomas; which more than sufficiently warranted the Court in setting aside the decree in 1752, as obtained by concealment and misrepresentation of the truth, even had it deter-

mined the question of survivorship in the then plaintiff's favour; but in fact, it did not appear to have determined the fact either way.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed, and that the respondent's bill in the Court of Exchequer in Ireland should be dismissed without costs. (MS. Jour. *sub anno* 1774. p. 30.)

[588]

## JOINTURE.

CASE 1.—Dame MARGARET EUSTACE, Widow,—*Appellant*; THOMAS KEIGHTLEY and others,—*Respondents* [29th June 1713].

[Mew's Dig. iv. 1134; viii. 500. Forfeitures were abolished by the Forfeiture Act 1870 (33 & 34 Vict. c. 23), except when consequent on outlawry.]

[A. upon his marriage with B. settles lands of £400 per ann. for her jointure, and covenants, that if the particular lands so settled should not yield £400 per ann. clear, B. should have so much of the rents of the residue of the settled estate as should make up the said £400 per ann. A. being attainted of high treason, his estate becomes forfeited, and was granted by the Crown to J. S. The particular jointure-lands did not amount to £400 per ann. Held, that the jointress is entitled, as against the grantee of the Crown, to have the deficiency made good.]

\*\* DECREE of the Court of Chancery in Ireland REVERSED.

See *post* Case 4, 5.\*\*

Sir Maurice Eustace, in consideration of his marriage with the appellant, and of £2000 her portion, by indentures of lease and release, dated the 24th and 25th of October 1684, settled his estate at Castlemartin and elsewhere in Ireland, to certain uses, and particularly as to part thereof, to the appellant for her jointure: and in this settlement there was a clause, "That if the particular lands so settled for the appellant's jointure, should not really yield her the clear yearly rent of £400 per ann. over and besides reprises; she should have and receive so much of the rents, issues, and profits of the residue of the settled estate, as should make complete the said sum of £400 per ann."

In the year 1691, Sir Maurice was attainted of high treason, for being concerned in the Irish rebellion; whereupon he and his Lady fled into France, where they lived together till October 1693, when Sir Maurice died: but the appellant not returning from thence till the year 1695, was in the mean time deprived of all the rents and profits of her jointure lands.

In May 1696, the appellants exhibited her petition of right in the Petty-bag of the Court of Chancery in Ireland, in order to obtain possession of these jointure lands; and the Attorney General having confessed her title, she obtained a writ of *amoveas manus*; and thereupon, after great opposition from the creditors of Sir Maurice who were then in possession upon extents or other executions, she, in May 1697, recovered possession of the lands; but was not able to let them for more than £306 10s. 6d. per ann.

[589] The respondent Keightley having in May 1696, obtained a grant from King William, for a term of ninety-nine years, of all the estates of Sir Maurice Eustace, except the jointure lands: the appellant, in February 1697, exhibited her bill in the Court of Exchequer in Ireland against Mr. Keightley and the then Attorney General, in order to recover the deficiencies of her jointure, and also the arrears thereof from the time of her husband's death: and on the 17th of February 1699, the same were decreed to her accordingly; and it was referred to the chief Remembrancer of the Court to state the account of such arrears and deficiencies. But the *act of resumption* soon afterwards passing, no proceedings were had under this decree.

The appellant however, in August 1700, exhibited her claim before the trustees

appointed by that act, for the arrears and deficiencies of her said jointure, grounded on the aforesaid settlement and decree; and also for a sum of £3472 17s. 8d. as the amount of what she had paid for the purchase of several judgments, which affected the residue of Sir Maurice's estates. And on the 28th of February following, the said trustees gave judgment in the appellant's favour, and decreed that she should hold and enjoy the particular lands limited to her in jointure, for and during her natural life; with all such benefit and advantage, to which she was or could be entitled, either in law or equity: and it was further decreed, that she should receive the sums due to her for the judgments which she had brought: but this sum was restricted to £1076 17s. 2d.

In April 1702, an act passed in England for the relief of the respondent Keightley; whereby it was enacted, *that nothing contained in the act for sale of the Irish forfeitures, should make void the grants made to him; but that he, his executors and assigns, under the limitations, trusts, and provisos in this act declared, should hold the lands mentioned in the letters patent, during the term thereby granted: and those lands were thereby declared to be granted to the said Thomas Keightley, his executors and assigns, charged with such rents as the same were chargeable with before the forfeiture. And it was by the said act further enacted and provided, "That the said Dame Margaret Eustace should hold and enjoy her jointure of £400 per ann. and all debts by judgment due to her, as the same had been allowed to her by the said trustees; and should also have and receive all arrears of her jointure, which had accrued and grown due since the death of her husband:" and the said act expressly saved to her "all such right, title, and interest, claim and demand, as she had or could or might have in law or equity, of, into, or out of the premises or any part thereof."*

On the 6th of July 1702, the trustees made an order, whereby it was referred to Mr. Spry, their Master of the References, to state the account of the arrears of the appellant's jointure, which had accrued due since the death of her husband; first giving notice thereof to the respondent Keightley.

[590] In consequence of this order, Mr. Spry, by his report of the 28th of August following, certified, that after deducting what the appellant had received out of her jointure-lands, there remained due to her on account of the arrears, from the death of Sir Maurice to May 1702, the sum of £1918 4s. 11d. This sum was therefore charged by the trustees, among the incumbrances affecting the forfeited estate of Sir Maurice Eustace, and a deduction was accordingly made upon their estimate of the value of what remained in them to be sold, and public notice thereof given to the purchasers; viz. to John Asgill Esq. who, in trust for Mr. Keightley, purchased for £312 the reversion expectant on his term of ninety-nine years; and also to Mr. Keightley himself, who for £100 purchased the reversion of the jointure-lands, expectant on the appellant's death: and accordingly, in the conveyances executed to them by the trustees in June 1703, the lands thereby conveyed were made subject to all claims and demands as had been allowed by the said trustees; and an express saving was made to the appellant, of all such claim and demand as she had or might have by the aforesaid act made for the relief of Mr. Keightley.

The respondent Keightley declining to pay the appellant the £1918 4s. 11d. for the arrears of her jointure, or to make her any satisfaction for the deficiencies thereof, she was reduced to great distress; so that in November 1703, she sold all the judgment debts and other incumbrances, which she had before purchased, to Sir William Fownes; and in December 1709, she also sold to him a considerable part of her jointure, in order to raise money for satisfying her debts, and obtain her liberty from prison, where she had been confined for near two years.

In August 1710, the appellant exhibited her bill in the Court of Chancery in Ireland against the respondent Keightley, for a satisfaction out of the estate of the said £1918 4s. 11d. and of the subsequent deficiencies of her jointure.

And the cause being heard on the 26th of February 1712, the Lord Chancellor declared, that the lands of Castlemartin, and other the lands late of Sir Maurice Eustace, and since granted to Mr. Keightley, were not to be charged with the arrears of the jointure, from the year 1696 to the time of the trustees decree in February 1700, in regard Mr. Keightley was never in possession of the jointure-lands; and that the lands so granted to Mr. Keightley ought not to be charged with the de-

iciency claimed by the plaintiff to the date of the said trustees decree, in regard she had claimed such deficiency before the trustees, who had decreed her to hold her jointure-lands, saying they were then worth £400 per ann. but had not, in express terms, decreed any deficiencies to her. But his Lordship decreed, that the plaintiff was entitled to the deficiencies, if any, from February 1700 to December 1709, being the time of her sale to Sir William Fownes; and for ascertaining the amount thereof, it was ordered, that a trial at law should be had between the parties, upon the following issue: viz. what was the yearly value of the jointure-lands from the 28th day of February [591] 1700 to the 10th day of December 1709; and after such trial, his Lordship would consider, whether Mr. Keightley's person or estate should be charged with the deficiency, if any.

From this decree the plaintiff appealed; and on her behalf it was insisted (E. Northey, J. Pratt), that she had obtained a decree against the respondent in the Court of Exchequer, for the deficiencies of her jointure, and the arrears thereof, out of the rest of her husband's estate, which was obliged to make that jointure a clear £400 per ann.; and that it had also been decreed to her by the trustees, together with all such benefit and advantage as she was or could be entitled to, either in law or equity. That by the act passed for the respondent's relief, the appellant was to have and receive all arrears of her jointure, which had accrued and grown due since the death of her husband; and the trustees under that act had referred it to Mr. Spry, to state the account of those arrears, which he had accordingly done in the presence of the respondent's agent; and liquidated the same at the aforesaid sum of £1918 4s. 11d. which the same trustees had charged among the incumbrances affecting Sir Maurice's estate, and made a deduction thereof in their estimate of the value of that estate to be sold. It was therefore hoped, that the decree would be reversed; and that the sum reported due to the appellant for the arrears of her jointure, together with interest from the date of that report, and also the subsequent deficiencies would be decreed to her, and the estate made chargeable therewith; and so much thereof sold as should be sufficient to satisfy the appellant's demands, and also her costs of this suit.

On the other side it was contended (R. Raymond, W. Peere Williams), that the trustees for the Irish forfeitures had only adjudged, that the appellant should have her jointure-lands and the money she had paid for the purchase of incumbrances; but had allowed her no deficiencies or arrears. That if these trustees had conceived the appellant to be entitled to any arrears or deficiencies, they would doubtless have decreed her the same and charged the estate therewith; and, on the sale of it, would have made a proportionable allowance out of the purchase-money; but as the trustees had not allowed the appellant's claim of arrears or deficiencies, it was the same as if that claim had been formally dismissed; and consequently, she was totally barred by the *act of resumption*, which says, "That if the claims shall not be allowed by the trustees, the party claiming, his heirs, executors, or administrators, and all claiming under them, shall be for ever debarred and without remedy." As to the objection, that the appellant was let in for the arrears of her jointure by the proviso in the act passed for the relief of the respondent: it was answered, that there were no words in that act which gave those arrears against the respondent; and it would be very unreasonable to make a construction by implication, that he should answer what others had received: but the words of the act being general, must be intended to give the appellant a remedy [592] for her arrears, against such only as received them, and who ought, in conscience, to be liable to the payment thereof.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be reversed, and that the appellant should have a satisfaction for the arrears of her jointure of £400 per ann.; that such arrears having been computed by Mr. Spry, Master of the References to the trustees of forfeitures in Ireland, in his report made the 28th of August 1702, to amount to £1918 4s. 11d. should be taken as a sum stated at £1918 4s. 11d.; and that the Court of Chancery in Ireland should order Irish interest to be computed for the same, at £8 per cent. from the 28th of August 1702 until the said sum of £1918 4s. 11d. with such interest due and to grow due thereon, should be fully paid and satisfied: and it was further ORDERED, that the said Court should refer it to a

Master, to examine and take an account of the annual deficiency of the appellant's jointure, from the time to which the said arrears of her jointure were so computed to amount to the said sum of £1918 4s. 11d. until the 10th of December 1709: and it was further ORDERED and ADJUDGED, that the said sum of £1918 4s. 11d. and the interest thereof, and the subsequent deficiency from the time to which the said arrears were so computed as aforesaid, should be computed together, and from thenceforth stand a charge, with Irish interest to be computed for the same, until satisfaction thereof, on the premises granted by letters patent under the great seal of Ireland, to the respondent Keightley for ninety-nine years, during the continuance of the said term, as well on the reversion and inheritance of the said premises, expectant on the determination thereof, and also upon the reversion of the appellant's jointure-lands: and it was further ORDERED and ADJUDGED, that if the respondent Keightley should make default in payment of the said several sums so to be computed together as aforesaid, at such time as by the said Court should be appointed for his payment thereof; the said Court should cause a sale or sales to be made of so much of the said premises comprised in the said ninety-nine years term, during the residue of the said term, and of the reversion and inheritance of such premises, and also of the reversion of the appellant's jointure-lands, after her decease, as would be sufficient to satisfy the said appellant her several demands aforesaid, together with her costs of this suit, to be taxed by a Master of the said Court; and the respondent Keightley was to join in such sale, and procure all persons claiming any estate, right, title, or interest, into or out of the said premises, or any incumbrance thereon, by, from, or under, or in trust for him, to join therein. And this order was to be without prejudice to any demand or satisfaction the appellant might have or make, for or in respect of the deficiency of her jointure, since the said 10th of December 1709, if any such there was. (Jour. vol. 19. p. 589.)

[593] CASE 2.—THOMAS GROVE and others,—*Appellants*; Dame ESTHER HOOKE, Widow,—*Respondent* [8th May 1714].

[Mew's Dig. viii. 499.]

[Where lands are settled in jointure, and covenanted to be of £500 per ann. value, but the husband afterwards discovering a defect in the title, settles other lands as an additional jointure, and declares them to be in recompence of all deficiencies, either in title or value of the lands before settled; the jointress shall have lands of the full value of £500 per ann. over and above the other lands, and all other provisions made for her by her husband's will]

\*\* DECREE of Lord Chancellor Harcourt AFFIRMED.

Viner, vol. 5. p. 293. ca. 40: 2 Eq. Ca. Ab. 218. ca. 4. 389. ca. 1.

By deed dated the 25th of April 1664, and by a fine, Sir Thomas Hooke, in consideration of his marriage with Elizabeth, the daughter of Sir William Thompson, and of £6000, her marriage portion, conveyed to trustees and their heirs, several manors and lands in the counties of Norfolk, Warwick, and Gloucester, of the value of £1500 per ann. to the following uses; viz. as to Shelford in Warwickshire, and other lands of the yearly value of £800 to the use of himself for life: remainder to Elizabeth for her life, for her jointure; remainder to their first and other sons, in tail male; remainder to Sir Thomas, in fee: and as to the residue of the estates, to the use of Sir Thomas for life; remainder to his first and other sons by Elizabeth, in tail male; remainder to Sir Thomas, in fee.

Sir Thomas Hooke had issue by his Lady four children; namely, Hele, his only son, and the appellants Elizabeth and Ann, and Mary the mother of the appellant John Hammond; and by deed, dated the 11th of May 1675, he conveyed several manors and lands in the counties of Somerset, Monmouth, Hereford, and Derby, to trustees and their heirs, to the use of himself for life; remainder to trustees for a term of 500 years, for raising portions for his daughters, which were afterwards



paid; remainder to his son Hele for ninety-nine years, if he should so long live; remainder to the first and other sons of his said son Hele, successively in tail male; remainder to trustees and their heirs, in trust, to permit his said daughters and the heirs of their bodies to receive the rents as tenants in common; and then to permit Sir Thomas and his heirs to receive the rents; with a proviso for Sir Thomas and his son Hele to limit and appoint all, or any part of the premises, as a jointure for any woman or women, whom they, or either of them, might afterwards marry.

On the 1st of December 1677, Sir Thomas made his will; and thereby devised his reversion in fee, of all the said estates, to his son Hele for life; remainder to his first and other sons, in tail male; remainder to the testator's said three daughters for their lives, as tenants in common; with remainder to their sons and [594] daughters, in tail; and soon afterwards died, leaving his said son and daughters, and no other issue.

Upon the proposal of a marriage between Sir Hele Hooke, who was then only seventeen years of age, and Esther, the daughter of Edward Underhill Esq. certain articles were on the 2d of July 1683, entered into by Mr. Underhill and one Robert Thompson, who was Sir Hele's guardian and one of his father's executors; whereby Underhill covenanted to pay £1000 on the day of marriage, and if Sir Hele should, within six months after he attained his age of twenty-one, settle lands of inheritance of £500 per ann. in Warwickshire, to the use of himself for life; remainder to the said Esther, his intended wife, for her life, in lieu of dower; remainder to their first and other sons, in tail male; remainder to the right heirs of Sir Hele: that then Underhill would pay Sir Hele the further sum of £3000, and would also convey a farm in Worcestershire, and several houses in London, of the yearly value of £220 to certain uses therein particularly mentioned.

The marriage was soon afterwards had; and when Sir Hele attained his age, he, by indentures of lease and release, dated the 10th and 11th of May 1687, conveyed all the said manors and lands in Norfolk, Warwick, and Gloucester to trustees, to the following uses, viz. as to Shelford and other particular parts of the premises, to the use of himself for life; remainder to Dame Esther for life, for her jointure, and in bar of dower; remainder to their first and other sons, in tail male; remainder to Sir Hele in fee: and as to the residue, to Sir Hele in fee.—Mr. Underhill, at the same time, executed a conveyance of the Worcestershire estate and houses in London to the uses of the articles; and also paid Sir Hele the £3000 in performance of the covenant. The yearly value of the lands, so settled on Dame Esther for her jointure, was £783, which was considerably more than what was stipulated for by the articles.

Some years afterwards, Sir Hele, on looking over his father's settlements and will, discovered that the demesnes of Shelford, part of his Lady's jointure, were settled upon his mother who was then living; he was also advised, that in case of his death without issue, the whole of his Lady's jointure might become void; and therefore he, by a deed-poll, dated the 22d of September 1705, in pursuance of the power reserved by the settlement of May 1675, limited and appointed several of the lands in the counties of Monmouth, Hereford, and Derby, comprised in that settlement, of about £240 per ann. to the use of Dame Esther for life, as an additional jointure; *but expressly declared the same to be in recompence of all deficiencies, either in title or value, of any estate on her before settled, or agreed to be settled, in consideration of their marriage.*

On the 22d of July 1709, Sir Hele Hooke made his will, and thereby gave his wife Dame Esther a legacy of £4000 and all his ready money, plate, jewels, household stuff, and other goods and furniture; he also devised to her several houses and lands of the [595] yearly value of £200 and upwards, for her life; and appointed her and the appellant Grove executors and residuary legatees.

In June 1712, Sir Hele died without issue; and not having suffered any recovery of the settled estates, the appellants Elizabeth and Ann, his two surviving sisters, and the appellant Hammond, as the son and heir of the deceased sister, became entitled thereto, under the father's settlements and will; and they accordingly entered thereon, so that Dame Esther was totally defeated of both her jointures.

Whereupon in Hilary Term 1712, she exhibited her bill in Chancery against the

appellants, in order to compel them either to confirm her jointure or to assign her dower by way of recompence, out of all the lands whereof Sir Hele was seised in fee-simple or fee-tail during the coverture, according to the proviso of the statute, 27 Hen. VIII. c. 10.

The defendants, by their answer to this bill, insisted upon their title to the premises by virtue of the settlement of May 1675, and Sir Thomas Hooke's will: and as they did not claim the lands as heirs at law of Sir Hele Hooke, but by a title paramount, they did not conceive themselves to be affected by the articles made on his marriage with the plaintiff: they also insisted, that the additional lands limited to her, and the other lands and legacies given her by Sir Hele's will, which were above double the value of her jointure, were intended, and ought in a Court of Equity to be deemed a full recompence for her said jointure.

The defendants also exhibited a cross bill against Dame Esther, for a discovery of the settlements and wills in her custody; of the value of the lands settled upon her by the second jointure, and of the several estates and legacies given her by Sir Hele's will; that the deeds and writings might be delivered up to them, and that they might be quieted in their possession.

To this bill Dame Esther, by her answer, admitted, that the value of the lands comprised in her second jointure was £233 per ann. besides the woods; and that the pecuniary and specific legacies given her by the will, amounted to £6400 and upwards; but insisted, that in case the original jointure should be defective, she was entitled to dower under the statute of 27 Hen. VIII.

Both these causes were heard before the Lord Chancellor Harcourt, on the 20th of November 1713; who declared, that the settlement made by Sir Hele Hooke upon Dame Esther, by the deeds of the 10th and 11th of May 1687, becoming void by the death of Sir Hele without issue, she ought to have a jointure made good to her according to the articles made on her marriage; and therefore decreed, that the defendants, the heirs at law of Sir Hele, should convey to Dame Esther, for her jointure during her life, out of the estate whereof Sir Hele was seised in fee or fee-tail, lands of the value of £500 per ann. clear of all taxes, except parliamentary taxes, and that she should hold and enjoy the same during her life; which lands, so to be settled, were to be above and besides the premises limited and appointed to her by the deed [596] of 22d September 1705; the premises devised to her by Sir Hele's will; and those particular premises which she claimed by virtue of her marriage-articles, and the conveyances made by her father in pursuance thereof: and the defendants were also decreed to pay Dame Esther the arrears of her jointure of £500 per ann. from the time of Sir Hele's death, deducting parliamentary taxes: and as to the lands claimed by Dame Esther, for her original jointure, his Lordship reserved the consideration thereof till she had tried her title at law; and as to costs, he did not think fit to give any on either side.

From this decree the defendants appealed, insisting (S. Cowper, W. Pearce Williams), that the respondent was not entitled to a specific execution of her marriage-articles, nor to have her jointure of £500 per ann. made good to her by the aid of a Court of Equity; for she had received a very ample recompence and satisfaction for the same, by the lands limited to her by the deed of September 1705, which were expressly declared to be in recompence of all deficiencies, either in title or value, of any of the lands before settled, or agreed to be settled upon her, in consideration of the marriage; and also, by the other lands, estates, and money-legacies, given by Sir Hele's will: and if the £500 per ann. should likewise be made good to her, as by this decree was directed, she would have, in land and houses, double the value of her intended jointure, besides the £4000 in money, and the specific legacies; amounting in the whole to £6498, together with Uphorpe farm, and the houses in London of £220 per ann. That the appellants were decreed to make good the covenant in Sir Hele's marriage-articles, by settling £500 per ann. upon the respondent for her life, out of the lands which came to them from their father Sir Thomas Hooke; whereas, though they were heirs at law, yet they had no assets either real or personal from Sir Hele, except about £70 per ann. in land and tithes; nor did they claim any other estate as heirs at law to him, but their claim was by virtue of the remainder in their father's settlement and will, which was a title paramount that of Sir Hele. That if the respondent ought to be com

sidered as a creditor in a Court of Equity, because of the breach of covenant in the marriage-articles; and if the estate of the respondent ought to be subjected in equity to make good such breach; yet she ought not to take what was settled upon her by the deed of 1705, and what was given her by her husband's will, merely as a gift or bounty, and, at the same time, insist upon a satisfaction for breach of the covenant: for a voluntary gift or legacy, which surmounts the value of a debt, ought to be taken as a satisfaction of such debt, unless where there is an express declaration to the contrary. That the appellants were deprived by the decree of a legal estate, without sufficient grounds to warrant the same; and the want of a recovery was thereby supplied in behalf of a jointress, who had received an abundant satisfaction, in prejudice of the heirs at law of Sir Thomas Hooke.

[597] On the other side it was argued (J. Jekyll, T. Lutwyche), that the respondent's marriage-portion, agreed upon by the articles, amounted in money and lands to £6000; for which it was thereby agreed, she should have £500 per ann. for her jointure; and though, in respect of her father's bounty and kindness after the marriage, Sir Hele Hooke was pleased, when he came of age, to settle an estate for her jointure, which amounted to £783 per ann. yet the decree had given recompence for no more than £500 per ann. That Sir Hele never apprehended or imagined, that there was any defect of title by reason of the want of a common recovery; for, if he had, he could easily have supplied that defect; but it was plain, he thought a fine sufficient, which fine was accordingly levied at the time of his making the second jointure; and neither the respondent or her father, or those concerned for her, had ever any notice of the title of the appellants in the life-time of Sir Hele Hooke. That besides the respondent's marriage-portion of £6000, Sir Hele received by the death of her father and mother to the value of £1000 more; besides which, the respondent had freely given him the inheritance of her father's real estate, which she was solely entitled to, and also the remainder of his leasehold estate; and therefore it was but reasonable, that she should have the benefit of the law, respecting her additional jointure of £233 per ann. especially, since Sir Hele intended her, upon the first settlement, £783 per ann. which, by the decree, was reduced to £500 per ann. That the legacies and bequests in his will were intended by him as a bounty, and not in satisfaction for the defect of her jointure, which he knew nothing of; and therefore, considering he had so great a fortune with the respondent, it was hoped, that what he had so left her would be thought no unreasonable bounty; especially, since he had left the appellants and their issue the reversion of all his estate of inheritance after the respondent's death, part of which came to him by the respondent; and as the whole of the jointure settled upon her, would by virtue of the fine have been good, in case he had not died without issue; there could be no reason why a less jointure should not be made good against collateral heirs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 19. p. 679.)

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[598] CASE 3.—Lord Viscount MOUNTAGUE,—*Appellant*; Sir GEORGE MAXWELL & Ux.,—*Respondents* [16th May 1716].

[Lands settled in jointure, are covenanted to be of the yearly value of £1000, the husband by his will gives his wife £1000 and other legacies. The jointure-lands prove deficient £300 per ann. Held that the legacies, which were admitted to be of greater value than the defect of jointure, ought to be taken in satisfaction of such deficiency.]

\*\* DECREE of Lord Chancellor Cowper, VARIED.

See this work, title *Satisfaction*, Case 2 [6 Bro. P.C. 368].

The point in Viner, and 2 Eq. Ca. Ab. as extracted from the MSS. table,

is as follows; and is there quoted as decided on April 1, 1717; which was on the hearing of this cause on the matters and equity reserved.

Person who proved a will in the Spiritual Court, by which he swears the testator was of sound memory, after controverts the same will at law as to the real estate, upon which an issue was directed *compos* or *non compos*, and found *non compos*.\*\*

Viner, vol. 11. p. 65. ca. 9: 2. Eq. Ca. Ab. 421. B. ca. 2.

Francis Lord Viscount Mountague, on the marriage of Francis Browne his eldest son, with the respondent the Lady Dowager Mountague, who was then the widow of Richard Mollineux, Esq. by indenture, dated the 10th of January 1673. settled several manors, lands, and hereditaments in the county of Sussex, to the use of the Lady for life, for her jointure; with remainders over in strict settlement: and the lands so settled were covenanted to be of the yearly value of £1000, which was deemed an adequate provision for the intended wife; as she brought no other fortune but a jointure of £1000 per ann. settled by her former husband, and a reversionary interest in an annuity of £200 per ann. both which were, after the marriage, sold for £10,000.

On the death of Lord Mountague, which happened some few years afterwards, the honour and estate came to the said Francis his eldest son; who, having suffered recoveries of several parts of it, by indentures of lease and release, dated the 15th and 16th of February 1685, limited the same to himself for life, remainder to the heirs male of his body; remainder to his brother Henry (the appellant) for life; remainder to his first and other sons in tail male; remainder to the heirs of the body of Anthony Lord Viscount Mountague deceased; with remainder to his own right heirs. And in this settlement a power of revocation was reserved to Lord Francis, either by deed or will.

Accordingly, he soon afterwards made his will, all of his own hand-writing, dated the 26th of March 1686; whereby he revoked the uses of the last deed, as to several of the lands therein comprised; and devised other lands of about £500 per ann. to the Viscountess for life, together with a legacy of £1000 and all his household goods, not comprised in any inventory mentioned in his will: and the said testator thereby subjected his manor of Cocking and certain other lands to the payment of his debts and [599] legacies; and created a term of 200 years in those premises for that purpose.

But the Viscount having no issue, and being minded to make some further provision for his Lady, he, by indenture, dated the 7th of April 1686, revoked the uses of other parts of the estate, comprised in the settlement of 1685, and limited the same to trustees, in trust to raise £10,000 for her, in case she should survive him; and subject to this charge, the premises were limited to the same uses as in the former settlement of 1685.

By indentures of lease and release, dated the 20th and 21st of August 1688, the said Francis Viscount Mountague conveyed certain lands, of which he was seised in fee, to trustees; in trust, to pay his own and his father's debts, and all annuities, legacies, rents, and other sums, which he by will or codicil should direct or appoint; and subject to these trusts, the lands were limited to himself in tail male; with remainder to his brother Henry for life; remainder to his first and other sons in tail male successively.

On the 12th of February 1707, Lord Mountague, (as alleged,) made a codicil to his will, and thereby devised to his Lady an annuity of £500 per ann. during her life, clear of taxes, to be issuing out of certain lands therein mentioned; and appointed her and Lord Powis executors of his will. On the 12th of April following, the testator died without issue; whereupon the honour and family estate came to his brother the appellant.

In July 1710, the Lady Dowager Mountague married the other respondent Sir George Maxwell; and her jointure-lands proving deficient about £300 a year, she and her said husband, in Michaelmas term 1711, exhibited their bill in the Court of Chancery against the appellant, for a satisfaction of their demands, on account of this deficiency, and to have the jointure made good for the future; also for payment of the legacy of £1000 and the several specific legacies given to the Viscountess

by the testator's will; and to compel payment of the annuity of £500 per ann. given her by the codicil, with the arrears thereof from the testator's death.

The defendant, by his answer to this bill, insisted that his brother the late Viscount had no power to charge the estates further than for his own life only; and that the several deeds, will, and codicil, were unfairly obtained from him; that the annuity of £500 was charged on lands of the gift of the Crown, which the testator had no power to charge; that the Lady had the sole management of his real estate in his life-time, and had thereby raised great sums to her own private use; and that one Monsieur Brunette had, by his will, given her the interest of 100,000 livres during her life, which she had accordingly received till her husband's death; and which ought therefore to be taken as part of his personal estate. The defendant also exhibited a cross bill, praying an account of all these matters; and that what the Vis[600]-countess had so received, might be applied in payment of her late husband's debts and legacies.

On the 25th of January 1715, both these causes were heard before the Lord Chancellor Cowper; who, *inter alia*, declared, that the £1000 and other legacies, which were admitted to be of greater value than the defect of jointure, ought to be taken by the Viscountess, in satisfaction of her husband's breach of covenant, in not settling lands in jointure of £1000 per ann. And it being admitted, that she had received the £1000 legacy, but had given a note whereby she might be liable to repay it again: it was ordered, that such note should be forthwith delivered up to her by the defendant. As to the £10,000 secured by the deed of April 1686, his Lordship declared, it was well charged on the premises therein comprised, and ought to be raised, with interest at 5 per cent. from Lord Mountague's death, by an account of profits, or by sale; but, in regard the trustees had made no entry, and the defendant had two years time given him for payment of this £10,000 and interest; the account of profits was therefore to commence only from the time of exhibiting the original bill; and the consideration of the sale of the said premises, and of the timber growing thereon, was reserved until after that account should be taken. And as to the £500 per ann. given by the codicil, it being insisted that the same was charged on lands, the reversion whereof was still in the Crown, his Lordship declared, that if it was to be considered merely as a rent-charge issuing out of lands that were entailed, the reversion whereof was still in the Crown, it would be void; but that it ought to be considered also as an annuity or legacy given to the Viscountess by the codicil: and inasmuch as the late Lord Mountague had, by the deed of August 1688, subjected the premises to debts, and to such annuities, legacies, and other sums, as he by will or codicil should appoint; the said deed had relation to a codicil after to be made, and was intended to be a provision for any annuity which should be thereby given; and that the codicil, having given the £500 per ann. by the name of an annuity, and it being the only annuity given thereby, the same fell within the express words of the trust deed of August 1688; and therefore decreed it to be raised accordingly. And it was referred to a Master, to compute what was due for the £10,000 and interest, and the arrears of the £500 per ann. and interest; towards satisfaction of which, the defendant was to account for the profits received out of the premises, comprised in the deed of April 1686, and those subjected by the will to the debts and legacies, and comprised in the 200 years term; as also for the profits of all the lands in the deed of August 1688, till the part thereof was sold; and from thence, for what remained unsold, and for the money raised by sale thereof; which was to be brought before the Master, and paid to the plaintiffs towards satisfaction of their demands. And an account was directed to be taken of the personal estate come to the hands of the defendant; and the Viscountess was to ac[601]-count for what thereof had come to her hands; but as to her accounting for what of her husband's estate she had received and managed in his lifetime, his Lordship declared there was not yet sufficient proof toarrant any such direction; but if, as was pretended, the said estate was £6000 per ann. clear when she took the management thereof upon her, and that there was not sufficient left to pay wages and necessaries for the family, and that her husband was indebted upwards of £20,000 at his death, there might, in such case, be grounds to give such directions; and therefore the Master was ordered to state what debts Lord Mountague owed at his death, and when contracted; and the consideration of

her accounting for the profits of his said estate, and the interest of Monsieur Brunette's legacy received in her husband's lifetime, was reserved until after the report; but, as to the legacy itself, it was declared to survive to the Viscountess. And what upon the several accounts aforesaid, should appear due for profits, or money raised by sale, the same, together with the personal estate, was to be applied towards satisfaction of the plaintiffs demands, so far as it would extend; and if deficient, the consideration how such deficiency was to be supplied, was reserved.

From this decree the defendant appealed; insisting (S. Cowper, S. Mead), that the £10,000 appointed to be raised pursuant to the deed of April 1686, ought not to be in any manner satisfied out of the estate comprised in the deed of August 1688, but ought to be raised only out of the lands on which the same was originally charged; and since, as the decree stood, even the personal estate of the late Lord Mountague was made subject to satisfy this £10,000, it was apprehended to be considered as a legacy; and if so, it ought to go in satisfaction of the other legacy of £1000. That no immediate satisfaction ought to have been decreed to the respondents, till it had been determined whether the Viscountess should account for what she had received of her late husband's estate in his lifetime; since it might probably happen, that on taking such account, she would be found to have already a satisfaction in her hands for great part of her demands; and therefore she ought to have been immediately directed to enter into that account, and also for the interest of the 100,000 livres received in her husband's lifetime; especially as there was sufficient proof in the cause to warrant such a direction. That there was plain proof of Lord Mountague being incapable of executing any will at the time of the date of the pretended codicil; and therefore the annuity of £500 per ann. ought not to have been established: but if the codicil should be taken to be well executed, yet, under the circumstances of the case, it was apprehended to be very hard to charge this annuity on the lands comprised in the deed of August 1688, when it did not appear that the late Lord Mountague had any such intention or design; and when the contrary might rather be presumed, from his having charged it by the codicil on other lands, and given a power of distress in case of non-payment. That [602] all the provisions for the Viscountess were voluntary, the respondents by their bill having stated the consideration of them to be, *as a recompence to her for the indefatigable pains she took in the constant attendance upon her said late husband's person, for an uninterrupted course of many years together, he being very infirm for a long time before his death*: and therefore it was hoped, that as the Viscountess, over and above the provision by her marriage-settlement, had an estate for life in lands of considerable value, and in the capital seat of the family, a legacy of £1000, jewels, household stuff and other effects to a large amount, besides the £10,000 to be raised; there was no reason for a Court of Equity to interpose in making good the annuity, by charging it on lands upon which it was never intended to be charged, and even contrary to the intention of the codicil itself.

On the other side it was said (J. Jekyll, T. Powys), that the codicil was made two months before the testator's death, and that both the will and codicil were read over to the appellant in two or three days after his brother's death; that he acquiesced under the same, and did not pretend that his brother was imposed upon, or that he was *non compos mentis* at the execution thereof; but only seemed to be displeased at a legacy of fifty guineas given to one of the servants. That the appellant being some time afterwards desirous of taking out administration with the will and codicil annexed, he applied to the counsel of the Viscountess for that purpose; and proposed, that if the executors would renounce, so that such administration might be granted to him, he would carefully pay his brother's debts and legacies, and faithfully perform his will and codicil. That this proposal was assented to, and carried into execution accordingly; by which means the appellant had got possession of the personal estate, to the value of £6000 which the Viscountess might otherwise have retained towards satisfaction of her demands: and therefore it was insisted that the appellant had sufficiently affirmed the codicil, and ought not, after such acquiescence, to be permitted to impeach it. As to the annuity of £500 per ann. it could not be raised out of the lands in the codicil, by reason of the entail and reversion in the Crown, it ought to be raised by the trust deed of August 1688. In the reasons stated in the decree. And as to the legacy of £1000, it was admitted

have been long since paid; but this and the other legacies given by the will, were decreed to be a satisfaction to the Viscountess for the great breach of covenant in the deficiency of her jointure; so that if the appellant should prevail in the point of applying the £10,000 in satisfaction of this legacy, the Viscountess would be left without remedy for the breach of covenant, and yet lose this part of the recompence which was given in satisfaction thereof. Besides, this £1000 was a legacy given by will, payable immediately out of the personal estate, and was paid accordingly; but the £10,000 was a charge upon lands by deed, and was not made payable till two years after the testator's death; so that they were given upon different occasions, made payable at [603] different times, and out of different funds; and the £10,000 was moreover declared by the codicil to be as an augmentation to the jointure of the Viscountess, and which she was to enjoy over and above such legacies as were given her by the will.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree, in such part thereof as directed the Viscountess to account for the personal estate of her late husband, should be so far varied, as that she should only be decreed to account for such part of the said personal estate as was resting in her hands, or in the hands of any person or persons for her use, or in trust for her, at the time of her said late husband's decease: and as to such part of the decree as directed an inquiry by the Master, in order to determine whether the Viscountess should account for the rents of her late husband's estate, received in his life-time, the same was affirmed. And as to the £500 annuity mentioned to be devised by the codicil, it was ordered, that the Court of Chancery should direct an issue at law to be tried at bar, by a jury of the county of Sussex, the first convenient opportunity, to try whether the said Francis late Lord Viscount Mountague was of sane memory at the time of the execution of the codicil in question: and as to the other points in question upon this appeal, it was ordered, that the consideration thereof should be reserved until after the issue above directed was tried: but as to all other matters in the decree, not complained of by this appeal, or now affirmed, the Court of Chancery was ordered to proceed thereon as should be just, notwithstanding the direction of the said trial, and the reservation above mentioned. (Jour. vol. 20. p. 361.)

In obedience to this order, a trial was had; when the jury found a verdict, "that the said late Lord Viscount Mountague was not of sane memory at the time of the execution of the said codicil." And counsel on both sides being heard, on the 5th of April 1717, upon the matters and equity reserved, it was ORDERED and ADJUDGED, that the said decree, so far as the same related to the £500 annuity devised by the said codicil, should be reversed; and that the respondent's bill in the Court of Chancery, so far as the same concerned the demand of the said annuity, should be dismissed; and that so much of the decree as allowed costs of suit to the respondents generally, should be so far varied as to except such costs as related solely to the matter of the said annuity; that in respect to the circumstances of this case, no costs for the said trial at law should be allowed or paid to the appellant; and that the decree, as to the other matters complained of in the said appeal, should be affirmed. (Ibid. p. 439.)

[604] CASE 4.—MARGARET PARKER, Widow,—*Appellant*; EDWARD HARVEY and others,—*Respondents* [2d May 1726].

[Mew's Dig. vi. 1449; vii. 1263; viii. 499.]

[Lands settled on A. for life, for her jointure, are covenanted to be of a certain clear yearly value; after the death of the husband, the jointure-lands turn out deficient. The jointress is entitled to have the deficiency made good out of other lands, and to come in as a specialty creditor upon the husband's estate, for the arrears of the deficiency, with interest.]

\*\* ORDERS of Lord Chancellor Macclesfield REVERSED *in part*.

Various points of this case, as they appear to have occurred in its different stages, are reported in Viner, and 2 Eq. Ca. Ab.; though it is not clearly certain whether all the points arose in the same cause; some of the dates assigned being as early as Easter 1715, and others as late as 1729.

In 11 Vin. 292. ca. 39: 2 Eq. Ab. 460. ca. 9, the decision is thus stated: The grantor's covenant in a marriage-settlement for him and his heirs, that the premises were free from incumbrances, shall come in with creditors equally on bond; per Cowper, C. Pasch. 1715.

14 Vin. 458. c. 16: 2 Eq. Ab. 532. c. 20.—Interest was allowed upon demands due by covenant; though objected, that they were not liquidated, and only found in damages. Mss. Tab. tit. Interest, cites 28 Ap. 1729. *Parker v. Harvey*.

6 Vin. 367. ca. 21: 2 Eq. Ab. 241. ca. 25. state an irrelative point as to costs.

7 Vin. 400. ca. 27: 2 Eq. Ab. 280. ca. 6. the like as to a Master's report.

11 Vin. 181. ca. 20: 2 Eq. Ab. 627. ca. 3.—Where a husband borrowed of his sister jewels to present to his wife on his marriage, Cowper C. said, this giving of them is a change of the property, and a kind of sale in market-overt. And on a devise of real and personal estate for payment of debts, if the personal is not sufficient, and the real be, and the husband devises to her all her jewels, etc. she shall have the specific legacy of her jewels. Pasch. 1715. Canc. *Parker v. Harvey*.

14 Vin. p. 458. ca. 15: 2 Eq. Ab. 532. c. 18.—Judgment debts carry interest. Mss. Tab. tit. Interest, cites 28 Ap. 1726. *Parker v. Harvey*.\*\*

By indenture dated the 16th of May 1707, Christopher Parker, the appellant's late husband, mortgaged several closes and parcels of land in Birchholme and Waddington, in the county of Lancaster, of £68 4s. per ann. clear rent, to William Peere Williams Esq. for the term of 1000 years, for securing £500 and interest; and afterwards borrowed of Mr. Peere Williams the further sum of £100, which was likewise secured on the said premises, by way of endorsement on the mortgage.

By indentures of lease and release, dated the 14th and 15th of July 1710, in consideration of a marriage then intended, and afterwards had, between the said Christopher and the appellant, and of £3000 portion, the said Christopher Parker conveyed to trustees and their heirs the mortgaged premises, and divers other lands and hereditaments in the counties of Lancaster and York, to the use of himself for life; remainder to the appellant for life, for her jointure; remainder to the issue of that marriage, with remainder to himself in fee. And he thereby covenanted, that he was seised in fee of all the premises, and that the appellant's jointure estate was and should continue £350 per ann. beyond all re-[605]-prises, parliamentary taxes excepted, and free of all incumbrances, save only the before mentioned mortgage to Mr. Peere Williams, which was to be immediately paid off, and the term to be assigned to Thomas Jenkins Esq. in trust, to attend the uses limited by the said indenture of release; which was soon afterwards done, and the term assigned accordingly.

At the time of making this settlement, other part of the jointure-lands, situate in Clitherow in the county of Lancaster, were in mortgage to the respondent Harvey and his heirs for £200 and interest, by indentures of lease and release dated the 20th and 21st of July 1707; and by several sums of money afterwards borrowed, and endorsed upon that mortgage, the principal money due thereon, at the death of the said Christopher Parker, was increased to £500.

In August 1712, the said Christopher mortgaged other part of his estate to Mr. Peere Williams, for the residue of certain terms for years, for securing £200 and interest, which continued due at his death. And he was likewise at his death indebted to Edward Dixon in £400 principal money, secured by two several judgments of £200 each, entered up about Hilary Term 1711.

In January 1712, Christopher Parker died without issue, having first made his will, and thereby directed, that all his just debts should be in the first place paid and fully satisfied; and for that purpose did will and appoint, that all his personal estate should be in the first place sold, and applied towards the payment of his debts; and then such part of his freehold, leasehold, and copyhold estate, should be likewise sold and applied for the discharging such part of his debts as his personal estate should fall short to do, at the discretion of his executrix, the manor of Bradkirke only excepted; and of his said will made the appellant executrix;



but she renouncing, the respondent Catherine Stanley, the testator's sister and heir at law, took out administration with his will annexed.

Soon after the death of the said Christopher, the respondent Harvey paid off Mr. Williams, and took an assignment of his last-mentioned mortgage, in the names of Ayloff and Bridges, his trustees. And he likewise took an assignment of the two judgments to Dixon.

Having so done, the respondent Harvey, in Trinity Term 1713, exhibited a bill in Chancery in his own name, and in the names of Ayloff, Bridges, and Dixon, against the appellant, and the respondents Stanley and his wife, and others, for an account of the real and personal estate of the said Christopher Parker, and to be paid the several principal sums and interest above mentioned to be due to him, or that the equity of redemption of the mortgaged premises might be foreclosed; and that what should be due to him over and above the value of the said mortgaged premises, might be paid him according to the said Christopher's will, out of his other estates. And the appellant finding her jointure-lands to fall greatly short of £350 per ann. did, about the same time, exhibit her bill in Chancery against the respondents Stanley and his [606] wife, and others, to have the deficiency of her jointure-lands made good to her, according to her husband's covenant; and likewise to have the benefit of the 1000 years term assigned to Jenkins, and to be reimbursed several sums of money which she had, since her husband's death, paid to several of his creditors; and also to have her jewels and *paraphernalia* decreed to her.

The respondents Stanley and his wife, by their answer to the original bill, insisted, that Mary Parker, the mother of Christopher and of Mrs. Stanley, being possessed of a very considerable sum of money in her widowhood, purchased lands and tenements in Clitherow, of which the lands comprised in the mortgage to Harvey were part; and that by her will dated the 1st of July 1703, she gave £2000 to the respondent Catherine, to be paid her by her son Christopher, at the age of 21, or marriage; and £60 per ann. maintenance in the mean time, to be paid quarterly; and charged her whole real and personal estate therewith; and also gave the respondent Catherine one half of all her household goods and plate; and she gave to her son Christopher all her manors, messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, to hold to him and his heirs, from and immediately after his age of 21; and in the mean time directed, that the rents and profits thereof should be received by her executor, and laid out in the education and maintenance of her said son; and declared, that if either of her said children should die before 21, or before her daughter Catherine should be married, or her son Christopher should have children, that then the survivor should be heir to the deceased, and have the whole estate. And therefore the respondents further insisted, that Christopher being dead without issue, they were become entitled to the said premises in Clitherow; and that no conveyance or mortgage, pretended to be made by him, could take place, or deprive them from enjoying the benefit of the said will.

The other defendants having put in their answers, and issue being joined, and witnesses examined in both causes, they came on to be heard together, before the Lord Chancellor Cowper, on the 9th of May 1715; when his Lordship was pleased to declare, that the lands in Clitherow, part whereof were mortgaged to the respondent Harvey, and also comprised in the appellant's jointure, for want of a fine and recovery by Christopher, did, on his death without issue, belong to the respondent Catherine Stanley and her heirs, by virtue of the will of her mother Mary Parker; and that they were not liable to any of the debts of the said Christopher her brother; and therefore decreed the same to be held and enjoyed accordingly by the respondent Stanley and his wife: and it was further ordered and decreed, that the lands and premises in mortgage to Mr. Peere Williams, and by him assigned in trust for the respondent Harvey, should be sold by the Master to the best purchaser, who was to compute what was due to the respondent Harvey for the £200 by him advanced to Mr. Peere Williams, with the interest thereof, which was to be paid him in the first [607] place, out of the money arising by such sale; and the over-plus was to be retained by or paid over to him, towards satisfaction of his other demands: and the Master was directed to look into the reality of the respondent Harvey's securities and incumbrances, and state what was due to him for principal

and interest thereon, and what, upon such account, should be found due to the respondent Harvey for principal and interest, he was to receive a satisfaction for out of the real and personal estate of the said Christopher, made liable by his will to the payment of his debts, in equal degree with his other creditors then before the Court.

And upon the appellant's bill, it was referred to the Master to take an account of her late husband's real estate, whereof he died seised in fee, and which, by his will, was subjected to the payment of his debts, and of the yearly value thereof, and what was to be the yearly value of the appellant's jointure; and to certify what was the clear yearly value of such lands, and what they had fallen short of the yearly value, which, by the marriage-settlement, the same was to have been; and whether the jointure-estate was subject to any and what incumbrances, prior to the marriage-settlement; and what the appellant was damnified by her said husband's covenant being broken, as well for the time past as to come; and the Master was to make an estimate of the value of the appellant's estate for life therein, and for so much as should be so certified to be due, the appellant was to receive a satisfaction out of her husband's real and personal estate, subject to the payment of his debts, with the other creditors in equal degree, then before the Court: and for that purpose, the real estate of the said Christopher whereof he died seised, and which was subject to his debts, and the reversion of the appellant's jointure, was to be sold before the Master; and the money arising by such sale was to be brought before the Master, who was to apply the same to and amongst the said Christopher Parker's creditors, then before the Court, in equal degree, and proportionably to their respective demands, in such manner as before directed; and the residue of the purchase money was to remain in the Master's hands, subject to the directions after given concerning the same. And the Master was also to see what debts of the said Christopher the appellant had paid since his death, and for which she was to stand in the place of such creditors, and to receive a satisfaction for the same in equal degree with her husband's other creditors; and in taking the account of the testator's debts, the Master was to distinguish what debts were due by specialty, and what by simple contract; and the creditors of the said Christopher, who were no parties to the suit, were at liberty to come before the Master, and to prove and make out their debts; they, in the first place, paying their proportion of the charges of the said suits; and the consideration how and in what manner those debts should be paid was reserved till after the Master's report. And the appellant's jewels were to wait the said account, till it was seen whether the estate liable to the payment of the debts was sufficient without resorting thereto; [608] and it was further ordered and decreed, that the respondents Stanley and his wife should come to an account before the Master, for the rents and profits of the real estate belonging to the said Christopher, which were received by or came to the hands of the said Mary Parker his mother, as his guardian during his infancy; in the taking of which account, the Master was to make a proper allowance for the maintenance of the said Christopher during his infancy, together with all other just allowances; and in like manner an account was to be taken as between Christopher and Stanley and his wife, and Christopher was to be charged with what should appear to be the value of the household goods and plate of the said Mary, devised by her will to the respondent Catherine, as also of her personal estate which at any time came to the hands of the said Christopher, as also with the rents and profits of the real and chattel estates belonging to Mary, which were received by or came to the hands of Christopher: in the taking of which last-mentioned accounts, the Master was to make an allowance for such debts of the said Mary as were paid off and discharged by Christopher, together with all other just allowances; and if, in taking the said accounts, the said Christopher should be found to be a creditor of his said mother, over and above what he received out of her estate, the same was to be made good to his personal estate, out of the real estate and assets which were devised to the respondent Catherine; but if Christopher should be found debtor to his mother's estate, then the respondents Stanley and his wife, the administratrix of Christopher, were to retain so much as should be found due to them out of the personal estate of Christopher, come to their hands, according to a course of administration; of which said personal estate an account was likewise directed to be taken; and all parties were, in the first place, to have their costs out of the

said estate, except only the respondent Harvey, who was to be paid his costs when he received his money, in such manner as before directed.

On the 27th of July 1721, the Master made his report; and thereby certified to be due to the respondent Harvey, on the mortgage assigned in trust for him by Mr. Williams, £304 for principal and interest, and £93 2s. 0½d. for his costs, amounting in the whole to £397 2s. 0½d.; and on the other mortgage made to the respondent Harvey himself, £792 11s. 7d.; and on the judgments assigned to him by Dixon, £631 12s. 7d. The Master also certified the appellant's jointure estate to be only £187 14s. 3d. per ann.; and that, as a compensation to her for the deficiency, she was then entitled to £2779 9s. 3d.; and that the appellant had paid to her husband's creditors several sums, amounting to £158 13s. 3d. That there had come to the hands of the respondent Stanley and his wife, of the personal estate of Christopher, £644 1s. 11½d. out of which was deducted £504 18s. 8½d. for the funeral charges and debts of the said Christopher paid by them; and, on the balance of that account the Master certified them to be creditors upon the said Christopher's [609] estate, in £1244 7s. The Master further certified, that several creditors, not parties to the suit, had come before him and proved their debts, to the amount of £1588 3s. 11½d.; and computed all the debts of Christopher to be £7789 10s. 1d.

The lands comprised in Mr. Williams's mortgage, and by him assigned in trust for the respondent Harvey, were afterwards sold for £950, and the money being brought before the Master, was by him paid to the respondent Harvey, which was £690 19s. 11d. more than was due to him, in respect of that mortgage, either for principal and interest, or his costs; he having before received, on account of those costs, £77 12s.

The other estates of the said Christopher, including the reversion of the appellant's jointure, were likewise sold; and the whole money brought before the Master, on account of the sale of the said Christopher's estates, was £5239 11s. out of which the Master paid, towards the costs of the several parties, £585 11s.; so that there then remained in his hands, to be divided between the appellant and respondent Harvey, towards satisfying their several other demands, £3704, besides the appellant's jewels.

On the 29th of January 1723, the causes were heard before the Lord Chancellor Macclesfield, on the equity reserved after the Master's report; when his Lordship was pleased to order, that public notice should be given in the *Gazette*, for such of the creditors of the said Christopher, who had not proved their debts, to come in and prove the same, in order to receive a satisfaction in proportion with the other creditors; and if they should not prove the same before Easter then next, they were to be excluded the benefit of the said decree; and the Master was to carry on the account, as to the creditors who had proved their debts, and compute interest for such debts as he had allowed interest for, from the time of his report; and the Master was to sell the jewels so brought before him, and the money arising by sale thereof, and also the other money in the Master's hands, was to be apportioned between the several creditors who had or should prove their debts by the time aforesaid, to be paid them by the Master; first deducting thereout each party's proportion of the charges of the suit; and the Master was to inquire and see what the appellant had paid and disbursed in carrying on those suits, more than her proportion of the charges thereof; in the taking of which account, the Master was not to tax the bill as between plaintiff and defendant, but to make the appellant all just and reasonable allowances; and the Master was also to inquire and see what the appellant had received towards satisfaction thereof, and what should appear to be remaining due to her in respect of such costs, was to be paid her in the first place out of the money in the Master's hands; and the creditors who had already received satisfaction were to pay their proportion of the said costs, to be apportioned by the Master according to what they had received, and was coming to the rest of the creditors who were not then paid, [610] and should prove their debts before the Master by the time aforesaid.

The causes being reheard, upon the petition of Dixon and Dobson, as judgment creditors, on the 20th of July 1724, his Lordship was pleased to declare, that the

judgment creditors of Christopher ought to be paid their principal, interest, and costs, in the first place, out of the money arising by the sale of the jewels, and the other money in the Master's hands; and that the rest of the creditors ought to be paid in proportion, as far as the residue of the monies would extend, and ordered the same accordingly; and referred it back to the Master, to carry on the interest of such debts as he had allowed interest for, and to tax the parties their subsequent costs.

And in pursuance of this last order, the Master, by two reports, dated the 17th of February 1724, certified to be due on Dixon's judgment for principal, interest, and costs, £732 17s. 11d.; and on Dobson's judgment, £381 6s. 8d.

From the original decree, and the several subsequent proceedings and orders made in pursuance thereof, the present appeal was brought; and on the appellant's behalf it was argued (T. Lutwyche, C. Robins), that, by the original decree, she was to receive a satisfaction out of her husband's real and personal estate, in equal degree with the other creditors then before the Court, and the money arising by sale of the estate was to be applied accordingly; and that this decree being signed and enrolled, ought not to have been varied by the subsequent orders, whereby the other creditors, and particularly those by simple contract, were let in to be paid equally with the appellant, who was a specialty creditor, and had a prior mortgage term of her jointure lands assigned, to protect her jointure from incumbrances. But if this decree might be varied by the subsequent orders, yet, as the appellant was a specialty creditor by covenant, wherein her husband had bound himself and his heirs, she had a real lien on the freehold estate, which the simple contract creditors had not; and as the will did not direct the whole estate to be sold for the payment of debts, but expressly excepted the manor of Bradkirke, that part of the estate so excepted was real assets descended, and was liable to the specialty creditors then before the Court, in preference to any others either of equal or inferior degree. That since obtaining the last order, and the Master's reports thereon, the respondent Harvey insisted to apply the £631 19s. 11d. which remained in his hands of the £950 paid him by the Master, beyond what was due to him in respect of the £200 mortgage and for his costs, wholly to the payment of his £500 mortgage, which had turned out deficient, because of the respondent Mrs. Stanley's being entitled to the whole of the lands comprised in that mortgage, and also to part of the land comprised in the appellant's jointure; so that Mr. Harvey and the appellant were creditors of her late husband no otherwise than by virtue of the covenants in the respective securities, and therefore he had [611] no right to any preference in respect of the £500 mortgage; but the appellant had more right to all the money arising by the sale of the lands mortgaged to Mr. Peere Williams, because they were assigned to protect her jointure. The respondent Harvey had also, by virtue of the order of the 29th of July 1724, been paid the £709 7s. 3d. due on the judgments, in preference to the appellant; but by the express provision and meaning of the original decree, he had no right to any such preference. By that decree the respondents Stanley and wife were to retain the personal estate towards satisfaction of their debt, which was now reported to be £1244 7s. in a course of administration; but by the order of the 29th of January 1723, it was made payable in equal degree with the appellant's demand, but which ought not to have been; for in case her husband had been indebted to his mother's estate, on the balance of the account that debt could only be a debt by simple contract, and therefore ought not to be paid in equal degree with the appellant's demand, which was for the deficiency of her jointure. That by the order of the 20th of July 1724, such of the debts carried interest were to have interest computed and carried on to the time of payment; but no provision whatever was made, by either of the two last orders, for the appellant's having interest for any part of her demand, from the time of it being stated and settled by the Master, although it was now upwards of four years since her husband's death; during all which time she had been a loser of about £160 per ann. on account of her jointure, of which she was a purchaser for the most valuable of all considerations, besides the great trouble and expence which she had been put to in the prosecuting these suits. It was therefore hoped, that the said decrees or orders, and the subsequent proceedings in pursuance thereof, would

be varied in the several respects before mentioned, and proper directions given for the appellant's relief.

On the part of the respondent Harvey it was insisted (C. Talbot, J. Idle), that he was entitled to the whole £950 arising from the sale of the premises mortgaged to Mr. Peere Williams; because, by the original decree, the money thereby arising was, in the first place, to be applied in discharge of that mortgage, and then the overplus was to be paid in satisfaction of the respondent's other demands; but which overplus was not sufficient for that purpose, as appeared by the Master's report: besides, this £950 had been paid to this respondent by the consent of the appellant herself and the other parties in the cause. That it did not appear that the original decree was founded upon a persuasion, that there would be more than sufficient to make good the appellant's jointure, and pay the respondent's demands; but if it did so appear, the appellant would not thereby be entitled to the 1000 years term assigned to Jenkins; because that term, as the appellant shewed by her appeal, was so assigned to protect the freehold reversion and inheritance of the premises, according to the uses of the settlement; one only of which uses regarded the appellant, viz. the use to her, after the [612] said Christopher Parker's death, for her life, during which time she was entitled to, and still enjoyed the protection of that term; but as she was not entitled to nor pretended to claim the value of the inheritance, so she was not entitled to the value of the term distinct from the inheritance, because the term was intended to go along with and protect the inheritance. And that no provision was made by the decree for the appellant's having interest for her demands, because those demands resting upon the covenant in damages only, did not carry interest.

On the part of the respondents Stanley and wife it was contended (P. Yorke, N. Fazakerley), that as to the appellant's claim of priority under the assignment of the 1000 years term, she had made no such case by her bill, nor thereby sought any benefit of that term; nor was this satisfied mortgage and assignment ever proved in the cause, or produced or offered to be read at the hearing; nor did the appellant ever set it up, or insist upon any benefit of it, save only by her appeal. On the contrary, her own bill was so far from surmising any deficiency in the value of the estate to make her a satisfaction, that it expressly charged her husband's estate, subject to his debts, and by his will devised to be sold, together with his personal estate, and the reversion of her jointure, to be more than sufficient to satisfy her demands, and all his other debts; and therefore prayed a sale thereof, for those purposes. And for this she could have had no foundation, if her husband had not made such a will, under which every creditor had as good an equity to be satisfied his debt as the appellant, who, at most, could only be considered as a creditor for what she was damnified by her husband's breach of covenant. But if it were possible for such an irregular attempt to succeed, it tended only to set up a satisfied incumbrance to give the appellant a preference to her husband's other just and honest creditors, and who, in all events, must lose the greatest part of their debts; at the same time that she sought to partake of the fund which he had appointed for the satisfaction of them all. That the whole debt due to these respondents appeared by the Master's report to be £1383 10s. 3d. whereout they were allowed to retain only £139 3s. 9d. and were by that report to be paid the £1244 7s. residue thereof, out of the estate devised by the testator for the payment of all his debts, in equal degree with his other creditors then before the Court; and under such a general devise this was highly just and equitable, because the testator was as justly indebted to these respondents as to any other of his creditors; and as by his will he had made no distinction between his creditors, equity would give no preference to any of them. That as to interest upon the appellant's demands, she was not entitled to any; and therefore it was not asked, nor even reserved by the decree, and consequently could not be given to her by any of the subsequent orders. And as to the appellant's great costs and charges in carrying on these suits, she certainly complained of an order made evidently in her favour; it not being usual for the Court of Chancery to make such a distinction in [613] the taxing of costs as in this case had been made. For all which reasons it was hoped, that the present appeal, as against these respondents, would be dismissed with costs.

And on the part of the respondents Dixon and Dobson it was insisted (C. Talbot, J. Strange), that there could be no reason for reversing the decree and the subsequent proceedings thereon, as to the respondent Dixon, she being an original plaintiff in the cause; neither could there be any objection as to the respondent Dobson, for, by the appellant's own shewing, there was liberty reserved by the decree for the creditors, who were no parties to the suit, to come in before the Master and prove their debts, which she accordingly did; and the consideration how the same should be paid was reserved until after the Master should have made his report. Besides, both these respondents were creditors by judgment, and consequently had a lien upon the real estates which had been sold, and were entitled to a preference, even against the personal assets, before the debts by specialty and simple contract.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the several orders appealed from, whereby £631 12s. 7d. was directed to be paid to the respondent Harvey, over and above the principal, interest, and costs due on the mortgage assigned to him by Mr. Peere Williams, should be reversed; and that the said £631 12s. 7d. should be applied in equal proportion towards the debt due to the appellant, to be computed according to the sum stated to be due to her, with interest for the same from the time of such stating; the debt due to the respondent Harvey, and the debts due to the other creditors by specialty; and that so much of the orders appealed from, as directed the application of £1244 7s. to the payment of the respondent Stanley's demands in equal degree with the other creditors, should be reversed; and that an account should be taken by one of the Masters of the Court of Chancery, of the reality of the respondent Stanley's debt, how it became due, and whether by specialty; and to report the same to the said Court, who were to do thereon as should be just: and it was further ORDERED and ADJUDGED, that the rest and residue of the orders complained of, should be affirmed. (Jour. vol. 22. p. 669.)

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[614] CASE 5.—WILLIAM GLEGG and another,—*Appellants*; JULIANA GLEGG, Widow, and others,—*Respondents* [15th May 1728].

[Mew's Dig. viii. 499.]

[Where in marriage articles, the lands agreed to be limited in jointure are expressed to be of the yearly value of £500 and afterwards prove deficient; this amounts to an agreement that they were of that value, and is a sufficient foundation for making up the deficiency.]

\*\* DECREE of the Master of the Rolls REVERSED, with directions.

Thus stated in *Viner*, and 2 *Eq. Ab.*—Marriage articles recite, that lands covenanted to be settled were £500 per annum, but there was no express covenant that they were so; yet decreed that deficiencies should be made up out of other lands. *Mss. Tab.*\*\*

*Viner*, vol. 5. p. 511. ca. 21: 2 *Eq. Ab.* 27. ca. 32.

By a settlement dated the 30th of July, 30 Car. II. between Edward Glegg and Judith his wife, and William (afterwards Sir William Glegg) their son, of the first part; Sir Robert Cotton and other trustees of the second part; and Sir Thomas Mainwaring and John Lacon Esq. of the third part; in consideration of a marriage had between the said William Glegg and Elizabeth his wife, and in performance of articles made before the marriage, it was agreed, that common recoveries should be suffered of all the premises therein mentioned; the uses whereof were declared to be;—As to the premises in the city of Chester or the liberties thereof, to the use of William Glegg and Elizabeth his wife, and the survivor, for life, in part of Elizabeth's jointure; and as to House-Pensby *cum pertin'*, in trust, that William Glegg and Elizabeth, and the survivor of them, in full of Elizabeth's jointure, and in

bar of her dower, should receive thereout the yearly rent of £20 with a power of distress: and as to part of Gayton demesne, in trust that the said Judith, if she survived Edward Glegg her husband, should receive thereout £60 per ann. for her jointure, and in bar of her dower, with a power of distress: and as to House-Pensby, subject to the said rents and power of distress, and all the rest of the premises whereof no use was before limited, except Elizabeth's jointure, to the use of Edward Glegg for life, *sans* waste; remainder to William Glegg, for life, *sans* waste; then to Mainwaring and Lacon for 99 years; remainder to trustees and their heirs, to preserve contingent remainders; remainder to the use of the first and every other son of the said William and Elizabeth Glegg, in tail general; remainder to Edward Glegg and the heirs male of his body; remainder to the right heirs of Edward Glegg, in fee. With a power for William Glegg, if he should have two or more issue male by Elizabeth his wife that should survive him, to charge any part of the premises, except the lands charged with the several rent-charges, and the jointure-lands limited to Elizabeth, with an annuity not exceeding £50 per ann. to the second son, if but one; but if two or more younger sons, with any sum not exceeding £30 a-piece per ann. with [615] power of distress. And the trusts of the term of 99 years were, that if William Glegg had two or more daughters, to raise out of the rents, issues, and profits, £2000 to be equally divided amongst them, payable at eighteen, or marriage; with maintenance in the mean time, after the death of Elizabeth.

William Glegg had two sons, Robert, and the appellant William; and three daughters, Elizabeth, Mary, and the appellant Grace; the two first received their shares of the £2000, but Grace did not receive her's, being £666 13s. 4d.; and there became due to her £1000 and upwards for principal and interest of this portion.

By marriage articles dated the 24th of August 1710, between the said Robert Glegg of the first part; the respondent Juliana of the second part; Sir Richard Newdigate Bart. her brother, and the respondent William Stevens, and the appellant William, of the third part; reciting a marriage intended between Robert Glegg and Juliana; and that she was entitled to £5000 portion, whereof Robert Glegg was to have £4800 and Juliana the remaining £200 for her own use; in consideration thereof, Robert Glegg covenanted with Sir Richard Newdigate, and the respondent Stevens, and the appellant William, in nine months, by such conveyance as the counsel of Sir Richard should advise, to convey to him and Stevens, and their heirs, or such other persons as should be thought meet, the manor of Gayton, and all his lands, etc. in Gayton, the manor of Pensby with its rights, etc. and all his lands in Chester and Flint, except Lady Glegg's jointure, to the following uses, viz.

That the appellant William should have a rent-charge of £50 per ann. for life, tax free, out of all the premises not limited in jointure to the respondent Juliana, payable at Lady-day and Michaelmas, with a power of distress; and as to all the rest of the said manors, lands, etc. to the use of Robert Glegg for life, *sans* waste; remainder to trustees to preserve contingent remainders; and after his decease, as to the manor of Pensby, and a farm in Gayton, which are therein mentioned to be of the yearly value of £500 to the use of the respondent Juliana for her life, for her jointure and in bar of her dower; and also to the intent that a competent part of the premises not limited in jointure to the respondent Juliana, should be limited to trustees for 200 years, to commence from Robert Glegg's death, on trust to raise £3000 for portions for the daughters of that marriage, with such maintenance as should be thought fit; remainder to the first and every other son of Robert Glegg, in tail male; remainder to Robert Glegg and the heirs male of his body; remainder to the appellant William Glegg and the heirs male of his body; remainder to the right heirs of Robert Glegg, in fee. With a power to lease any part of the premises for twenty-one years at the then rents; and a covenant that the premises were free from incumbrances, except Lady Glegg's jointure, the £50 per ann. to the appellant William for life, and the £2000 for Robert Glegg's sisters' portions; with [616] other usual covenants. And it was thereby agreed, that it should be lawful, by any writing under the hands and seals of Robert Glegg, Juliana, Sir Richard Newdigate, Stevens, and William Glegg, and not otherwise,

to make any additions or alterations in the said marriage settlement, as they should think fit.

The marriage was afterwards had, and by deeds of lease and release dated the 12th and 13th of July 1713, between Robert Glegg and the respondent Juliana of the first part; John Glegg and Richard Cottingham of the second part; and Sir Richard Newdigate and William Stevens of the third part; after reciting the articles, it was agreed that Robert Glegg and Juliana should levy several fines to John Glegg and Cottingham, of all the premises in Cheshire and Flint, to make them tenants to the precepe for suffering several common recoveries; the uses whereof were thereby declared as follow, viz. As to the manors of Mollington and Gayton, with their rights, etc. (Richardson's farm excepted,) and all the messuages, lands, etc. of Robert Glegg, in the counties of Chester and Flint, to the use of Robert Glegg for life, *sans* waste; remainder to Newdigate and Stevens their executors, etc. for 200 years; and as for the manor of Pensby with its rights, etc. and Richardson's farm, with their appurtenances, to the use of Robert and Juliana for their lives, and the life of the survivor of them, for Juliana's jointure; and as to the premises in Handbridge, or elsewhere in the city of Chester, and all the residue of the premises whereof no use was before declared, to Robert for life; remainder of the whole to trustees to preserve contingent remainders; remainder to the first and every other son of Robert Glegg, in tail male; remainder to the heirs male of his body; remainder to the right heirs of Robert Glegg in fee. The trusts of the 200 years term were declared to be, that in case there should be one or more daughter or daughters of the marriage at the decease of Robert, by sale or mortgage, or by the rents till sale, to raise portions for such daughter or daughters, viz. if but one, £3000 to be paid her at the age of twenty-one, or marriage; if two or more, then £3000 to be equally divided between them, at the age of twenty-one, or marriage; and in case any such daughter or daughters should die before her or their portion or portions should be payable, then the portion of her or them so dying should be paid unto and be equally divided amongst the survivor or survivors, when the original portion or portions of such surviving daughter or daughters should become payable; and in trust, out of the rents and profits, in the mean time, until such daughters portions should become payable, to raise and pay such yearly sum or sums for the maintenance of such daughter and daughters, as Newdigate and Stevens should judge convenient, not exceeding the interest of their respective portions, at £5 per cent.

In December 1723, Robert Glegg died, leaving issue one son, named Edward, who died on the 30th of March 1725; and two daughters, Juliana, who died on the 26th of April 1725, and the respondent Mary.

[617] In December 1725, the respondents Juliana and her daughter Mary filed their bill against the appellants William and Grace, and the trustees, stating the above articles and settlement, and praying to have a recompence or satisfaction out of that part of the estate of Robert Glegg settled on the appellant William, for the deficiency of her jointure, which, as she alleged, was but £280 per ann. and to have the same made up to her £500 per ann. and also to have £150 per ann. raised for the maintenance of the respondent Mary, till her portion of £3000 should become payable, who was then about fourteen years of age, the trustees having made an appointment for that purpose.

The appellant William by his answer insisted, that he was an entire stranger to the value of the lands agreed by the articles to be limited to the respondent Juliana for her jointure, and though these lands might be given in as of the value of £500 per ann. yet the articles did not amount to a covenant to make up the same £500 per ann.; that the respondent Juliana had, before the execution of the articles, inquired by her agent into the value of the lands intended to be limited to her for jointure, and though the settlement made pursuant to those articles was not made till several years after the marriage, and no other lands were thereby limited for her jointure but what were mentioned in the articles, yet no notice was taken in the settlement of any particular value these lands were to be of, nor was there any covenant that they should be of the value of £500 per ann. and that therefore he was not obliged to make up the lands to be £500 per ann. And the appellant William likewise insisted, that by the articles there was no express



mention of what sum was to be paid for the maintenance of the respondent Mary, nor who should settle the *quantum*; and that £60 per ann. was sufficient. And the appellant Grace insisted, that the money due to her for her portion, by virtue of her father's settlement, and thereby charged upon the estate, ought to be paid.

Issue being joined, and divers witnesses examined, the cause came on to be heard before his Honour the Master of the Rolls, on the 28th of June 1727, who was pleased to declare, that the articles imported an agreement to settle lands of £500 value per ann. in jointure on the respondent Juliana; and that the particular lands limited to her were given in of that yearly value; and that the appellant William, being a party to and transacting that agreement, ought to be bound thereby; and that the whole estate of Robert Glegg, deceased, was liable to make good the said jointure: and therefore decreed, that it should be referred to a Master, to examine what was the yearly value of the lands mentioned in the jointure deed, and to set apart so much more lands as would make them up £500 per ann.; and that the appellant William Glegg should execute proper conveyances, to settle such lands on the respondent Juliana for life, for her jointure; and that the Master should examine what the lands settled on the respondent Juliana had fallen short of £500 per ann.; and that [618] the appellant William Glegg should account for what he, or any person for his use, had received of the rents and profits of the other lands, since the death of Edward Glegg the son; for discovery whereof the usual directions were given. And it was further ordered, that the appellant William should, out of what upon the said account should appear to be in his hands, pay to Juliana what the lands settled on her in jointure fell short of £500 per ann.; and if what should appear to be in his hands should not be sufficient to pay the respondent Juliana what the lands settled on her had fallen short of £500 per ann. then the Master should compute what was due for the appellant Grace's portion and interest, and tax her costs; and on the respondent Juliana's paying the appellant Grace what should be certified due for her portion, interest, and costs, the said respondent Juliana was to hold over the estate until she should be repaid, with interest for the same, together with the arrears of her jointure. And as to the respondent Mary, the Court declared that the trustees had a power to appoint what they thought fit, not exceeding the interest of the £3000 portion at £5 per cent. for her maintenance; and they having appointed £150 per ann. his Honour ordered the same to be paid until her portion became payable, and then she was to be at liberty to apply to have it raised; and if the £150 per ann. should not be duly paid, then the respondents Mary and Juliana were to be at liberty to apply to the Court to have a receiver appointed; and the Master was to examine what was fit to be allowed the respondent Juliana for the maintenance of Mary, for the time past and to come, and to state the same to the Court for further directions; and after deduction of what should be allowed for the respondent Mary's maintenance, the £150 per ann. was to be placed out at interest for the benefit of the respondent Mary, till she attained twenty-one, and then the same was to be paid her. And it was further ordered, that the respondents Juliana and Mary should pay the trustees their costs to be taxed, and that the appellant William should pay the respondents Juliana and Mary their costs to be taxed, together with such costs as they should pay the trustees.

From this decree the present appeal was brought; and on behalf of the appellant William it was contended (P. Yorke, W. Hamilton), that he ought not to have been decreed to make good the jointure £500 per ann. as there was no covenant for that purpose either in the marriage articles or settlement, although the lands intended to be settled for the jointure were particularly mentioned in both. That the appellant William ought not to have been decreed to pay £150 for the respondent Mary's maintenance, from the death of Edward Glegg her brother, she being then but 13 years of age, and entitled only to a portion of £1500 as her sister Juliana was then living; and though the trustees did make an appointment for this purpose, yet they had no such power by the articles, nor was the appellant William any party to the settlement made after the marriage. That he was decreed to account for the whole profits [619] of the estate received since the death of Edward Glegg, and pay the same to the respondent Juliana, to make up the deficiency of her

jointure lands; although the same was also liable to the demands of the appellant Grace for her portion and interest, and to the appellant William's annuity of £50 per ann. which was excepted both in the articles and settlement as an incumbrance on the estate. The appellant Grace conceived herself to be aggrieved by the decree, because there was no absolute direction that she should be paid her principal, interest, and costs in a reasonable time; and also, because her demands were postponed to those of the respondents Juliana and Mary, although she claimed under a prior settlement.

On the other side it was insisted (C. Talbot, T. Lutwyche), that the respondent Juliana was a purchaser for a valuable consideration of her jointure-lands; and it being expressed in the articles, that the lands thereby covenanted to be limited in jointure were £500 per ann. that amounted to an agreement that they were of that value, and was a sufficient foundation for making them up £500 per ann. out of Robert Glegg's real estate; especially as against the appellant William, who was a party to and executed the articles, and was concerned in the treaty and transaction touching the settlement, and, by means of those articles, became entitled to the estate of Robert Glegg, without any consideration moving from him, subject to the jointure, and to the maintenance and portion of the respondent Mary. That upon the treaty for the marriage, and previous to the execution of the articles, it was insisted upon, that the portions of the daughters, on failure of issue male, should be the amount of the mother's fortune, as in such cases is usual; but the respondent Juliana gave way, so that only £3000 was limited. There being, however, both by the articles and settlement, a discretionary power in the trustees to appoint maintenance, not exceeding £5 per cent. per ann. for the £3000 portion, they, on considering all the circumstances of the case, and that the respondent Mary was heir at law to Robert Glegg, and would have been entitled to the inheritance of the estate, if the same had not been voluntarily settled by him upon the appellant, appointed the full interest of the portion for her maintenance: and as such appointment was reasonable, and the trustees had not exceeded their power therein, the directions of the decree touching this maintenance were very agreeable to equity and justice. As to the appellant Grace, it was apprehended that she had no cause to complain of the decree; for whatever demand she should appear to have on the estate of Robert Glegg, she was to be paid the same, with interest and costs, by the respondent Juliana, upon assigning her interest therein. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of, so far as it concerned the appellants, or either of them, should be reversed: and then the following directions were given:—"And it is further [620] ORDERED, that it be and is hereby referred to Mr. Thurston, one of the Masters of the Court of Chancery, in the decree named, to examine what is the yearly value of the lands by the marriage-articles agreed to be settled, and afterwards, by the settlement made in pursuance thereof, actually settled upon the respondent Juliana, one of the plaintiffs in the cause, for her jointure; and to allot and set apart so much of the other lands in the said articles and settlement comprised, as, together with the said lands already settled, will make up an estate of £500 per ann. according to the intention of the said articles; and that the appellant William Glegg, one of the defendants in the court below, do execute proper conveyances, by recovery and otherwise, as the Master shall direct, to settle such lands so to be allotted on the said plaintiff Juliana for her life, for her jointure, free from all incumbrances by him the said William Glegg: and it is further ORDERED, that the said Master do examine how much the plaintiff Juliana hath been damnified from the death of Edward Glegg her son, by reason of her jointure not being £500 per ann.; and that the same, together with what she shall be further damnified before such settlement hereby ordered for making up her jointure as aforesaid shall be perfected, be made good to the said Juliana out of the other lands in the said articles and settlement comprised, and not settled upon her, and out of the rents and profits thereof from the time of the bill exhibited: and it is further ORDERED, that the said defendant William Glegg do come to an account before the said Master, for what he, or any other person for his use, hath received by and out of the rents and profits of the said other lands, since the time of the bill filed; for

the better discovery whereof, the said defendant is upon oath to produce before the said Master all the books of account, papers, and writings, which he has in his custody or power relating thereto, and is to be examined on interrogatories as the said Master shall direct; and in taking of the said account, the said Master is to make unto the said defendant all just allowances: and the said William Glegg shall likewise come to an account before the said Master, for what he, or any other person for his use, hath received from the said Robert Glegg deceased, or his order, in part or upon account of the money for which he contracted (according to the confession in his answer) to sell his annuity of £50 per ann. in the articles mentioned, to the said Robert; for the better discovery whereof, he the said William Glegg is to be examined upon interrogatories, as the said Master shall direct; and in case any part of the price of such annuity still remains due and unpaid, the said William Glegg is to be allowed the same, upon the said account, out of the profits so as aforesaid by him received: and it is further ORDERED, that the defendant William Glegg, out of what shall appear to be in his hands upon the said account, after just allowances made, and deduction of what remains due to the said William Glegg for the sale [621] of his said annuity as aforesaid, do and shall pay unto the said plaintiff Juliana what she hath been or shall as aforesaid be damnified by the deficiency of her jointure of £500 per ann.; and in case what shall appear to be in his hands as aforesaid shall not be sufficient to pay to the plaintiff Juliana what is decreed to be paid her for the said deficiency as aforesaid, then the Master is forthwith to compute what is due to the appellant Grace Glegg, one other of the defendants, for her portion and interest, and is to tax her costs of this suit, and appoint a time and place for payment of the same; and upon the plaintiff Juliana's paying unto the defendant Grace Glegg what the said Master shall certify to be due for her portion, interest, and costs as aforesaid, the plaintiff is to hold over the said estate, and have the benefit of the term for securing the said Grace's portion, until she shall be repaid what she shall so pay to the defendant Grace, with interest for the same to be computed by the said Master, together with what shall remain unsatisfied for the arrears of her jointure as aforesaid; but in case the said Juliana shall not think fit to proceed in taking the account of what is due to the said Grace as aforesaid, or do not pay what shall be certified to be due to the said Grace at the time and place appointed by the said Master; then and in either of the said cases, the plaintiff's bill, as against the said defendant Grace Glegg, shall from the time of such default stand absolutely dismissed out of the said Court of Chancery, with costs to be taxed by the said Master and paid by the said plaintiff Juliana to the said defendant Grace: and as to the respondent Mary Glegg, another of the plaintiffs in the original bill, it is further ORDERED and decreed, that the sum of £100 per ann. and no more, be allowed and paid for her maintenance, according to the said articles and settlement, until her portion shall become due; and the same, with the arrears thereof, shall be paid to the hands of the plaintiff Juliana for that purpose, so long as she shall continue to maintain and provide for the said Mary, or until the Court of Chancery shall otherwise order; and in case the same shall not be duly paid, the plaintiffs are to be at liberty to apply to the Court of Chancery to have a receiver appointed of the said estate, or such other method taken as shall be just; and if any order hath been already made for such receiver, the said order, so far as concerns the raising the said sum of £100 per ann. and no more, is to stand until the Court of Chancery shall otherwise order: and it is further ORDERED, that the plaintiffs do pay unto the defendant William Stevens, one of the trustees, and unto the representatives of the other defendant Sir Richard Newdigate deceased, another trustee, their costs of the said suit in the Court of Chancery, to be taxed by the said Master; and that the defendant William Glegg do pay unto the plaintiffs their costs of the said suit in the Court of Chancery, to be taxed by the said [622] Master, together with such costs as they shall pay to the trustees as aforesaid: and it is further ORDERED, that the Court of Chancery do cause this order and judgment to be duly put in execution, according to the intent thereof in every particular." (Jour. vol. 23. p. 265.)

## ISSUE.

CASE 1.—ISAAC VANHOVEN,—*Appellant*; JOAN GIESQUE, Widow,—*Respondent*  
[24th January 1706].

[Mews' Dig. v. 485. See R.S.C. 1883, Ords. 33, 34.]

[A. gives three bonds to B. for £500 each, payable at different times. The two first are paid, but upon the parties settling an account relative to other matters, the third bond is delivered up by mistake, instead of a particular voucher belonging to that account. Equity will relieve against this mistake, by directing an issue to try whether there were two bonds or three, and whether the last bond was paid or not.]

\*\* DECREE of Lord Keeper Wright VARIED.\*\*

The appellant was a merchant in Amsterdam, and Mathias Giesque, a merchant in London; between whom there were, for several years, various dealings and transactions, which generally passed through the hands of one Crawley, a merchant in London, who was the agent or factor for both of them.

In January 1699, Giesque became a bankrupt; at which time, he owed the appellant £5000. But instead of proving his debt under the commission, the appellant entered into an agreement with Giesque, to accept a composition of 10s. in the pound, to be paid by instalments, amounting to £2500. The first payment of £1000 was to be made at the time of signing the agreement, or within fourteen days afterwards; and for the remaining £1500 Giesque was to give three several bonds for £500 each, payable at different periods to Crawley, in trust for the appellant.

The bonds were accordingly executed, and the first payment of £1000 was made pursuant to the agreement; several sums of money were also paid on account of the first two bonds; but there remaining due £182, which Giesque was backward in paying, the appellant, in February 1701, caused him to be arrested for the same, and towards satisfaction of this part of the demand, Giesque assigned to Crawley in trust for the appellant, a parcel of cocoa [623] nuts; and at the same time entered into a covenant to pay whatever sum these cocoa nuts should fall short, in paying the £182.

The cocoa nuts being sold, Giesque and Crawley, on the 11th of September 1703, settled an account of the sale, when there appearing due from Giesque, a balance of £26 14s. 8d. (exclusive of the third bond for £500), he satisfied this balance, partly in cash and partly by a note; and then demanded the covenant relative to the cocoa nuts to be delivered up. This demand Crawley readily complied with; but it happening that this covenant and also the said third bond lay together, and were both indorsed in the same words, viz. Mr. Giesque's *obligation*; Crawley, by mistake, delivered up the bond instead of the covenant.

Giesque refusing to rectify this mistake, the appellant, on the 11th of October 1703, exhibited his bill in Chancery against him, in order to compel payment of the £500 and interest, due upon this *third* bond; to which the defendant, by his answer, insisted, that he had entered into *two* bonds only, and that there was no any bond delivered up by mistake; but that he had really and *bona fide* paid the £1500 composition-money to Crawley, by money and goods.

On the 31st of October 1704, the cause came on to be heard before the Lord Keeper Wright; when his Lordship was pleased to direct an issue at law, to try whether there were two bonds or three bonds given by the defendant for payment of the £1500 to the plaintiff, or the said Crawley for his use; and, if three bonds, whether the £500 payable by the third bond was satisfied or not? and the defendant was ordered to produce the deed of composition to the plaintiff or his attorney, a week before the trial, and also to produce the same at the trial; and, after such trial had, each party was to be at liberty to resort back to the Court for such further order as should be just.

From this decree, and also a decree confirming it, on a re-hearing, the plaintiff appealed; and the defendant soon afterwards dying, the suit was revived against the present respondent, his widow and administratrix.

On the part of the appellant it was said (S. Dodd), that he ought to have had a decree for the £500 payable by the last bond; because it was fully proved in the cause, and also confessed by Giesque, that there were *several* bonds entered into by him for payment of the £1500 composition-money; and therefore, whether there were two or three bonds, was not material to the point: and, because it was also proved, that the last £500 bond was delivered up by mistake, and not one penny of the money paid; and that after Crawley had found out his mistake, he acquainted Giesque with it; who confessed, that he had received the bond and had burnt it; but desired Mr. Crawley not to be concerned, for that he did not pretend that he had paid it, but that the appellant owed him money, and that he (Giesque) would satisfy Mr. Crawley to the appellant for delivering up the bond. That Giesque had made no manner of proof of payment of one penny of the last £500 bond, [624] although he had sworn it by his answer; and, if in this case, the defendant's own oath should be sufficient to discharge him, without further proof, it would be the first case of the kind. But if there should be any doubt, whether this last bond was paid or not, the issue ought only to be to try, whether *that* bond was paid or not, without trying how many bonds there were, which did not seem to be material to the case.

On the other side it was only said (B. Nelson), that the appellant's proceedings had been very vexatious, and had put the respondent and her late husband to a great deal of unnecessary expence; and therefore, and as the orders were conceived to be very just and proper for determining the matters in difference, it was hoped they would be affirmed, and the appeal dismissed with costs.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of the Court of Chancery, of the 31st of October 1704, should be so far reformed or varied, that in the last issue, directed to be tried at law by that order, the words ["if three"] should be left out, between the words ["three"] and ["whether"]; and that the issues should be, "whether there were two bonds or three," and, "whether the last bond for £500 was paid or not?" and the Court of Chancery was to be at liberty to proceed upon the said issues, so directed to be tried at law, as should be just. (Jour. vol. 18. p. 204.)

CASE 2.—JOHN HARRINGTON and others,—*Appellants*; THOMAS HORTON,—*Respondent* [4th February 1706].

[In a suit for tithe-hay, the defendants, by their answer, only set up several moduses by the name of Strew Tithes; an issue is in this case proper to try whether the moduses insisted on by the defendants, in their answers, have been time out of mind paid and payable for and in lieu of tithe-hay in kind.]

**\*\* DECREE of the Court of Exchequer REVERSED.\*\***

The manor, demesne lands, and parsonage of Bedminster and Redcliff in the county of Somerset, have immemorially belonged, as a corps, to the prebendary of the Prebend of Bedminster and Redcliff, in the cathedral church of Sarum; and having been usually leased out for lives, were, for above 100 years, held by Sir Hugh Smith Bart. and his ancestors, as lessees thereof; who had besides, a very large estate of inheritance, lying within this impropriation.

In order to ground an exemption from the payment of tithe-hay in kind, the tithes agreed with their tenants to accept a yearly composition for the tithe-hay, leasing out of their respective farms, amounting in the whole to £3 14s. 5d. payable yearly, on Good [625] Friday; but such of the lands held by those tenants, as belonged to the prebend, were not comprehended in this agreement, and were therefore left at large, to pay their tithe-hay in kind.

These compositions were generally paid for the greatest part of the time that

the Smiths enjoyed the parsonage; but there were some times small variations in them, at other times the tithe in kind was paid, and sometimes money to the full value of the tithe.

On the death of Sir Hugh Smith, the respondent's father being then prebendary of the prebend, became seised of the parsonage; and, in the year 1698, he granted the same to the respondent for three lives.

In Easter Term 1700, the respondent exhibited his bill in the Court of Exchequer against Sir John Smith, the son and heir of Sir Hugh, and also against the appellants, as his tenants; for recovery of his tithe-hay, and the arrears from the time of his grant. To this bill, the appellants, by their answer, denied tithe-hay in kind to be due; and set up the several sums, so payable by composition, as so many moduses, in lieu of the tithe-hay, under the name of *strew-tithes*; but the defendant, Sir John, in his answer, set forth a paper which he found among his father's writings, relating to the profits of the parsonage, in which was the following article: "*Item, There is a duty paid there, in lieu of tithe-hay, called strew-tithe, and it is due upon Good Friday; for which there is extant a rental of the particulars, which is to be paid out of every tenement, and out of divers particular grounds, which, if they that hold them refuse to pay, then they must pay tithe-hay; and if it can be all gathered, it will come, per annum, to about £3 14s., but it is now hard to be gathered.*"

On the 22d of June 1703, the cause came on to be heard, when the Court decreed the defendants, the occupiers, to account with and satisfy the plaintiff for the value of their tithe-hay, and the arrears; and the usual directions were given for taking such account.

But from this decree the defendants appealed; contending (S. Dodd, C. Coxe), that an issue ought first to have been directed to try whether tithe-hay in kind was, of right, due or payable within the parish. That the respondent's father, for twenty years and upwards, and Sir Hugh Smith and his ancestors, for above 100 years before, received tithe-corn and all other tithes in the parish; but forgot, for all that time, to ask for so valuable a part as the tithe of hay; which if it had been really due, seemed very improbable and scarce to be credited. And though many debts at law are lost by length of time, and a demand is in most cases necessary to preserve the right to a duty; yet the only foundation of this decree in Equity, was the length of time without any demand; so that the laches of the respondent's ancestor, which ought to be for the advantage of the appellants, turned out to their manifest prejudice.

[626] On the other side it was insisted (C. Phipps), that tithes in kind are due of common right; and that there was no proof in the cause sufficient to support the moduses, as laid in the answer. For tithes in kind were proved to be paid for some of the lands alleged to be covered by these moduses; and, as to other farms, the customary payments were proved to be different from those mentioned in the answer; and some of the lands were destitute even of the pretence of a modus. And as to the objection, that there ought to have been a trial at law; it was answered, that a Court of Equity does not send any fact to be tried at law, but where it is rendered doubtful by a contrariety of evidence; but as the appellants had wholly failed in proving their moduses, there was no foundation to send any one of them to such a trial.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be so far reversed, as that several issues should be tried in the proper county, at the next Summer Assizes; *whether the several moduses insisted on by the defendants in the Court below, in their answers, (who are now appellants,) have been, time out of mind, paid and payable for and in lieu of tithe-hay in kind; and that the Court of Exchequer should proceed upon the issues directed as should be just.* And if any difference should arise between the parties in settling the issues, it was ORDERED, that they should apply to Mr. Baron Price to settle the issues so to be tried. (Jour. vol. 18. p. 227.)

CASE 3.—WILLIAM DAWSON and others,—*Appellants*; WILLIAM FRANKLYN,—*Respondent* [13th July 1713].

[In an Issue directed to try whether M. made a contract for his own use, or in trust for B. C. and D., M. is very properly made a party, and ought not to be a witness; because, as a witness, he was to answer to his own advantage; viz. to lessen the number of his partners in a beneficial contract.]

**\*\* DECREE** of the Court of Exchequer **REVERSED** in part.

In directing an Issue, a bare trustee ought not to be a party; for that might hinder his being an evidence. MSS. Tab. cites this Case as in 1703.\*\*

Viner, vol. 16. p. 257. ca. 71: 2 Eq. Ca. Ab. 631. ca. 2.

On the 16th of August 1706, the respondent contracted with the commissioners of the navy, for supplying her majesty's service with slops, for three years certain, and till one year after warning, at the prices particularly mentioned in the contract; and which were to be payable to the respondent in the usual manner.

After entering into this contract, the respondent entered into articles, dated the 21st of October following, with the appellants Gough and Braddyll and one Samuel Heathcote, who afterwards [627] died, and to whom the appellant Dawsonne was executor; whereby it was agreed that Gough, Braddyll, and Heathcote should each have a fourth part of the contract, and the profit thereof, as fully as if they had all joined with the respondent in making the same; and, to enable the respondent to carry on the undertaking, which would require a considerable expence, it was agreed, that sufficient sums should, as occasion required, be lodged by the parties in the Bank of England, and from thence to be issued as the majority of them should direct; and that all money received from the navy should be paid into the Bank, for the equal use of all the parties, and taken from thence and divided between them as the majority should agree; and that a strong box was to be kept under four keys, wherein all tallies, orders, and warrants, made out on account of the contract, were to be preserved: and it was further agreed, that no bargain should be made for goods, nor any goods issued out, or any material thing transacted in relation to the premises, but by consent in writing.

Some time afterwards the respondent informed his partners, that the commissioners of the navy had ordered him to make the seamen's clothes of a larger size than what had been contracted for; and that therefore it was necessary to enter into new articles, and give him additional advantages.

Accordingly, on the 1st of February 1708, new articles were entered into between the respondent and appellants Gough, Braddyll, and Dawsonne, (Heathcote being then dead,) whereby, after reciting the first articles, the allowance of materials for the seamen's clothes was augmented; and it was agreed, that over and besides the commission of £2 10s. per cent. allowed the respondent by the former articles, he should have £50 per ann. for his trouble in going to the navy and victualling-offices, and settling the commissioner's and purser's accounts; £20 per ann. for his house-rent; that all his expences should be borne out of the partnership, and that he should always have £50 in advance for that purpose. And it was also agreed, that if any of the parties to these articles, or any in trust for them, should make a new contract with the commissioners, the other parties should be at liberty to come and be interested therein for a fourth part; and that in all other particulars the first articles were to stand.

The respondent being the person who contracted with the navy, he received the pay and brought in his accounts, but would not divide the money as it was received, or render any new accounts till those delivered were first agreed to and signed, which the appellants Gough, Braddyll, and Dawsonne were forced to submit to; but, growing at length weary of this kind of treatment, they, on the 31st of December 1710, desired the respondent to discontinue his contract with the navy; which he refusing to do, and still soliciting the commissioners to make him further payments, the said appellants, in order to secure their shares of the navy-pay, and also to indemnify themselves from £5000, which Government had lent to the

partnership, applied to the [628] commissioners to stay their hands, and which, on proof of the appellants interest in the contract, they were pleased to do.

On the 12th of March 1711, the commissioners gave the respondent notice of determining his contract at the expiration of twelve months from that time; in consequence of which, and of advertisements for all persons inclinable to serve the navy with slops to make proposals for that purpose, the respondent, and the appellant Martyn, and several other persons, delivered proposals accordingly; but Martyn's proposals being the lowest were received, and he was accordingly admitted as the contractor, on giving security to perform his contract.

The appellant Martyn thereupon applied to the other appellants, and, offering them much better terms than what they had from the respondent, they came to an agreement with Martyn, and, by way of security to the commissioners, consented to become joint-contractors with him; and this being accordingly accepted, notice of the whole transaction was thereupon given to the respondent, and he was offered his election to accede to the new articles with Martyn, but refused to give any answer on this head.

Soon afterwards, two several suits were instituted in the Court of Exchequer; the one by the appellants Gough, Braddyll, and Dawsonne, against the respondent, praying, that the money due from the navy, which then amounted to above £20,000, might either be paid into the Bank, or be brought into Court for the benefit of all the parties: the other, by the respondent against all the appellants; praying, that he might be let into a fourth part of the benefit of the new contract, and to have all the separate advantages and allowances stipulated for him by the former articles insisting, that Martyn was only a nominal person in the new contract, in trust for the other appellants.

On the 11th of May 1713, these causes were heard; when it was, *inter alia* decreed, that all stops made by the navy should be discharged; and that the money then due, or to become due in respect to the respondent's contract, should be paid to and received by him as formerly; and, that he should pay the same forthwith into the Bank as it should be received, according to the articles of partnership, as the parties could agree; and, that all such monies should be divided amongst the partners according to their respective interests therein: and it was further ordered that the parties should proceed to a trial at law upon the following issue, *v.* "Whether Martyn made the contract with the commissioners for his own use, or trust for Braddyll, Gough, and Dawsonne, or any and which of them, and for what part or parts thereof;" and that in this issue Franklyn should be the plaintiff, and the other parties defendants; and the consideration of continuing the separate advantages to Franklyn were reserved till after the trial.

From this decree, the present appeal was brought; and, on behalf of the appellants it was insisted (P. King, N. Lechmere), that the design of the articles throughout was to secure all the partners shares in the [629] navy payments; which, received in money, were to be paid into the Bank; and if in orders, tallies, warrants, to be put into a strong box under the keys of all the parties: whereas the decree the navy payments were not secured for the benefit of the partners, but contrary to their original design, were decreed to the respondent alone; and consequently the shares of three of the partners were put into the power of one, whom the others were in nowise indebted, nor did he claim to be entitled to more than one fourth part of such payments. That there were no words in the articles, importing any exclusive right in the respondent to receive the money from the navy; but, on the contrary, there was an express agreement, that nothing material should be transacted in the premises but by the consent of a majority of the parties; and that majority had sufficiently and repeatedly dissented to the respondent's sole receipt of the navy money. That although the respondent was the original contractor with the navy, yet, by the articles, the benefit of that contract was assigned to the appellants, under the terms therein mentioned, and of what assignment, the commissioners of the navy had notice; consequently, by the known usage and practice of the navy, and by the justice of the thing itself, the appellants were to be considered by the commissioners in the same light as if they had been the original contractors, and, as such, entitled to receive their shares of the navy payments: and, that this was originally the respondent's intention, appeared



from the articles themselves; wherein express provision was made, that the appellants should be as much interested in the profits of the contract as if they had all joined in it. As to the respondent's being alone answerable for the debts contracted in partnership, and therefore ought to receive the navy payments to answer those debts, it was a mere pretence; for, on the 31st of December 1710, the stock was worked up and the accounts closed, and it was then agreed, that the partnership should be determined as to all matters, but the division of future payments of the navy; in consequence whereof, the respondent had since divided £300 among his partners, which he would scarcely have done had there been any debts to be paid. But supposing there were any unsatisfied debts, the appellants were, by the articles, jointly responsible for the payment of them, and were sufficient to that purpose; nay, were ready, on receiving their shares of the navy payments, to give the respondent security to indemnify him against their proportions of any such debts. And as to the issue which the decree had directed to be tried, it was neither warranted by the articles or the proofs in the cause; but, if it was warranted, it ought to have been between the respondent and the appellants Gough, Braddyll, and Dawsonne only; because, if, (as the respondent insists,) the appellant Martyn had no interest in the contract, he ought, in that case, to be at liberty to give evidence upon the trial of the issue; and the other appellants ought not to have been deprived of the benefit of his testimony by his being made a party.

[630] On the other side it was said (R. Raymond, S. Dodd), that the articles were express that the money, as received from the navy for or in respect of the contract, was to be paid into the Bank for the equal use of all the parties; and this money must necessarily be received by the respondent, because he was the only contractor with the navy, and no other person could account with or discharge the navy. And as to the issue, it was insisted that the appellant Martyn was very properly made a party to it, and there could be no ground for his being a witness; because he was a party to the fraud, and was to swear for his own advantage, viz. to lessen the number of his partners in a beneficial contract.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree as ordered, "that all money stopped, and due and payable, or thereafter to become due and payable, to the said Franklyn, by virtue of the contract in the decree mentioned, should be forthwith duly and in course paid to, and received by Franklyn, as formerly; and that he should pay the same forthwith into the Bank of England, from time to time, as the same should be received," should be reversed: and it was further ordered and adjudged, that all such money stopped, and due and payable, or which should thereafter become due and payable to the said Franklyn, by virtue of his said contract, should be forthwith duly and in course paid by the commissioners or treasurer of the navy into the Bank of England; and should be issued from thence for the benefit of the several partners, according to their respective interests therein, pursuant to the said articles, as the Court of Exchequer should from time to time direct. (Jour. vol. 19. p. 609.)

CASE 4.—Sir TIMOTHY LANNOY and another,—*Appellants*; JOHN WERRY and another,—*Respondents* [7th March 1717].

[Mew's Dig. i. 91; xiii. 460. On point as to convoy, see *Marshall v. De La Torre*, 1795, 1 Esp. 367.]

[In what cases a Court of Chancery will settle a difference in damages, by way of estimate, without sending the matter to be tried by a jury.]

\*\* ORDER of Lord Chancellor Harcourt VARIED by consent.

This seems one of the many cases which involve only an uninteresting and private question.\*\*

In 1707 the respondent Werry was master of a ship, called the *Swallow Galley*, and the respondent Trewolla was master of a ship, called the *Beak Galley*; and the appellants, who were Turkey merchants, having great quantities of goods at different ports in Turkey, hired these two ships in order to bring the same home to England.

[631] For this purpose the appellants and respondents entered into a several charter-party for each ship; the one with Trewolla, being dated the 12th, and the other with Werry the 23d of September 1707; and by these charter-parties the appellants took the said ships to freight in equal moieties for a voyage from Leghorn to Alexandria in Egypt, and then to Tripoli, Scanderoon, and Cyprus, all, or any or either of the said ports, as the appellants, or their factors should direct: and at each of these ports to take in all such goods as their factors should tender to be put on board the said ships; and the factors were to dispatch the said ships at those several ports, in the space of seventy days in the whole.—The respondents on their parts covenanted, “That as soon as the said seventy days for loading were expired, they would sail directly for Gibraltar, and there tarry and remain until some convoy, either British, Dutch, or any other in alliance or amity with the Crown of England, should then next present from thence, bound either for Lisbon or England, and would sail with such convoy either for Lisbon or London. And in case such convoy should not proceed directly for England, that then the said galleys should sail for Lisbon with the first convoy bound thither; and there tarry and remain until some convoy, either British, Dutch, or other in alliance or amity with her Majesty, should present from thence for England; and then sail thither with such convoy. And if such convoy should not come into the Downs, then the respondents were to stay with their ships at the first port they should make in England until a convoy should sail from thence to the Downs, with which convoy they should sail thither, and from thence make the best of their way for London, and there deliver their cargoes.”—The appellants also on their parts covenanted, “That they would load the ships and dispatch them within seventy days, and pay three single freights, two thirds of the port-charges, and primage and average as accustomed; and would also pay to the respondents in London £6 per diem for the *Swallow Galley*, and £7 per diem for the *Beak Galley*, for each and every day that the said galleys should wait for convoy at Gibraltar, Lisbon, or elsewhere, during the said voyage, over and above the space of twenty days in the whole: it being thereby agreed, that during the said space of 20 days, if the said galleys should so long stay for convoy at Gibraltar, Lisbon, or the ports of England, they should lie at the sole charge of the said commanders.”—And the parties reciprocally bound themselves in the penalty of £2000 for the performance of these covenants.

Pursuant to these charter-parties the respondents sailed with their ships in company together, from Leghorn to Alexandria, Tripoli, Scanderoon, and Cyprus; and having taken in what goods were tendered at Cyprus, the last loading port, they sailed from thence for Gibraltar on the 22d of March 1707, and arrived there on the 11th of May 1708, where they stayed for want of convoy till the 6th of October following, being 148 days.

[632] For on the 27th of September 1708 Captain Moody, with two other English and some Dutch ships of war, and about sixty sail of English and Dutch transports, of which he was Commodore, came into Gibraltar, where he stayed till the 6th of October; when having given the said two galleys sailing orders, he sailed with them and the rest of the fleet from thence to Lisbon, where he arrived on the 16th of the same month, and stayed there till the 14th of November following, from whence they then departed for England and arrived at Falmouth on the 2d of December, and there stayed till the 17th of January, being 46 days, and then sailed for Spithead, where he arrived on the 20th of the same month, and from thence to the Downs; and the said galleys having there taken leave of their said convoy, arrived in the river Thames on the 6th day of February following, and there finished the voyage.

The respondents, soon after their arrival at the port of London, delivered their cargoes to the appellants, or their order, in good condition, and, accordingly, expected payment of their freight, demurrage, port-charges, primage, and average, pursuant to their charter-parties; which, by an account delivered, amounted for the *Swallow Galley* to £2908 19s. 4d. and for the *Beak* to £3429 10s. making together £6338 9s. 4d.

Part of this money, to the amount of £3000, was, at different times, paid: but the appellants neglecting to pay the residue, actions at law were commenced against them by the respondents in the Court of King's Bench, to compel a satisfaction of

their demands: to these actions the defendants, for delay, put in long and frivolous demurrers, which being over-ruled by the Court, and judgment obtained, they then brought writs of error in the Exchequer Chamber; and afterwards on the 25th of May 1709, exhibited their bill in Chancery against the respondents, insisting that no demurrage ought to be paid for either of the said ships, for any of the days after convoy had joined them; that the respondents did not join the first convoy which came to Gibraltar; that they (the plaintiffs) had sustained great loss by the ships not coming sooner from thence, particularly by their not coming away with Sir John Leake, who passed by Gibraltar on the 25th of September 1708; and therefore the bill prayed a satisfaction for the damage which had arisen from this conduct, and a proportionable deduction out of the demurrage.

The defendants, by their answers to this bill, denied the several allegations thereof, and set out the whole course of their voyage from Gibraltar, under the convoy of Captain Moody, as before stated; and that they used all their endeavours to have come with Sir John Leake when he passed by Gibraltar, but that he positively refused to take them under his convoy, having appointed Captain Moody for that purpose.

On the 1st of February 1711, the cause was heard before the Lord Chancellor Harcourt, who referred it to a Master to take an account of what was due to the defendants respectively from the plaintiffs for freight, demurrage, port-charges, and average, or [633] otherwise, according to the covenants in the charter-parties, and decreed, that the plaintiffs should pay the same in moieties; and the Master was to see when the sums payable to the defendants became due, and what they had received from the plaintiffs towards satisfaction thereof, and when; and the said Master was to make all just allowances on either side; and upon the plaintiffs paying what the Master should certify to be due, satisfaction was to be acknowledged on the records of the several judgments obtained upon the charter-parties; but upon non-payment of what the Master should certify to be due, the bill was to stand dismissed with costs. And it was further ordered, that the parties should proceed to a trial at law, in the Court of Queen's Bench, the then next term, to try whether the plaintiffs, or either of them, were damnified by any breach of the covenants in the said charter-parties, or any of them, committed by the defendants, or either of them, and wherein; and if the plaintiffs were damnified, then how much they were damnified by such breach: and after such trial had, either party was at liberty to resort back to the Court; and the consideration of interest and costs was reserved till after the account taken and trial had.

On the 9th of December 1713, the issue was tried; when the jury, without going out of Court, found against the plaintiffs; and that they were not damnified by the breach of any of the covenants in the charter-parties.

In consequence of this verdict the parties proceeded before the Master, upon the account directed by the decree; and by the report, dated the 4th of March 1716, the Master certified, that there was demurrage due to each ship for 219 days, which, at £6 per diem, for the *Swallow Galley*, amounted to £1314; and for the *Beak*, at £7 per diem, to £1533. And in this demurrage was included the 46 days which the ships stayed at Falmouth.

To this report the plaintiffs filed several exceptions, the most material of which were, 1st, That the Master should have distinguished how the demurrage happened, and should not have charged those days which the defendants were detained by contrary winds. And 2d, that he had over-charged for both the ships, 8 days at Gibraltar after Captain Moody arrived there; 28 days at Lisbon, 46 days at Falmouth, and 9 days at Spithead.

On the 17th of December 1717, these exceptions were argued before the Lord Chancellor Cowper; who was pleased to declare, that the plaintiffs ought to be charged with demurrages during the time that the ships waited for want of convoy, beyond the 20 days; as also for demurrage, from the time that the convoy was not ready to sail; but that no demurrage ought to be allowed whilst the ships and their convoy stayed for want of wind, or were detained by contrary winds; but if the convoy was not ready or able to sail at any time when the ships were both ready and able to sail, the staying of the ships for the convoy was the same thing as if no convoy was near at that time. His Lord-[634]-ship also declared, that

upon the whole evidence it appeared, that the galleys were kept at Falmouth, partly by stormy weather and contrary winds, and partly by reason that their convoy could not turn out of the harbour, and prosecute the voyage when the galleys could; and therefore the Master, having charged the plaintiffs with the whole 46 days demurrage, had charged them with too much; but it not appearing exactly how long the galleys were detained there by contrary winds or bad weather, and it being unlikely, that any better evidence than was already before the Court could be had before a jury, if the matter was sent to a trial at law at so many years distance, and on such a subject as the state of wind and weather at that time; his Lordship thought fit to settle the difference by way of estimate, as near as might be on the evidence before him; and the rather because there had been several issues already directed and tried in this cause, wherein the defendants had been acquitted of all affected delay in the voyage; *and as this cause, by its long depending, had already become one of those which are a reproach to the justice of the kingdom*: his Lordship therefore ordered, that the plaintiffs should be allowed 16 days demurrage out of the 46 days with which the Master had charged them by his report; in respect of the time which the galleys themselves appeared, by a reasonable estimate on the proofs taken in the cause, to have been detained at Falmouth by bad weather and contrary winds; and during which time they must have continued there, though they had made the best of their way and not waited for convoy, as it appeared they did.

But from so much of this order as allowed any demurrage at Falmouth the plaintiffs appealed, insisting (S. Cowper, W. Peere Williams), that it manifestly appeared by Captain Moody and several other witnesses, and even by the respondents' own letters, that the ships were forced to put in, and were detained all the said 46 days at Falmouth by contrary winds and bad weather, and not for want of convoy; and that several ships which ventured out from thence were lost. That Captain Moody, who convoyed the respondents to Falmouth, sailed from thence three days after their arrival there, and that the respondents could not sail with him; and if they had, though they might not have been cast away, as several were, yet they must have stayed at Plymouth, where Captain Moody was obliged to put in, and continued by contrary winds till the respondents overtook him; so that although he left Falmouth so soon, he did not arrive in the Downs one day before the respondents did. That although Moody and others sailed from Falmouth without the respondents, yet several other men of war lay all the time there for no other purpose but to convoy the merchant-ships up the Downs; which they accordingly did as soon as the wind and weather permitted: and that if this fact had been as doubtful upon the evidence, as it was plain, it would have been at least reasonable to have tried the same at law; but as it fully appeared upon the proofs that the respondents were detained by contrary winds and bad weather and not for want of convoy, it was hoped that [635] so much of the said order as allowed the respondents demurrage for any of the said 46 days would be reversed; and the exceptions taken to the Master's report in that respect allowed.

To this it was answered (R. Raymond, S. Mead), that the reasons mentioned in the order as the ground and foundation of it, were so very strong and unanswerable, as made it evident that the appellants could scarce be thought to aim at any thing by this appeal, but to delay the respondents from receiving the residue of the money due to them, for which they had been now prosecuting almost nine years; and therefore it was hoped, that the appeal would be dismissed with exemplary costs.

BUT after hearing counsel on this appeal it was, *with the consent of the parties on either side*, ORDERED and ADJUDGED, that the order complained of should be so far varied, as that the payment of 30 days demurrage by the appellants of the said 46 days, should be reduced to 23 days. (Jour. vol. 20. p. 641.)

CASE 5.—JOHN STAFFORD and others,—*Appellants* ; The City of LONDON,—  
*Respondents* [9th March 1719].

[Whether a party has broken any of his covenants or not, is a matter properly triable at law ; as the damages (supposing a breach) cannot be settled without such trial.]

**\*\* DECREE** of the Court of Exchequer **AFFIRMED**.

The exemplary costs with which this appeal was dismissed show the opinion of the Lords, that it was brought merely for delay ; and, as here stated, the cause involves no general question of law.\*\*

Viner, vol. 4. p. 402. ca. 21 : vol. 6. p. 472. ca. 10 : 2 Eq. Ca. Ab. 244. ca. 18.

1 Wms. 428. Viner, vol. 4. p. 430. ca. 9 : vol. 16. p. 253. ca. 39 : 2 Eq. Ca. Ab.

1. *note* to ca. 3 : 166. ca. 9 : [1 Stra. 95].

In pursuance of an act of parliament, 3d and 4th William and Mary, by which the profits of all aqueducts of the city of London are appropriated to the use of the orphans, etc., the respondents, by indenture, dated the 16th of December 1703, demised to the appellants and one Peter Gray, who afterwards died, all those their waters arising within the parishes of Marybone and Paddington, in the county of Middlesex ; and the waters of Dalstone and Hackney ; and the *surplus* of Lamb-conduit waters, after the conduit on Holborn-hill and the cocks thereof were supplied ; and all *such right and title* as the city could or should have to the waters of Dame Agnes de St. Clare ; together with the use of all and every of their conduits and conduit-heads, drains, cisterns, and pipes for the better conveying the said waters to the city and suburbs (except as therein excepted) ; and all and every their springs and waters on the north-side of the river Thames, which then were *unlet* or *unappropriated* ; to hold from Christmas then next, for the term of 43 years, under the yearly rent of £700. And [636] by this lease, the city entered into the usual covenant with the lessees for their quiet enjoyment of the premises.

There being a great arrear of rent due upon this lease, and it being reported that Soames as well as Gray was dead, the city, in Michaelmas term 1716, brought their action against the appellants Stafford and Adams, who having pleaded in *abatement* that Bartholomew Soames was living, the city brought a new action against all the appellants to recover satisfaction for the rent in arrear.

Whereupon the appellants Stafford and Adams, notwithstanding their said plea, exhibited a bill in the Court of Exchequer, in the names of themselves only, against the city ; and when this cause came on to be heard, the bill was dismissed with costs, for want of Soames's being made a party.

In Trinity term 1718, the city obtained judgment against the appellants, *by default*, for £3600, besides costs ; whereupon they first brought a writ of error, and afterwards exhibited a new bill against the city in the Court of Exchequer ; suggesting, that by the said lease, the city had not only granted what they had no right to grant, but also had disturbed them in the enjoyment of what was rightfully granted in the several following instances. 1st, As to the waters of Marybone and Paddington ; for although the city had taken upon them to grant to the plaintiffs all the waters of Marybone and Paddington, yet the plaintiffs could not be admitted to enjoy the same ; because the owners of Somerset-house, by virtue of a grant from the city several years ago to the Duke of Somerset in fee, claimed a right to have a pipe in the main of those waters, sufficient for the supply of above 100 families ; and which right the city neither disclosed to the plaintiffs, or excepted out of their said lease. 2dly, That the plaintiffs had not been permitted to have the use or benefit of the Banqueting-house and Pump-house, which were conduit-heads belonging to the said waters of Marybone and Paddington, and which were absolutely necessary for the management of the said waters ; because one of the city's officers set up a pretended right and claim to the same. 3dly, As to the surplusage of the Lamb-conduit waters, the plaintiffs could never be let into the possession thereof ; because the parishioners of St. Sepulchre claimed a right and title thereto, and were actually in the quiet possession thereof at the time of granting the plaintiffs said lease, and long before. 4thly, As to the waters of Dalstone and Hackney, which came to the

conduit at Aldgate after the plaintiffs had possessed themselves of these waters, and were going to improve the same, and had actually let out part thereof to several persons, and laid pipes for the conveyance of such waters to their several tenants, they were interrupted in the enjoyment thereof by the city; who had ordered and directed the said pipes to be cut and destroyed, and the said waters to be laid on to Aldgate conduit for the use of the Tankard-bearers; by which means the plaintiffs were totally dispossessed thereof.—And therefore the bill prayed some reasonable deduc-[637]-tion out of the arrears, and a proper apportionment of the future rent in respect of these matters; and, in the mean time, an injunction to stay the city's proceedings at law.

The city, by their answer to this bill, as to the several particular grounds of complaint therein alleged; insisted, 1st, That the claim made by the owners of Somerset-house, was within the general exception of the lease; and that the plaintiffs had notice of the said grant to the Duke of Somerset. 2dly, As to the Banqueting-house and Pump-house, that they were not granted by the lease; and that the clerk of the city works claimed the same as a perquisite belonging to his office. 3dly, That the city had good right to grant the surplusage of Lambs-conduit waters; but if it should appear that they had not such right, they submitted to the Court as to the allowance to be made to the plaintiffs in respect thereof. 4thly, As to the waters of Dalstone and Hackney coming to Aldgate conduit, the city denied their making any order or giving any directions for the cutting and destroying of the plaintiffs pipes; or that they any way hindered or denied the plaintiffs the privilege of laying tenants thereto.

On the 11th of June 1719, this cause was heard; when it was unanimously ordered and decreed, that the bill should stand dismissed, with costs.

But from this decree the plaintiffs appealed; insisting (T. Lutwyche, J. Floyer) that it was erroneous, and ought to be reversed: for that with respect to the waters of Marybone and Paddington, the said grant to the Duke of Somerset in fee was not within the words or intention of the exception in the lease; in regard the said lease particularly distinguished the several places in and about London, which the appellants were to serve with the waters demised to them by the respondents, and a notice was thereby taken of Somerset-house; and the rather, for that the respondents themselves in a former lease of the said waters made by them to one Houghton, (as appeared by the said lease produced at the hearing,) obliged the said Houghton, in express words, to supply Somerset-house with the waters coming from Marybone and Paddington; and though the respondents had, by their answer, insisted that the appellants had notice of the said grant, yet they totally failed in making any proof of such notice. That, as to the Banqueting-house and Pump-house, it appeared by the proofs in the cause, that the same were ancient conduit-heads belonging to said waters, and were absolutely necessary for the management and conveyance thereof; and, as an evidence of it, there still remained a cistern in the said Banqueting-house for the reception of the said water; and both the houses were enjoyed by the said Houghton, the former lessee of the said waters, under the same general words by which they were granted in the appellants lease. That with respect to surplusage of Lambs-conduit waters, the respondents did not pretend to be in possession thereof at the time of granting the said lease, nor did they say or prove that they ever were; and yet [638] they confessed that the same were granted to appellants in express words: these waters appeared to be of considerable value, the appellants never had the benefit or enjoyment of them; of which hardship respondents themselves were so sensible, that they submitted to make the appellants an allowance in respect thereof, if the parish of St. Sepulchre should appear to have a better right thereto than the respondents; but this right the appellants insisted they were not bound to try, as it appeared that the respondents were not in possession of these waters, when they took upon themselves to make a grant thereof to the appellants. And as to the waters of Dalstone and Hackney coming to the conduit at Aldgate, although the respondents, by their answer, denied that they ever disturbed or hindered the appellants in the enjoyment thereof, or laying tenants thereto; the appellants had fully proved that the servants and workmen of the respondents, by their orders, did cut and destroy several pipes laid by the appellants for the conveyance of the said waters to several of their tenants, and caused the said waters

be laid on to Aldgate conduit, for the use of the Tankard-bearers; by which means the appellants were totally deprived thereof: and though by this proof, the appellants had directly falsified the respondents answer in that particular, yet they were not only dismissed from having any relief in the matters above complained of, but were also condemned in the costs of the suit; and therefore it was hoped that the said decree of dismission would be reversed.

To all this it was answered on the other side (W. Thomson, D. Dee), that the grant to Somerset-house was in fee, made so long ago as 2 Edward VI. and had been accordingly enjoyed ever since; so that it could not belong to the city at the time of their grant to the appellants, and which they themselves well knew; it therefore came within the exception of waters *unlet* and *unappropriated*, and consequently was not leased to the appellants. That the buildings called the Banqueting-house and Pump-house did not pass by their proper names, nor by the name of Conduits or Conduit-heads; for that whatever they might be formerly, they were not used as such at the time of the grant, but for many years before were *appropriated* to the clerk of the city works, who all along let them as tenements for habitation. That the city's grant extended only to waters *unlet* or *unappropriated*, and consequently if the waters of Dalstone and Hackney were at the time of that grant, and had been for time immemorial (in part) *appropriated* to the poor Tankard-bearers, for the use of the inhabitants about Aldgate, they were not granted: that the fact was a single fact, and done many years since; and if it was necessary to cut some pipes, (though the respondents denied there was any order of the Court of Aldermen, or the committee of city lands, for that purpose,) to bring the water to the conduit at Aldgate that the Tankard-bearers might enjoy it; it was doing justice to them and no injury to the lessees, who had only a right to the water after appropriations. [639] As to the surplus of Lambs-conduit waters, the city knew of no right which the parish of St. Sepulchre had to the same, nor did they ever acquiesce or yield to any such claim: how the lessees had managed those waters the respondents did not know, but certain it was that *no water* had come to that conduit for several years past, so there could be *no surplus*.

Having thus answered the appellants allegations, the respondents offered some further reasons for dismissing the appeal with costs:—That whether the respondents had broken any of their covenants or not was a matter properly triable at law; as the damages (supposing a breach) could not be settled without such trial.—That the lessees never looked upon this as a beneficial lease, but agreed to the same as an inducement to the city to grant them a licence to erect an engine to raise water in the fourth arch of London-Bridge; and though such licence bore date before the lease in question, it was apparent from entries in the city's books relative to these affairs, that the said licence was not executed until the appellants and the said Peter Gray had become bound in a bond of £10,000 penalty, dated the 14th of April 1703, conditioned that they should take, or procure some person to take, such lease of these waters as aforesaid; and then, and not before, the city seal was put to the licence for the fourth arch: it was also plain from the proviso contained in the lease, that if the said licence for erecting an engine in the fourth arch should, by any proceeding at law, be abated or declared illegal, the lease was to be void, and the whole rent to cease; so that both the lease and licence made but one agreement, and therefore the £700 per ann. ought to be esteemed (as it really was) the consideration for both grants; and accordingly the fourth arch was still enjoyed by the appellants, as well as all the waters intended to be granted by the lease. And lastly, that after several years acquiescence these cavils and exceptions first commenced, and afterwards increased, with the arrears of rent, and might well be maintained with the interest of those arrears; for at the time of the decree, there was an arrear of above £5000 detained by the appellants, under pretence of not enjoying the trifling particulars mentioned in their complaint.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order and decree therein complained of, affirmed: and it was further ORDERED, that the appellants should pay to the respondents the sum of £60 for their costs in respect of the said appeal. (Jour. vol. 21. p. 261.)

[640] CASE 6.—RICHARD FILKIN and others,—*Appellants*; ROGER HILL and another,—*Respondents* [30th May 1720].

[No Issue ought to be directed to try a matter not fully put in issue in the cause; and therefore where a bill was filed to take advantage of a forfeiture by marrying without consent, and an Issue was directed to try whether the party was a papist or not at the time of the marriage; the order was reversed, and the plaintiff left at liberty to amend his bill by putting in Issue in the cause, the matter intended to be tried by the said Issue.]

\*\* DECREE of the Chancery REVERSED in part.\*\*

Ann Stevenson, widow, grandmother of the appellant Frances, and of the respondent John Hill, being seised in fee of a freehold estate in Lincolnshire of about £70 per ann. and possessed of a personal estate, made her will, dated the 8th of May 1716; and after giving a legacy of £100 to her said grandson, payable at his age of twenty-one; she gave all her real and personal estate, not specifically devised, to the appellants Eyre, Bush, and Rawlins, their heirs, executors, and administrators, upon trust, to sell and dispose of the same, or so much thereof as they, or the survivor of them, should think most proper and convenient for the payment of her debts, legacies, and funeral charges; and after payment thereof, and subject thereto, upon further trust, to pay the residue thereof to her said grand-daughter Frances, when she should attain her age of twenty-one years, or should be married with the consent and approbation of the appellants Eyre and Bush; but if she died before such age, or marriage with such consent as aforesaid, then in trust to pay the same to her said grandson John Hill, at his age of twenty-one. And she appointed the appellants Eyre and Bush executors.

In July following, the testatrix died, and the executors proved her will.—The appellant Frances being then only thirteen years of age.

On the 25th of August 1717, the appellant Frances intermarried with the appellant Richard Filkin, by the consent of the appellants Eyre and Bush; and, previous to this marriage, the husband entered into articles with the trustees for settling the trust-estate upon himself for life, then upon the appellant Frances for life, and then upon their issue in tail.

But this marriage being at first celebrated according to the usage of the church of Rome, the parties, in two days afterwards, married again, according to the rites and ceremonies of the church of England; and (as it was alleged) had ever since continued in the worship and communion of that church and no other.

In Michaelmas Term 1717, the respondents exhibited their bill in the Court of Chancery against the appellants; praying, on [641] the behalf of the plaintiff Roger, that he might have the remainder of his wife's fortune paid him out of the testatrix's estate, as she was the representative of her husband, who had promised to give his daughter £800, but had only paid £200 in part of it; and on the part of the other plaintiff John, praying an account of the real and personal estate of the testatrix, devised to be sold for the benefit of the defendant Frances, she having, according to the terms of the will, forfeited her interest therein, by marrying without the consent of the trustees Eyre and Bush; alleging, that the first marriage was had without such consent, and that only the latter marriage was had after the consent obtained.

The defendants Filkin and wife having answered this bill, exhibited their cross bill against the trustees, and the plaintiffs in the original cause, praying an execution of the trusts of the will; and for that purpose, that an account might be taken of the testatrix's personal estate, and the same applied towards discharging the real estate; and that so much of the real estate as should not be sold might be settled according to the above marriage-articles.

On the 11th of November 1719, both these causes were heard before the Lord Chancellor Parker, when it was referred to a Master to take an account whether all, or what part of the plaintiff Roger's wife's portion was paid, and what remained due; and what should appear to be due thereof, was to be paid him out of the testatrix's estate, with interest from the time it became due. And it was further ordered,



that the defendants Eyre and Bush should give security, to be approved of by the Master, for the payment of the £100 legacy, given to the plaintiff John, when it should become payable. And as to the residue of the testatrix's *personal* estate, the Court was of opinion, that the defendant Frances had done no act to forfeit it: but, as the title to the *real* estate was claimed by the plaintiff John, as being next heir and a protestant, and as the defendant Frances having professed the popish religion, was insisted to be within the meaning of the statute of 11 and 12 William III. c. 4: and therefore incapable of taking; the Court ordered the plaintiff John and the defendants Filkin and wife to proceed to a trial on the following issues, viz. "Whether the defendant Frances was a person professing the popish religion at the time the testatrix made her will—and at the time of her death—and at the time of her marriage with the defendant Filkin;" and further directions were reserved until after the trial.

From this decree, the defendants Filkin and wife, and the executors appealed; insisting (S. Cowper, W. Peere Williams), that there was not sufficient ground to send it to a Master to enquire, whether any part of the respondent Roger's wife's portion was remaining unpaid; it being in proof in the cause, that on the 31st of January 1703, he stated accounts with Francis Stevenson, his wife's father, and gave him a receipt of that date in full of all accounts, reckonings, and demands; and had ever since, which was above sixteen years, acquiesced, without making any demand. That the appellants the executors ought not to have been decreed to give security for the £100 legacy, before any account was taken whether they had assets in their hands to answer the same; and the rather, because the respondent John Hill, the legatee, claimed the lands, which, as well as the personal estate, were by the will charged with the said legacy. And that none of the issues ought to have been directed, because no other right or title to the testatrix's real or personal estate was set up by the pleadings or put in issue in the causes, but the pretended forfeiture by the appellant Frances in marrying without the consent of the trustees, a matter which had been fully proved, and to which alone the evidence had been confined, as being the only matter in issue; whereas the directing these issues to be tried, tended to defeat the appellant Richard and his children, who were purchasers of the real estate for a valuable consideration, upon a point not in issue, or so much as mentioned in the pleadings.

To this it was answered (T. Lutwyche, C. Talbot) on the other side, that the pretended stated account was neither mentioned in the appellant's answer to the original bill, nor in the cross bill; and that the respondent Roger had in his answer to such cross bill sworn, that he never received more than £200 of the £800 which was to be paid him; nor was there any proof in the cause of the actual payment of any more. As to the giving security for the payments of the legacy, the executors never pretended any want of assets; but on the contrary, said, by their answer, that they were ready to pay the legacy to the respondent John when he should attain his age of twenty-one years; after which submission, there was no reason to direct any account to be taken of the testator's assets. And as to the issues, it was said to appear, both by the admission in the answer of the appellants to the original bill, and by the depositions of their own witnesses, that the appellant Frances was *educated* in the popish religion; but as it did not appear with sufficient certainty, whether she *professed* the popish religion or not at the several times of making the will and at the death of the testatrix, or at the appellant's marriage, nor consequently whether she was a person capable of taking under the will; it was necessary that those facts should be ascertained before the appellants could be entitled to any decree in their favour. And that the issues did not tend to defeat the appellants or their children of the real estate if they had any right to it; and if they had none, the issue tended to do justice to the respondent John Hill, who was the testatrix's heir at law, an infant and a protestant.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree as directed the trial of the several issues therein mentioned, should be reversed; and that the respondents should be at liberty to amend their bill, in order to put in issue in the cause, the several matters intended to be tried by the said issues; and the appellants were to be at liberty [643] to put in a new answer

thereto. And as to the several other matters complained of, the decree was affirmed.\* (Jour. vol. 21. p. 340.)

CASE 7.—Bishop of ROCHESTER and others,—*Appellants*; ATTORNEY-GENERAL and others,—*Respondents* [16th May 1721].

[Mew's Dig. iii. 222.]

[In the case of a charity, the most expeditious and least expensive methods should be adopted; and where no material fact is disputed, nor any point of law arises, but what a Court of Equity may determine upon, such Court ought to determine *finally* without directing an issue.]

DECREE of Lord Chancellor Parker REVERSED.

The note of this case in Viner only mentions, that the above point was *urged*—It does not appear to have been attended to in the decision.\*\*

Viner, vol. 4. p. 501. ca. 12. \*\* 2 Eq. Ca. Ab. 193. ca. 11: 202. ca. 2.\*\*

Sir Edward Hannes, Knight, by his will, dated the 5th of May 1708, directed his executors, Doctor John Waugh and Joseph Shale, to lay out £1000 in erecting a lodging for the forty King's scholars in Westminster School, *in such place as the Dean and Chapter should direct*; and in contriving whereof, he desired, that Sir Christopher Wren, and Doctor Aldrich, then Dean of Christchurch, Oxon, should be consulted.

After the testator's death, and before this legacy was paid, a suit was instituted in the Court of Chancery by Temperance Hannes, his daughter and only child, against the executors, for an account of his estate; and by the decree made on the hearing of that cause, before Lord Chancellor Harcourt, on the 24th of July 1711, it was, *inter alia*, ordered, that the £1000 should be laid out in building lodgings for the said scholars in such place as the said Dean and Chapter should direct; who were to consult Sir Christopher Wren in contriving thereof.

But when it came to be considered how much an *entire new building* would cost, the legacy was found to be greatly insufficient; and Sir Christopher Wren having advised to lay out the legacy in *repairing the old dormitory* for the intended purpose, all thoughts of a new building were laid aside; and on the 20th of April 1713, an order was made in the above cause, that the legacy should be applied in repairing the old room; in consequence whereof lodgings were taken for the scholars, and they were actually removed till the proposed repairs should be completed.

There being however, soon afterwards, a prospect of raising benefactions sufficient for a *new building*, the former design was [644] resumed; and at a Chapter held for this purpose on the 7th of January 1713, an act was made, *that a new dormitory should be erected in the college-orchard, according to a plan that was produced*. And accordingly the Dean and Chapter, on renewing a lease to Mr. Allen, of a messuage and ground next adjoining to that part of their garden where the new building was intended to be made, did, in two several Chapters held on the 8th and 18th of February 1714, make provision for such building in the said garden, by expressly stipulating in such lease, *that the Dean and Chapter might erect the same, notwithstanding any obstruction thereby to be given to the lights of Mr. Allen's house; and might use a part of his ground for that purpose, marked in a plan annexed to his lease in a yellow shadow*: and for these privileges they gave him a *consideration in his fine*.

In further prosecution of this design, the Dean and Chapter applied for and obtained his Majesty's bounty of £1000, and a present of £500 from his Royal Highness the Prince of Wales, besides several other benefactions, which would have enabled them to complete the intended building; and therefore, at a Chapter held

\* For the subsequent history of this cause, in which the statute of 11 and 12 William III. against popery, received determinations; see 2 P. Wms. 6: 10 M. 156. 481. 536: 2 Eq. Ca. Ab. 622. ca. 11: 624. ca. 16, 17: Cases in C. 22.

on the 30th of December 1718, they renewed their former act of the 7th of January 1713; and at another Chapter held on the 2d of March 1718, both those acts were confirmed.

But the respondent Doctor Friend having in the mean time purchased Mr. Allen's lease, and apprehending that it might be lessened in value by the intended building, he prevailed upon the other respondents to join with him in an opposition to this design.

Accordingly, on the 9th of May 1719, an information was exhibited in the Court of Chancery, by the Attorney-General, at the relation of the respondents, against the appellants, and Doctor Thomas Spratt, another Prebendary, since deceased; alleging, that the relator Doctor Friend's house, purchased of Allen, would, by the new building, be rendered of little or no value; that the garden was assigned to the use of the Prebendaries, together with a dwelling-house for each, of which they were respectively seised in their demesne as of freehold, distinctly in right, and as the corps of such Prebend, whereunto the said garden and the use thereof was in common to their respective houses, and made part of the corps of their respective Prebends; and which the Dean alone, or, together with any part or all of the said Prebendaries, had not nor could have any right, power, or authority, to dispose of, alter, apply, or convert, either in the whole, or any part, to any other use whatsoever; and that the building therein would deprive them of great part thereof: that the several Chapter acts for building in the said garden were obtained by surprize, and not binding: that the relator Doctor Friend was seised of a court-yard leading from the school to the garden, for life, not subject to any other control or use, which would in part be taken away: that the houses of the [645] relators Dent, Only, and Farrar, would be deprived of their light, air, and prospect: that the light of the school-room and musæum would be taken away; and that the garden was not so convenient a place as where the old lodgings stood, nor would the soil bear a foundation: and therefore they prayed a perpetual injunction to stay such building in the garden.

The defendants having answered, and the cause being at issue, several witnesses were examined on both sides; who proved, that in the lease to Allen, a power was reserved to erect such building in the garden, and an allowance made him in his fine for the same; and that Doctor Friend approved of the intention of building there, till after he purchased that lease: that the site of the collegiate church of Westminster, and the several lands and tenements thereto belonging, in which were included the prebendal houses, the garden, school, and old lodging-room, were by letters patent under the great seal of England, dated 21 May, 2d Eliz. granted by her said Majesty to the Dean and Chapter, and their successors, and were still vested in them, and had been constantly disposed of and managed by and according to resolutions and acts made in Chapter; and that all the Chapters which had been held relative to the building a new dormitory, were *regularly* assembled, and all the acts duly made and entered according to the usage and constitution of the said church, on various occasions, and at very distant times; so that there was no colour for pretending any *surprise* in that respect: that the garden, after the completion of such intended building, would be more useful and ornamental than it was before; and no part of the ground of it would be taken away but that on which the pillars in the piazza-walks under the new intended dormitory were to stand, and a small part at each end where the second Master's lodgings and offices were intended to be built: that the little yard claimed by Doctor Friend was the undoubted property of the Dean and Chapter, and was by their permission used as the school-garden, and so styled in their acts; but was never the garden of the chief, or either of the School-masters; that one part of it was expressly reserved to the Dean and Chapter by a clause in Mr. Farrar's lease, and the other part of it was not intended to be built upon, but only to have an arch eight or nine feet broad, and about nine feet high from the surface of the ground, turned from wall to wall over a narrow part thereof, being a small gravel walk of which no use was made: that none of the relators houses would suffer any real prejudice, much less such as would entitle them to obstruct the building; nor would the school or musæum be damnified: that the garden was upon all accounts the most proper place for the building, and would sufficiently bear the foundation of it; and that there were much greater objections

in point of property, expence, and convenience, to the erecting a new building in the place where the old lodgings stood; particularly, that the King's scholars must lie in private houses for two [646] or three years, while the chamber was rebuilding, which would ruin the discipline of the place.

On the 20th of June 1720, this cause came on to be heard before the Lord Chancellor Parker; when his Lordship was pleased to order, that the parties should proceed to a trial at law at the bar of the Court of King's Bench, upon the following issues; whether the relators the Prebendaries had such a right or interest in the garden as that the Dean and Chapter could not, without their consents, lawfully build thereon according to the plan proposed? whether the relator Doctor Friend had such a right and interest in the little garden as that the Dean and Chapter could not lawfully build thereon, without his consent, according to the said plan; and whether, if the said building should go on, it would be such a nuisance to the relators Dent and Farrar, as that they might lawfully stop the same.

From this order the defendants appealed; contending (T. Lutwyche, C. Talbot), that there was not the least proof in the cause, that the Dean or any of the Prebendaries had any distinct or separate interest in the garden; and therefore it was conceived no question could arise at law, whether the Dean and Chapter had a right to dispose of any ground belonging to them in common, to public use and benefit, which was the appellants sole aim; whereas the respondents appeared to act from views of private interest and convenience only. That the little garden or courtyard claimed by Doctor Friend as his freehold, was, and plainly appeared to be, the undoubted freehold of the Dean and Chapter, though by their permission used as the school-garden; part thereof being expressly reserved to the Dean and Chapter by a clause in the respondent Farrar's lease; and if building a small arch over part of it should in fact be any inconvenience, yet it was so minute that the School-master ought not, on such a trifling consideration, to obstruct a charity intended for the good of the scholars. That it was manifest from the proofs in the cause, that the houses of the respondents Dent and Farrar would not be damaged by the intended building, much less in any such degree as to entitle either of them to obstruct it. That no clear proof being made of any one material point alleged by the respondents in their bill, nor any doubt remaining touching any one material fact insisted on by the appellants, no point of law could arise in the case but what might and ought to have been determined by the Court of Chancery; and especially in the case of a charity, where the most expeditious and least expensive methods ought to be adopted: and therefore it was conceived, that the Court ought *finally* to have determined the place where the building should be erected. That it was plainly the intention of Sir Edward Hannes the testator, that a *new building* should be erected; and it was not pretended by the respondents, that there was any place so proper for the erection of such building as either the common garden or the site of the old chamber. But it appeared by the proofs, that nei-[647]-ther the contributions already received, or those justly expected, could be properly laid out in rebuilding the old chamber in the place where it stood, or if they could, yet the rebuilding it there would be liable to all the objections which, with any colour of reason, were urged against building it in the garden, and would moreover be attended with more and much greater inconveniencies; whereas there was satisfactory proof that the common garden was the most convenient place for the scholars, with respect to their health, learning, and virtue. And therefore it was hoped that the decree directing the said issues would be reversed, and the information dismissed with costs.

On the other side it was argued (P. Yorke, S. Cowper), that if the respondents had only shewn a reasonable foundation and probable evidence of a right which they had long enjoyed, and claimed as their freehold, the Court of Chancery ought not to deprive them of it by a decree, without giving them an opportunity of having the same tried and determined by the course of the common law. That as to the first issue. it appeared by the statutes of the college, that the garden was appointed by the founder for a common garden; and though the whole site of the college was granted to the Dean and Chapter by charter, yet that charter, like all other college charters, was restrained by the statutes, according to a clause in the charter, that the college should be ordered *secundum ordinationes regulas et statuta iis vel successoribus suis per nos*

*in quadam indentura, in posterum fienda specificand. et declarand.* That the Prebendaries had accordingly enjoyed this garden, or orchard, ever since the foundation of the college, and were always thought to have a right in it, as appeared by several acts of Chapter, and particularly by one in the year 1639, wherein is this clause; "That none but the Prebendaries living and residing about the church shall have a key to the orchard; that the orchard being restored to its former privacy, the Prebendaries may enjoy the benefit thereof, as of right they ought to do." That this right was conveyed to each Prebendary by his patent under the great seal, which entitles him to the house and all other accommodations of his immediate predecessor, in these words; *Concedimus A. B. canonicatum sive Præbendam modo vacant, &c. habend. & tenend. prædict. canonicat. sive Præbend. præfat. A. B. durante vita, una cum omnibus & singulis profit. commoditat. domibus, mansionibus, cæterisque juribus quibuscunque dicto canonicat. sive Præbendæ quovis modo pertinent. adeo plene, libere & integre, ac in tam amplis modo et forma, prout C. D. aut aliquis al. prædecessor, &c.* That this garden was a great accommodation to houses that had no tolerable outlets or gardens belonging to them, which was the case of all the old prebendal houses; and if the majority of any Chapter had a right to take away a part of this garden, they might take away the whole; and even the house of any Prebendary, as it all depended on the same reason. That as to the second issue, the respondent Doctor Friend had a grant under the seal of the Dean and Chapter, in which "they, for themselves and successors, con-[648]stitute him chief Master of the school; to hold the said office, and all profits, lodgings, and all other accommodations thereunto belonging, in as large and ample manner as Doctor Knipe, or any other of his predecessors, held or enjoyed the same, for and during his natural life." And by virtue of which grant Doctor Friend took possession of this little garden, in the same manner as he took possession of his house or lodgings, and had enjoyed it ever since. And it was fully proved in the cause, that this little garden, called the *school-garden*, had been possessed and enjoyed by Doctor Busby, Doctor Knipe, and Doctor Friend successively, and used by them as their own particular garden, of right, exclusive of all others; and that they alone successively had the key, enjoyed the produce, and paid the gardener for looking after it. And as to that part of the garden which the appellants alleged was reserved to the Dean and Chapter by a clause in Mr. Farrar's lease, it was true there was a little piece of ground reserved in the lease, and also in a former lease of the same house to Doctor Forrester; but it was also true, that after this lease to Doctor Forrester was granted, this piece of ground was by act of Chapter, 12th December 1685, added to the school-garden, and ordered to be always thereafter annexed and continued to it. That Doctor Busby and Doctor Knipe accordingly enjoyed the garden with this addition; so that it was so far from being, by that reservation, the right of the Dean and Chapter, that it belonged to Doctor Friend as his right and freehold, by virtue of his constitution, as the rest of the garden did; and therefore he insisted that the appellants could not build thereon, nor turn an arch over the other part of the garden, according to their plan, without his consent. As to the third issue, it was proved that the intended building in the common orchard or garden would stand within less than five yards of Doctor Dent's prebendal house, and in right angles with it, and would consequently obscure his light and intercept his air; and that the stair-case, through which the scholars were every day very frequently to pass, was next to his best rooms at the same distance, and would therefore be a perpetual annoyance to him; besides, that while the new dormitory was building, which might be several years, he would not be able to live in his house. That the second Master's lodgings, part of the intended building, would stand within ten yards fronting the windows of Mr. Farrar's best rooms, and overlook them, and within five yards of his side windows, and would therefore very much obscure his lights, and totally intercept the prospect and air of the common-garden, which by his lease he ought to enjoy, and for which he had paid a considerable fine. As to the pretence of the appellants, that the respondents did not make the least objection to the building in the common-garden till the respondent Doctor Friend purchased Mr. Allen's lease, and that the minute damage which he imagined he might sustain in such lease was the first occasion of this suit, and that he prevailed with the other respondents to let their names be made use of in the present in-[649]formation; it was answered, that the respondents the Prebendaries were well known to have been constantly and uniformly against any

building in the common-garden, both in the time of the late and of the present Dean; and that ever since the year 1711, when this project was first mentioned, there generally had been a greater number of Prebendaries against it than for it; so that the respondents were not prevailed upon by Doctor Friend, but voluntarily and heartily entered upon a defence of their own rights. That the reason of Doctor Friend's opposing a building in the common-garden, did not, as suggested by the appeal, proceed from any interest he had in the lease granted to Mr. Allen, but from a full persuasion that such building would be attended with many and great disadvantages to the school and scholars (whose good he believed himself as much concerned for, and as capable to judge of, as any of the appellants were); and that the situation of the old dormitory was much more convenient for that purpose, as he had declared long before he had any thoughts of the said lease: it was therefore a surmise without foundation, that the minute damage which Doctor Friend might sustain in that lease was the first occasion of this suit, he not having thought of any suit till he was applied to by some of the respondents the Prebendaries, to join with them in defending their several rights, and opposing a design so generally prejudicial and inconvenient. To preserve which rights, and to prevent several grievances to themselves and others, the respondents humbly insisted on a trial at law according to the decree; and hoped the House would not deprive them of any benefit which they might have by the law, of being protected in their just rights and properties.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be reversed: and it was declared, that the college-garden was a more proper place for building a dormitory than the place where the old dormitory then stood; and that a building should be carried on in the said garden, according to the plan proposed, so soon as conveniently might be, doing as little damage to the said garden in erecting thereof as possible; and that proper directions should be given from time to time, in order thereto, by the Court of Chancery: and it was further ORDERED, that so much of the information, or bill, exhibited by his Majesty's Attorney-General in the said Court at the relation of the respondents, as prayed a perpetual injunction to stay the building a dormitory in the said college-garden, should stand dismissed. (Jour. vol. 21. p. 522.)

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[650] CASE 8.—THOMAS BENNET,—*Appellant*; MICHAEL TREPPASS and others,—*Respondents* [7th March 1722].

[Mew's Dig. v. 1432. See *Payne v. Esdaile*, 1888, 627.]

[A parson sued for 2s. 9d. per pound for tithes of houses in London, under the statute 37 Hen. 8. (c. 12). But an issue was directed to try, whether less than that sum had ever been paid; although there was no proof of any regular modus.]

\*\* ORDER of the Court of Exchequer AFFIRMED.\*\*

Gilb. Rep. Eq. 191: Viner, vol. 8. p. 567. note to ca. 3: \*\* Bunb. 106, 142.\*\*

The appellant became vicar of the parish of St. Giles's, Cripplegate, London, in April 1717, and in Trinity Term 1719, he exhibited his bill in the Court of Exchequer against the respondents, as occupiers of houses within the parish, for tithes in London, after the rate of 2s. 9d. in the pound, according to the yearly rent of their respective houses: and he grounded this demand upon a statute and decree of 37 Hen. VIII. whereby it was decreed and enacted, "That the citizens and inhabitants of the city of London, and liberties of the same, shall yearly, without fraud or covin, for ever, pay their tithes to the parsons, vicars, etc. after the rate following; viz. of every 10s. rent by the year, of all and every house and houses, shops, warehouses, cellars, stables, and every of them, within the said city and liberty of the same, 16½d. and of every 20s. rent by the year of all and every such house and houses, shops, warehouses, cellars, stables, and every of them, within the said city and liberties, 2s. 9d.; and so above the rent of 20s. by the year, ascending from 10s. to 10s. according to the rate aforesaid."

The respondents by their answer to this bill admitted, that during the time

therein mentioned they had respectively occupied houses within the said parish, viz. the respondent Treppass, a house of the yearly value of £12; the respondent Bocket, a house of the yearly value of £16; and the respondent Witchell, two houses of the yearly value of £22; but they insisted that no such demand was ever made as 2s. 9d. in the pound, by any former vicar of the parish; nor was the same ever heard of within the parish till the appellant became vicar, which was but two years before the commencement of the suit. And they further insisted, that they were exempt from such payments after the rate of 2s. 9d. in the pound, either by virtue of a proviso in the said statute and decree, whereby it was provided and decreed, "that where less sum than after the rate of 16 $\frac{1}{2}$ d. in the 10s. rent, or less sum than 2s. 9d. in the 20s. rent, hath been accustomed to be paid for tithes, that then, in such places, the said citizens and inhabitants shall pay only after such rate as has been accustomed;" or by some other lawful ways and means.

[651] The cause being at issue, and witnesses examined, was heard on the 27th of October 1720; and there being no proof that the 2s. 9d. was ever paid or demanded within the parish, till by the appellant's bill, and some doubt arising concerning the same, the Court directed that a case, as it appeared upon the evidence, should be stated and settled by counsel on both sides; which was accordingly done to the effect following, viz.

That there was no proof in the cause whether the houses in question were, or any of them was in lease, at the time of making the said act, or not; or that the sum of 2s. 9d. in the pound, was at any time paid according to the value of the houses, by virtue of the statute and decree of the 37th Hen. VIII.; but it was proved by some of the appellant's witnesses, in their cross examinations on the part of the defendants, that, till the time of the present vicar, they never heard of any such demand as 2s. 9d. in the pound for tithes within the said parish: that in two ancient tithe-books there appeared to be charged for tithes, against the names of the then occupiers of Treppass's house, the several sums of 5s. and 3s. 4d. and in another ancient tithe-book the several sums of 5s., 3s. 4d., and 2s. 6d. which last mentioned sums of 3s. 4d. and 2s. 6d. were proved to be the collector's hand-writing, but the 5s. charged against Treppass's house was of another hand-writing; and in another book, the several sums of 3s. 4d. and 2s. 6d. were so charged and proved to be of the collector's hand-writing; and that no certain sum annually, or modus, in relation to Treppass's house, was proved to have been paid but as aforesaid: that in another tithe-book, commencing in the year 1708, and ending in the year 1713, Bocket's house was charged 1s. 6d. and Witchell's houses 1s. each quarterly. It was proved by one Suretys, that for nine years, during the time Bishop Fowler was vicar of the parish, he the said Suretys lived in Treppass's house; and during that time, never paid more to the vicar than 10s. per ann. or 2s. 6d. per quarter: therefore the question on the said case was, whether 2s. 9d. in the pound of the yearly rents of the said defendants respective houses was due for tithes, by virtue of the said statute and decree of 37th Henry VIII. or not.

This case was twice argued, by counsel on both sides; first on the 18th of April 1722, and afterwards on the 26th of October following; but the Court, conceiving some doubt in relation to these payments, ordered that it should be referred to a trial at law upon this issue, viz. "Whether any, and what sum or sums, less than 2s. 9d. in the pound had been accustomedly paid for any, and which of the houses in possession of the respondents, or any and which of them."

From this order the plaintiff appealed, insisting (C. Phipps, E. Edlin), that no issue whatever ought to have been directed; because there could be no occasion to send those facts to be tried by a jury which had already been settled and agreed to by the consent of both parties, in the above case; and that with so much care and deliberation [652] as to take up fifteen months in preparing the same, to the appellant's great delay and prejudice; that it appeared from the answer of the respondents, that there was no one customary rate in that part of the parish of Cripplegate which lies within the city of London; the respondent Treppass's pretended payment being after the rate of about 12d. in the pound, and Bocket's and Witchell's after the rate of about 4d. in the pound, and no more; and for this reason also it was apprehended an issue was unnecessary: that the respondents had not given the least colourable proof of any modus or customary payment whatsoever,

so as to bring them within the proviso of the act of Parliament; nothing more being proved, than that between the years 1708 and 1713, Bocket's house had been charged with 1s. 6d. and Witchell's houses with 1s. each; and as to Treppass's house, that different sums had formerly been paid, viz. 3s. 4d. and 2s. 6d.; that the respondents ought not, in this case, to have been admitted to read their proofs to support such pretended customary rates, because they had not fixed or alleged any time when the same were payable; and by the constant practice of the Court of Exchequer, a modus is held to be void, where no time is alleged or appointed for the payment of it: that the neglect of the appellant's predecessors to demand according to the statute could be no prejudice to a right vested by the express words of that statute, which was made to regulate and establish an immemorial custom of paying tithes in London\*; and therefore it was hoped that the decree would be reversed, and that the appellant should have an account from the respondents according to the statute; since he must either have that or nothing, there being no proof of any customary rate payable for the respondent's houses, sufficient to ground a demand upon.

On the other side, it was said (N. Fazakerley, C. Talbot) to be usual for Courts of Equity to direct trials, where matters of fact appeared doubtful; especially if such facts depend upon custom and usage, which are matters most proper to be determined by a jury; that the constant acceptance of lesser sums than 2s. 9d. in the pound was apprehended to be sufficient to induce the Court to direct such an issue as they had done, as it could not be presumed that the vicars of the parish would so long have accepted of such lesser payments, if 2s. 9d. in the pound had been due to them; because the same would make the living £3000 per ann. more than it was now worth, being only about £800 per ann.: that as it appeared, that lesser sums than 2s. 9d. in the pound had been paid for the respondents houses respectively, it was a strong evidence of an accustomed payment, and especially in this case where the full sum of 2s. 9d. had never in any single instance been paid; nor was there any evidence that contradicted the payment of these lesser sums, or proved any variation in those payments: as to the objection made by the appellant, that the direction of the trial would be the occasion of great delay and expence to him; it was said that the contrary was true, for that a trial might have been had, and a final decree made in less time and at less expence than what was occasioned by the present appeal. But it was manifest, that the avoiding either expence or delay had been very little in the appellant's view; there being a clause in the aforesaid statute or decree, "That if any variance, controversy, or strife do or shall

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\* The following note is subjoined to the appellant's case: "The appellant humbly hopes, he is sufficiently authorised in affirming, that this right was vested in the Clergy of London, by the immemorial custom of that city, antecedent to the statute: it appearing in the case of Dr. Dunn, related in Sir H. Calthorp's Reports, fol. 62. from the records of London, there referred to, and from several other books of great antiquity, that in 13 Henry III. there was an ancient custom which had then been used time out of mind, that provision should be made for the ministry of London in this manner, viz. That he which paid 20s. for his house, should offer every Sunday and every Apostle's day, whereof the evening was fasted, one half-penny; and he that paid but 10s. rent yearly should offer but one farthing; which amounted to 2s. 6d. in the pound in the whole year, there being then, besides the fifty-two Sundays, eight Apostles' days, the vigils whereof were fasted, and no more; which payment continued till 13 Rich. II. about which time the Clergy, beginning to insist on offerings to be paid on twenty-two Saints' days more, it then amounted to 3s. 5d. in the pound yearly. And in 36 Hen. VI. there was a composition between the citizens of London and the ministers, that this payment should be made according to that rate. But disputes afterwards arising, there was a submission to the Lord Chancellor and divers others of the Privy-Council, and they made an order for the payment of tithes, according to the rate of 2s. 9d. in the pound, which was first promulgated by proclamation, and afterwards established by act of Parliament 17 Hen. VIII. There was another order or decree made to the same purpose, with some additions, and confirmed by act of Parliament 37 Hen. VIII. which is the act on which the appellant now founds his demand."



arise within the said city, for the non-payment of tithes, etc. or if any other doubt arise upon any other thing contained within the said decree; that then, upon complaint made by the party grieved to the Mayor of the City of London, for the time being, the said Mayor, by the advice of counsel, shall call the said parties before him and make a final end in the same, with costs, to be awarded by the discretion of the said Mayor and his assistance." Which method, if the appellant had thought fit to have taken, the matters in question might have been long since determined, at a very easy expence: and therefore it was hoped, that the order would be affirmed and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed. (Jour. vol. 22. p. 109.)

[654] CASE 9.—EDWARD EDGORTH,—*Appellant*; MEAD SWIFT,—*Respondent*  
[11th February 1725].

[Where a party claims under marriage-articles and settlements made in pursuance thereof, it is not sufficient to direct an issue to try the validity of the articles only; but the issue should be extended to try the execution of the subsequent settlements.]

\*\* DECREE of the Irish Chancery REVERSED.\*\*

Sir Edward Tyrrell Bart. being seised in fee of Longwood and several other lands in the kingdom of Ireland, of great yearly value; and possessed of the lands of Lynn and Rathduffe, in the county of Westmeath, for the term of 1000 years, at a pepper-corn rent, by virtue of a lease from Nicholas Darcy Esq. died in the year 1690, leaving issue Catherine, his only daughter and heir, the appellant's mother.

The said Sir Edward Tyrrell was, after his death, outlawed for high treason, on account of the rebellion in Ireland; by means whereof the said several lands were seised into the hands of their Majesties King William and Queen Mary.

But there being a prospect of reversing that outlawry as being erroneous, Robert Edgworth Esq. the appellant's father, proposed to marry the said Catherine, and having obtained the consent of Dame Ellinor Tyrrell, her mother, it was, by articles previous to the marriage, dated the 5th of July 1692, and made between the said Robert of the one part, and the said Dame Ellinor Tyrrell, on behalf of herself and her said daughter Catherine, of the other part, agreed, that whenever the said Catherine, or the said Robert in her right, should be restored to the estate of the said Sir Edward Tyrrell, or any part thereof, the same should immediately after be settled on the said Robert and Catherine for their lives, and the life of the longer liver of them; remainder in tail male to the first son of the said Robert by the said Catherine, with other remainders over.

The marriage soon afterwards took effect; and Sir Edward's estate being vested in the trustees of Irish forfeitures, by the act of resumption, it was, by a private act of Parliament made in the first year of Queen Anne, enacted, that the said trustees should convey all the estate forfeited by the said Sir Edward Tyrrell to the said Robert and Catherine, and their heirs, discharged of all forfeitures; and the said trustees, by deeds of lease and release, dated the 8th and 9th of October 1702, conveyed the same accordingly; and also by their deed, dated the 10th of the same month, granted the said lands of Lynn and Rathduffe to the said Robert and Catherine for 974 years, being the residue then to come of the said term of 1000 years.

[655] Robert Edgworth being extravagant, and Dame Ellinor fearing the consequences thereof, used her best endeavours to provide a separate maintenance for the said Catherine and her issue during the life of Robert; and for that purpose she proposed to release a right which she had to a third part of the said estate for life, which at that time amounted to £500 per ann. and upwards, to

the said Robert Edgorth for £200 on condition that he would convey and assign over the said term for the separate maintenance of the said Catherine during her life, and after her death for the use and benefit of her eldest son by him; to which proposal Robert having agreed, Dame Ellinor accordingly executed such release; and as a farther inducement to Robert, did remit to him £100, part of the said £200, and thereupon Robert, in pursuance of the said agreement, prevailed upon John Percival Esq. who was entitled by several mesne assignments to a mortgage of the said term under Sir Edward Tyrrell, to assign over the same to Robert Adair Gent. who was pitched upon to be a trustee in the said settlement, and in which deed of assignment the said articles were recited; and in further execution of the said agreement, Robert and Catherine, on the 17th of June 1703, conveyed the residue of the said term to the said Robert Adair upon the following trusts, viz. that Catherine might receive and dispose of the yearly rents and profits of the lands for her natural life, to her separate use, as if sole; and afterwards in trust for and to the only use and behoof of the appellant, by the designation of the first and eldest son of the said Robert by the said Catherine; and the said Robert Edgorth, by the same deed, reserved to himself a yearly rent of £20 during his life out of the said leasehold premises, with liberty to distrain for the same.

The reversion and inheritance of the lands of Lynn and Rathduffe being forfeited by the attainder of Nicholas Darcy the lessor, and being vested in the said trustees, they, for some small consideration, conveyed the same to the said Robert Edgorth.

In pursuance of the said marriage-articles Robert Edgorth and his wife conveyed to Francis Edgorth Esq. and his heirs the reversion of the said last-mentioned premises, and all other the estate formerly belonging to Sir Edward Tyrrell, to the use of the said Robert and Catherine, for their lives, without impeachment of waste; with remainder to the use of the appellant their eldest son, during his natural life; remainder to the trustee and his heirs, for preserving the contingent uses; remainder to the appellant's first and other sons successively in tail male; with several remainders over: and with power for the said Robert and Catherine to charge portions for younger children not exceeding £1000; and a power for the appellant, after the death of Robert and Catherine, to settle a jointure on any wife he should marry, not exceeding £300 per ann.

Catherine died in the year 1707, leaving the appellant her eldest son, then a minor about nine years old; whereupon the said Robert Edgorth, in some few months afterwards, married a [656] second wife; and notwithstanding the said articles and settlement, took upon him to make fee farms and long leases of the premises, or part thereof, at small rents, and to mortgage and sell other part thereof; and publicly notified that he intended to sell the residue.

But the appellant having come to the knowledge of his title to the premises under the said articles, settlement, and deed of trust, did, for preventing any further sale, give public notice of such his title; at which Robert his father being displeased, and some other disputes having arisen between them, Robert, in December 1717, exhibited his bill in the Court of Exchequer in Ireland against the appellant, alleging, that neither he or the said Catherine ever made or executed any articles upon or before their intermarriage, or any settlement of the said premises; and therefore prayed, that if the appellant did insist on any articles or settlement, he might be obliged to shew cause why the same should not be brought into Court and lacerated.

To this bill the appellant put in his answer, though at that time a minor, and insisted on the said articles and settlement; and the cause being at issue, many witnesses were examined, who proved the articles and settlement; but some orders having been made in the cause, which the appellant apprehended would, in their consequences, run him into many suits, he, on the 27th of March 1721, appealed to Parliament from those orders, and upon hearing that appeal, they were reversed; and it was ordered, that the said Robert Edgorth should make all the purchasers, lessees, and mortgagees parties to the said bill, or to join with him therein; to the end that one decree might conclude all parties, and that the appellant should not be harassed with a multiplicity of suits about one and the same matter.

Notwithstanding this order, Robert Edgorth made no farther progress in

the cause than to serve some few of the tenants with subpoenas to answer; but in order to deprive the appellant of the benefit of the said order, he procured the present respondent to exhibit a bill in the Court of Chancery in Ireland against himself, the said Robert Adair, the appellant and others, pretending that the said lands of Lynn were granted to him in fee farm by the said Robert Edgworth, some time in the year 1711, and praying that the same might be established, and the said articles and settlement set aside; and that Adair might be obliged to convey over the said trust-term to the respondent, in order to protect his title to the premises under the said fee farm; or that the said Robert Edgworth might be compelled to make him recompence for the value thereof, and the loss he was likely to be at by the appellant's pretensions, out of his real and personal estate.

To this last bill the appellant, though at that time also a minor, put in his answer, and thereby insisted on the said articles and settlement, and also on the deed of trust; and that he was a purchaser under the same for valuable considerations, prior to any right pretended to by the respondent.

[657] The appellant soon afterwards caused an ejectment to be brought in the Court of King's Bench in Ireland, in Adair's name, for recovering the actual possession of the said lands; to which the said Robert Edgworth and the respondent appeared and made defence, and the appellant being prepared to go to trial, the respondent, by contrivance with Adair, prevailed on him to release the action; though the appellant had tendered him undeniable security, to indemnify him from any loss that might attend the same. And at the same time the respondent, in pursuance of such contrivance, exhibited a supplemental bill against the appellant and Adair, and served Adair with process long before the appellant was served, or had notice that any such bill was filed; by which management the respondent obtained an injunction for want of Adair's answer in time; but the appellant being soon after apprised thereof, put in his answer forthwith, and after some time prevailed on Adair to put in his answer.

The appellant thereupon applied to the Court in the usual manner to dissolve the injunction, or, in case it should be thought proper to continue the same, that the respondent might be obliged to waive the benefit of the release from Adair, and give judgment at law upon the ejectment, with a release of errors; both which the Lord Chancellor was pleased to refuse, and continued the injunction till the hearing.

The cause being at issue, witnesses were examined on both sides; but the respondent having obtained an order to pass publication before the appellant had wholly finished examining his witnesses, and the cause being set down to be heard, the appellant was under a necessity of applying to the Court for liberty to prove some exhibits, *viva voce*, which he had before proved in other causes; and though this was merely a motion of course, yet the Lord Chancellor thought proper to refuse it; and the cause coming to be heard on a conditional decree upon the 23d and 25th of November 1723, his Lordship was pleased to admit the answer of the said Robert Edgworth to be read as evidence against the appellant; and on the 27th of January following he directed an issue to try whether the said articles, dated the 5th of July 1692, were perfected by the said Robert Edgworth; and his Lordship at the same time declared, that, in case the said articles were found to be perfected, he would consider the equity of the respondent's case.

The appellant intending to appeal from these several proceedings, applied to the Deputy Register of the Court of Chancery for attested copies of the minutes taken on the motion for liberty to prove exhibits *viva voce* at the hearing; which being denied, he, on the 24th of February 1723, applied to the Court to oblige the Register to attest those minutes, but the Lord Chancellor was pleased to refuse the same.

The appellant therefore prepared an appeal; but before it could be presented, an order was made that no more appeals should be received that session: the respondent taking advantage of this [658] accident, and knowing that the appellant was detained in England on account of some other appeals then depending, applied to the Court on the 6th of May 1724, to have the issue taken as found against the appellant, which was ordered accordingly; and on Friday the 12th of June following, his Lordship was pleased to decree, that the articles and settlement which the

appellant was refused liberty to prove on the hearing, and to which the issue had no relation, should be set aside, and the fee-farm deed established; and further ordered, that the defendant Adair should convey over to the respondent the residue of the said term, and likewise the said mortgage; and that a perpetual injunction should be awarded against the appellant, to stop all further proceedings under the said articles and settlement.

In support of the appeal it was said (J. Roche, E. Hoskins), that the appellant having sworn in his answer that he was a purchaser for a valuable consideration, prior to any right pretended to by the respondent, and not having confessed any manner of equity therein; the injunction ought not to have been continued, nor the appellant prevented from asserting and verifying his title at law. But if there had been any colour for continuing the injunction, the Court ought to have obliged the respondent to give the appellant, or his trustees, judgment at law, with a release of errors. That the refusing the appellant liberty to prove exhibits *viva voce*, at the hearing of the cause, was unprecedented. That the term appearing to have been assigned to Adair for a valuable consideration, upon express trust for the appellant, after the death of Catherine, a Court of Equity ought not to have interposed; especially as, if the allegations of the respondent's bill were true, he might by his own shewing, have made a good defence and had a proper remedy at law; and therefore, and for that the whole of this suit seemed calculated to elude the order made on hearing the former appeal, the bill ought to have been dismissed. That the appellant's present title to the lands of Lynn and Rathduffe was under the deed of trust to Adair, and not under the articles, and therefore no issue ought to have been directed as to those lands; and the rather, for that there was not any room left to conceive or entertain the least doubt of the reality thereof, the Court having declared the same were sufficiently proved; and as the persons who appeared to be entitled to estates in remainder, by virtue of the articles and settlement, were not made parties to the suit, no trial could be effectual, available, or conclusive, as to them. That the answer of Robert Edgworth was admitted to be read as evidence against the appellant, which ought not to have been done: and that Adair was not only decreed to assign over the term to which he was entitled in trust for the appellant, under the deed of the 17th of June 1703, but also the mortgage for protecting the respondent's title, and which ought not to have been decreed to be so assigned, without first permitting the same to be proved and read, or knowing what it was.

[659] On the other side it was insisted (P. Yorke, C. Talbot), that the respondent was a purchaser of the said fee-farm lease of Lynn for a valuable consideration, without any notice of the said articles and settlement, even if the same were real and genuine: but Robert Edgworth had, upon oath, absolutely denied that he had ever executed the said articles or settlement. That the pretended assignment of the term to Adair, in trust for the appellant, and under which he now claimed a title to the lands of Lynn, appeared to be engrossed on parchment; whereas by the evidence of witnesses of undeniable character, it appeared, that the assignment of the said term executed by the said Robert Edgworth, the appellant's father, was engrossed on *paper*: and the appellant having brought an ejectment against one Smith and Damer to recover the lands of Rathduffe, under the same title; the jury upon the trial found a verdict for the defendants. That the appellant examined witnesses to prove the execution of the pretended settlement of December 1703, but, having failed therein, and there being just ground to suspect the reality of it, it was apprehended the Court did right in refusing him liberty to prove the same *viva voce* at the hearing. That the appellant had received great indulgence in the proceedings in this cause, for publication was respited, that he might have time to examine the witnesses which he desired, and several times were appointed for the appellant to appear, in order to try the issue directed, before the same was ordered to be taken *pro confesso*; but he having avoided such trial, it was but just to take the said issue *pro confesso*; and the decree founded thereon, being perfectly agreeable to the rules of equity, ought to be affirmed.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order of the 27th of January 1723, and all the proceedings subsequent thereto, should be reversed; and that the Lord Chancellor of Ireland should direct an issue at law, to try the validity of the execution of the articles of the 5th of July 1692, of

the settlement of the 17th of June 1703, and of the settlement of the 25th of December 1703; which issue should be tried at the bar of the Court of Common Pleas, by a jury of the county of Westmeath; and that the said Lord Chancellor should give proper directions for the settling and trying the same: and it was further ORDERED, that the appellant should, with all convenient speed, deliver the said articles and settlements into the said Court of Chancery, to remain there till the trial should be had; but in the mean time to be inspected by each party as there should be occasion; and that the said articles and settlements should be produced at such trial, and, after the same had, be returned back to the said Court of Chancery to be disposed of as the said Court should direct; and each party should, after such trial, resort back to the said Court of Chancery, to have such further directions as should be just. (Jour. vol. 22. p. 592.)

[660] CASE 10.—Sir JOHN ROUS,—*Appellant*; JOHN BARKER and others,—*Respondents* [23d March 1725].

[Mew's Dig. ii. 1853.]

[On a bill by the Lord of a Manor, praying a commission to ascertain the boundaries of a copyhold estate, an Issue was directed to try what copyhold lands were in the possession of the defendant. But, on an appeal, this decree was reversed, and a commission of inquiry directed with a previous inspection of all deeds, etc.]

In the manor of Bedfield in Suffolk, whereof the appellant was seised in fee, there were several freehold and copyhold tenements intermixed, out of which several free rents and quit rents were yearly payable to the Lord of the manor for the time being; and in this manor there is an immemorial custom, that, upon the death or alienation of every copyhold tenant, a fine, according to the yearly value of the copyhold lands and tenements, is always paid and payable to, and at the will of the Lord, besides the quit-rents and services in arrear.

James Mayhew, the respondent John Mayhew's father, being seised of several freehold lands within the manor, and also of several pieces of copyhold land holden of the same, the copyhold lands containing in the whole fifteen acres and three roods, and lying intermixed with, and by a long unity of possession not to be distinguished from the freehold lands; he, on the 14th of October 1703, surrendered into the hands of the appellant, as Lord of the said manor, to the use of John Barker and his heirs, six pieces of land, containing fifteen acres and three roods, part of the said copyhold lands, described by the ancient names following, viz. "One acre of land, called Freebornes; three roods, called Gelyans; two pieces, containing two acres, lying in a close called Gelyans; one other piece, in the same close, containing one acre; one other piece, containing seven acres; and one other piece, called Shraggs, containing four acres;" subject to a proviso or condition, to be void on payment of £147 upon the 14th of October then next. And default being made in payment of this sum, according to the condition, the said John Barker was admitted tenant to the premises, at a general court holden for the said manor on the 17th of January 1704; upon which admission, he paid a fine to the appellant, as Lord of the manor.

The said James Mayhew having, about the time of the surrender, mortgaged the remaining part of his estate within the manor to the said John Barker, and to the respondents John Howse and Lucy his wife, Charles Ward, William Powell and Mary his wife, John Russell and Robert Bence, or those under whom they claimed; the mortgagees, some time afterwards, entered upon all the freehold and copyhold estates belonging to the [661] said James Mayhew within the said manor, and depending upon the impossibility of distinguishing the copyhold from the freehold, they refused to satisfy the appellant for the fines and quit-rents due for the copyhold lands.

In 1714, the said John Barker died, leaving James Barker his son and heir, who

was admitted to the tenement and four acres called Shraggs; but refused to be admitted to any other part of the lands to which his father was admitted, and died in some short time after, without being admitted to any other of the said lands. Whereupon, the death of the said James Barker being presented by the homage, three proclamations were made, according to the custom, at three general courts holden for the said manor, and no person coming in to be admitted to the said copyhold lands, the Steward awarded a seizure, and directed a warrant to the Bailiff of the manor, to seize into the hands of the appellant such of the said copyhold lands as the said John Barker was admitted to, and to which the said James Barker refused to be admitted; but the Bailiff not being able to distinguish or find out the ancient abuttals, no seizure could be made; whereupon, in order to make out the ancient land-marks and boundaries, the appellant, together with the Steward and several ancient copyholders of the manor, did, with the greatest care and diligence, upon view of all the estates of the said James Mayhew within the manor, and by inspection of the manor books, endeavour to find out the boundaries, but to no purpose; the abuttals and boundaries described in the manor books being either destroyed, or so changed and altered, that they could not be discovered.

James Barker leaving the respondent John Barker his son and heir, he also refused to be admitted to any part of the copyhold lands, formerly the estate of James Mayhew, to which John Barker his grandfather was admitted, except the said tenement and four acres called Shraggs; unless the appellant would set out and ascertain the metes and boundaries thereof, which was not in his power to do.

The said James Mayhew being dead, leaving the respondent John Mayhew his son and heir, who, as such, became entitled to the equity of redemption of the mortgaged premises; the appellant, in Michaelmas term 1720, exhibited his bill in the Court of Exchequer against all the respondents, praying a discovery of their deeds and writings, and that a commission might be awarded, to set out, ascertain, and describe the copyhold lands, late of the said James Mayhew.

To this bill the respondents put in their several answers; and thereby admitted, that sixteen acres, part of the estate of Mayhew, were in the possession of the respondent Barker; twenty-four acres, other part thereof, in the possession of the respondents Howse and his wife, or of Charles Ward and Robert Bence, as their trustees; that twenty-four acres, other part thereof, were in the possession of the respondents Powell and his wife; and that the respondent Russell was in possession of a tenement and ten acres [662] of land, other part thereof, under several mortgages made by the said James Mayhew.—The respondent Barker by his answer said, he did not know whether a close called Shraggs, containing about seven acres, part of the said sixteen acres admitted to be in his possession, was freehold or copyhold; but said, he was entitled to fifteen acres and three roods of copyhold land, by virtue of the surrender made by Mayhew to John Barker, his grandfather; and insisted, that the appellant ought to set out and allot the particular copyhold lands to him, before he was obliged to be admitted and pay his fine.—And the respondent Mayhew insisted, that he was heir at law of his said father James Mayhew, and as such, entitled to the equity of redemption of the said copyhold lands.

The cause being at issue, witnesses were examined on both sides, and publication being duly passed, the same was heard on the 25th of June 1725, before the Lord Chief Baron Gilbert, Mr. Baron Price, and Mr. Baron Page; when the Court was pleased to order and decree, that it should be referred to a trial at law, to be had at the next assizes to be held for the county of Suffolk, upon the following issue, viz. whether any and what copyhold lands were in the possession of the respondent John Barker besides Shraggs; and whether any and what copyhold lands were in the possession of the respondent Russell; and it was further ordered, that the respondent John Mayhew might be a defendant in the said trial at law, if he should think fit: and that the appellant's bill, as to the other respondents, should be dismissed with costs.

From this decree the appellant appealed, and on his behalf it was insisted (C. Wearg, T. Lutwyche), that the directing such an issue was giving him no proper relief; he having by the proofs in the cause sufficiently ascertained, that James Mayhew and his ancestors were successively admitted to the said fifteen acres and

three roods of copyhold land; but by reason of the confusion in the boundaries, he could not make legal proof of the particular abutments thereof; and which ought therefore to be set out as near as might be, by commissioners appointed by the Court, upon an inspection of the deeds and writings relating thereto, and by comparing the descriptions therein contained, with the lands in the possession of the several respondents, and by other inquiries proper for such commissioners to make; but should the appellant be referred to an issue at law for that purpose, he must, for the above reason, be wholly destitute of relief in the premises. That the appellant's bill ought not to have been dismissed, as to the respondents Howse and wife, Ward, Powell and wife, and Bence, or any of them; for it appearing that James Mayhew was admitted to and in possession of fifteen acres and three roods of copyhold land, and that all his freehold and copyhold lands were in the actual possession of those respondents, and of the other respondents Barker and Russell; the Court ought to have granted a commission to separate the copyhold from the freehold, and to distinguish [663] the metes and bounds of the copyhold; and if the exact boundaries could not be found, then to set out so much of the freehold in lieu of the copyhold, as might be an equivalent; and all parties should have been directed to produce their deeds and writings, in order to find out the truth; and the rather, for that in this case it ought to be presumed, that at least fifteen acres and three roods of the lands formerly in Mayhew's possession were copyhold and not freehold; and to put it upon those deriving under him, to shew that they were ancient freehold. Lastly, that refusing the appellant a commission was a precedent of dangerous consequence, and affected the Lords of all the manors in England; inasmuch as where the boundaries of copyhold lands were so ancient or obscure as not to be without great difficulty ascertained, the Lords of manors would, in many cases, inevitably lose their inheritance.

On the part of the respondent Barker it was contended (P. Yorke, T. Brown), that neither he or any of his ancestors, or their tenants, appeared to have been ever in possession of any lands lying within this manor, called by the name of Freebornes, or Gelyans; or any other of the copyhold lands described in the surrender to John Barker, except the four acres called Shraggs. Nor did it appear, that James Mayhew was ever seised of any lands either freehold or copyhold, called by the name of Mysess; or that this respondent, or any of his ancestors, ever made any exchange with any of the other respondents, or any other person or persons, of lands lying within the said manor, or ever altered the ancient boundaries thereof. That it was proved in the cause, that all the lands which the respondent Barker, or any of his ancestors were possessed of in the manor, contained no more than sixteen acres in the whole, whereof only four acres, called Shraggs, were copyhold; the other twelve acres, called Mysess, being freehold: but according to the surrender made to Barker, the copyhold ought to contain fifteen acres and three roods. That the respondent Barker was always ready to be admitted to the remaining eleven acres and three roods, of copyhold land, and to pay such fine as should be reasonably set for the same, together with all arrears of quit-rents, provided the land was so set out and described, as that he might be able to recover possession thereof; he was also willing that a commission should be awarded for this purpose, and had so offered in his answer to the appellant's bill. The respondent Barker therefore hoped, that if the House should be of opinion, that a commission ought to be awarded to set out these copyhold lands, it should be at the appellant's expence, being for his benefit and advantage; and that as this respondent had been guilty of no concealment or other default, he should have his costs.

And on behalf of the other respondents it was argued (C. Robins), that the several lands which they were in possession of, were mortgaged or conveyed to the several persons under whom they respectively claimed, not as copyhold but as freehold lands, long [664] before the pretended surrender from Mayhew to Barker, and the same had been ever since held and enjoyed accordingly. That no fraud or misbehaviour appeared, or was proved against these respondents, or any of them, or those under whom they respectively claimed, either in concealing copyhold lands, or in removing, defacing, or destroying ancient boundaries or landmarks; consequently, the appellant had no foundation in a Court of Equity, for the relief prayed against them by his bill; and the rather, because they were purchasers of

their said lands, as freehold lands, for a valuable consideration, and without notice that any copyhold lands were intermixed therewith. That the appellant had already had a commission for the examination of witnesses, to prove and support the pretended equity of his bill; and under that commission he might have examined to the several matters for which he would now have another commission, and so put the respondents to double expence of the like nature for one and the same thing. That the trial at law directed by the decree, was agreeable to the constant course and practice of the Court in like cases, and being to bind and determine the right and inheritance of the lands in question, was the undoubted birthright of the subjects of this realm; who ought not to be bound or affected in their rights or inheritances, without a trial by a jury of their own countrymen. That the same evidence might, by order, be produced and laid before a jury, as could be had upon an enquiry before Commissioners; and the jury being upon oath, which the Commissioners were not, it would undoubtedly determine them to make the more strict and impartial inquiry concerning the matters submitted to their decision. And therefore it was hoped, that the decree would appear just, and be affirmed.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the Court of Exchequer should award a commission, directed to such persons as they should think proper, to inquire whether all, or any, and which of the lands contained in the surrender made by James Mayhew, on the 14th of October 1703, were in the possession of all, or any, and which of the respondents; and whether all or any of the freehold lands whereof the said James Mayhew was seised, were in the possession of all, or any, and which of the respondents; and that the Court should direct, that the respondents should have liberty to inspect the Court rolls, and to take copies as they should think fit, at their expence; and that the respondents should, upon oath, within a convenient time to be appointed by the said Court of Exchequer, bring before and leave with the remembrancer of that Court, all such deeds, copies, writings, and other evidences, relating to the matters in question, as were in their respective custodies or power; and that the appellant should have liberty to inspect them, and take copies at his expence; and that such of the said deeds, copies, writings, evidences, and Court rolls, as either side should require, within [665] ten days before the execution of the commission, should be produced at the execution of the said commission; and upon the return thereof, the Court of Exchequer were to make such further order thereon as should be just.\* (Jour. vol. 22. p. 630.)

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CASE 11.—ATTORNEY-GENERAL and others,—*Appellants*; JOHN WALL and others,—*Respondents* [4th February 1760].

[On the hearing of an information brought for the recovery of certain mine duties, the Court of Chancery proposed to the Attorney-General, an Issue to try whether the Crown, or its lessee, was by custom entitled to those duties; but the Issue being refused, the information was dismissed. On an appeal, the decree was reversed; and proper Issues to try the custom were directed.]

In the hundred of High Peak, in the county of Derby, there is a district called the King's Field, or King's Fee, in which all the King's subjects have immemorially had a right to sink and search for mines, or veins of lead ore, (churches, churchyards, houses, gardens, orchards, and highways excepted,) and to get the ore out of such mines for their own use and benefit; paying to his Majesty and his successors, his and their lessees and farmers, certain duties called *lot* and *cope*. The *lot* is

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\* A commission accordingly issued, and the return of it appears in Bunbury 251. But on searching the Exchequer Chamber minute-book, No. 7. it appears that this return was, on the 28th of October 1728, quashed for uncertainty, and a new commission ordered. I do not however find any subsequent proceedings in the cause.



every thirteenth dish of ore, dressed and made merchantable. The *cope* is four pence for every lot of ore, which load weighs about 500 pounds, and contains nine dishes. The dish is a wooden measure about twenty-one inches long, six inches and a half broad, and four inches deep; in which all the ore, when dressed and separated from the dirt and base minerals which adhere to it when it first comes out of the mine, has immemorially been measured. And the right and interest both of the King, his lessees and farmers, and of the miners within all parts of this district, have immemorially been governed by the same laws, usages, and customs.

King Edward I. by a commission, dated the 28th of April, in the 16th year of his reign, directed to the then sheriff of the county of Derby, signified to him, that he had assigned Reginald of the Lye, and William of Meynill, to inquire, by the oaths of good and lawful men of the county, of the liberties which the King's miners then claimed to have in those parts, and which they had hitherto used to have, and by what means, and how, and from what time, and by what warrant; and commanded the sheriff, that at a certain day and place which the said Reginald [666] and William should appoint, he should cause to come before them so many and such good and lawful men of his bailiwick, by which the truth of the premises might be best known.

In obedience to this commission, an inquisition was taken at Ashborne in the said county, upon Saturday next after the Holy Trinity in the same year, before the said Reginald and William, by the oaths of twelve persons therein named, in which inquisition it was found, amongst other things, as follows: viz. *Et de minera lucrata in hujusmodi opere in feodo domini regis, dominus Rex habebit pro dominio suo tertiam decimum discum qui dicitur le Loth, his hactenus usi sunt pro his autem dominus Rex inveniet mineratoribus liberum ingressum et egressum ad mineram suam portandum et cariandam usque ad regiam viam.*

His Majesty and his predecessors have immemorially appointed an officer in the district of the King's Field in High Peak, called a Barmaster, and such barmaster has from time to time appointed deputy barmasters in particular places within his district, whose office it is to keep the King's dish, and attend the measuring the ore, to keep an account thereof for the King, his lessee and farmer, and the proprietors of the mines and their agents, and to collect the aforesaid duties.

The ore comes out of the mine intermixed with various substances or base minerals, called *Kaulk*, *Keval*, *Spar*, etc. which produce no profit, and are necessary to be separated from the ore in a course of dressing, before it can be made merchantable and fit to be measured by the King's dish. The ore is distinguished by various names in the process of dressing. When it first comes out of the mine it is called *fell* or *boose*; the purer, richer, and cleaner part of it is dressed by an instrument called a *chipping-hammer*, which chips and separates the base minerals from it without the use of water, and makes it sizeable for the dish, and such ore when so dressed is called *bing*, or *round* ore. That part of the ore which is thinner and more intermixed with base minerals is necessary to be broke smaller, before those base minerals can be separated from it, which is done by a flat iron instrument called a *bucket*; and in order to separate the dirt and base minerals from it, it is put into riddles and sieves, as necessary and usual instruments, and by the working thereof in water, the dirt and base minerals are separated from the ore, and the ore which remains when so dressed is called *peazy* ore. That part of the ore which, from the smallness of its particles, goes through the sieve in dressing the *peazy* ore, is afterwards washed again in other sieves, and the dirt and base minerals separated from it, and it is then called *smytham* or *offal*. And what remains in the sludge and dirt, after the *smytham* is taken away, consists of the minutest particles of ore which has been pulverized in dressing the other kinds, and by modern arts and inventions is capable of being smelted into lead, by being put into a furnace with the sand and small particles of dirt from which it cannot be separated, and this is called *belland*.

[667] The Duke of Devonshire and his ancestors have, for about seventy years, been entitled to the *lot* and *cope*, and all other profits arising from the lead mines in this district, and to the office of barmaster within the same, by virtue of several leases from his Majesty and his predecessors, of which many years are yet to come.

In the district of High Peak there are several towns, vills, hamlets, or places,

called Winster, Taddington, Monyash, Chelmorton, Flagg, Prescliff, Upper Haddon, Castleton, Bradwall, Great Hucklow, Little Hucklow, and Hope, which are all governed by the same mineral laws, usages, and customs.

The appellant and his ancestors have let to farm the mineral duties arising within the vills or places called Castleton, Bradwall, Great Hucklow, Little Hucklow, and Hope, lying on the north side of a certain river called the Wye, for all or much the greatest part of the time which they have held and enjoyed the same under such leases; and have during that time kept in their own hands, and by their agents received, the mineral duties arising within Winster, and the other towns and places.

The thirteenth dish of all the several species and kinds of ore has constantly been collected and received, as the duty of *lot*, by the several persons who have held and enjoyed the mineral duties in the vills or places let to farm by the appellant and his ancestors; but the appellant and his ancestors, to encourage miners and mineral pursuits, have frequently remitted part of the duty called the *lot*, within the town and place called Winster, and the other towns, vills, and places where they have kept the mineral duties in their own hands, and have not strictly taken the thirteenth dish of the ore called *smytham* or *offal*, the same being formerly of little estimation, and gained after the *bing* and *peasy* ore had been made, by an expensive dressing; but the deputy barmasters have in many instances, when they have thought that indulgence abused, taken *lot* of the *smytham* or *offal*, as well as of the other ore in the liberty of Winster, and in the other vills and liberties where the mineral duties have been kept in hand.

In 1744, the respondents, together with the Duke of Devonshire the appellant's late father, became possessed of a lead mine called Portaway mine, in the liberty of Winster, which they worked and enjoyed, and got thereout upwards of 31,859 loads of pure and valuable lead ore, which was sold for £63,718 and upwards, and ought to have produced to the appellant and his late father, £4901 7s. 8d. as the value of a thirteenth part thereof, for their duty of *lot*; but the respondents, under colour of the indulgence shewed by the appellant and his ancestors in remitting the *lot* of *smytham* or *offal* ore, and with intent to defeat the right of his Majesty to the thirteenth dish of ore for the duty of *lot*, did, in the course of dressing the ore got at the said mine, from the said year 1744 to November 1750, the time of filing the information and bill after mentioned, unnecessarily, wilfully, and designedly, break and beat down into what they have called *smytham* or [668] *offal* ore and *belland*, nine parts in ten; and upon a medium, from the year 1744 to the year 1753, five parts in six of all the ore got at the said mine: so that instead of the respondents paying one thirteenth part thereof for the duty of *lot*, they did not pay for the first six years above one dish of ore in 130; and upon a medium, during all the time aforesaid, not more than one 78th part of the whole. And, to complete their fraud, they took one George Tissington, who had been appointed by the appellant's late father deputy barmaster of the liberty of Winster, and whose duty it was to have prevented such attempts, into their service, and employed him as their agent to superintend the management of other mines belonging to them, and allowed him considerable salaries for such his employments; and introduced a new method at Portaway mine, for the working miners to allow Tissington, as deputy barmaster, 3s. for every twenty loads of ore measured at the mine; and compelled their workmen to pay him that sum, which was never required by or paid to any former deputy barmaster.

The respondents also, in order to bias the common working miners, whom they made their instruments of the fraud, agreed with them to get and dress the ore at the mine at a certain price *per* load, and made it part of such agreement, that they should not be paid any thing for getting and dressing that part of the ore which was to be taken as the *lot*, and by such means the respondents made it greatly to the advantage of the working miners to break down all the ore into what they called *smytham* or *offal*, the common price which the respondents paid for getting and dressing the ore being about 15s. *per* load on a medium, and the expence of breaking down *bing* or *peasy* ore into *smytham* or *offal*, not above four pence or six pence *per* load, and the ore which was made into *smytham* or *offal* at the mine since the year 1744, has been sold at the same price as the *bing* and *peasy* ore pro-

duced from the mine. And in further fraud of the duty of *lot*, the respondents, by their workmen and servants at the mine, frequently broke down *bing* and *peazy* ore after it had been dressed and made merchantable, into what they called and measured as *smytham* or *offal* ore, and were great gainers thereby; and to protect their fraudulent designs from being discovered, the respondents frequently gave directions to their workmen to conceal the ore, when the Duke's agents came to inspect the mine.

The late Duke, in the year 1750, finding the indulgence by remission of the duty of *lot* for *smytham* or *offal* ore so grossly abused by these practices at the mine, and that instead of receiving one dish of ore in thirteen for his duty of *lot*, he did not receive above one dish in one hundred and thirty, thought it absolutely necessary to maintain and support the undoubted right which his Majesty, and his Grace as lessee, had to the thirteenth dish of all ore dressed and made merchantable, and to seek a satisfaction for the same; and accordingly, in Michaelmas Term 1750, an information and bill, by his Majesty's then Attorney-General and the Duke, was exhibited in the Court of Chancery against the [669] respondents and the said George Tissington, which was afterwards several times amended; insisting upon and claiming a right to every thirteenth dish or measure of all lead ore got within the district called the King's Field in High Peak, as due, payable, and of right belonging to his Majesty, his lessees or farmers, by the miners, ready dressed, cleansed, and made merchantable; and that no part of the ore was of right exempt from payment of that duty: and thereby (amongst other things) charged the respondents and the said George Tissington with many acts of fraud and imposition, in beating down and dressing the ore, and with introducing riddles as gauges or standards to ascertain what the respondents called *smytham* or *offal*, and varying and enlarging the holes thereof; and particularly, that the said George Tissington, in one of his books of account, entered the following memorandum, in large characters, with his own hand, viz. "That in the years 1747 and 1748, Winstar liberty produced eleven loads of *smytham*, for one load of ore that paid duty; and that riddles were altered at Christmas 1748, to sixteen holes in six inches, and to remain as a standard." The information and bill therefore prayed an account of all the ore got and raised at the mine since the year 1744; and that the Duke might be paid what should appear due to him for the duty called the *lot*, and that the same might be paid for the future; and that his Majesty's right to the inheritance of the thirteenth dish or measure of all ore got out of the mine, and his Grace's interest therein during the term of his lease, might be established.

The respondents put in several answers to this original and amended information and bill, and thereby alleged, that within the hundred of High Peak there were many manors, liberties, or districts, called the King's Field, wherein all the King's subjects had been used and accustomed, and for time immemorial had and ought to have, a right to seek and search for mines or veins of lead ore in all manner of grounds of whose inheritance soever, and to get the lead ore out of such mines for their own use and benefit, conforming to the several customs of the respective liberties in which such mines lie; and paying to his Majesty and his predecessors, or his or their lessees, such customary payments or duties as had been paid, according to the several customs had and used in the different liberties within the King's Field, and particularly throughout the liberty of Winstar, the thirteenth dish of all lead ore called *bing* or *round* ore, and *peazy* ore, for the *lot*. That the dish used in the liberty of Winstar, was a certain measure twenty-one inches and one quarter long, four inches deep, and six inches and one quarter wide, which had been immemorially used as a common and customary measure for measuring ore, and paying the duty of *lot*, and that nine dishes made a load of ore. They admitted, that his Majesty and his predecessors, kings of England, had immemorially a right to appoint, and had appointed officers over the lead mines in the King's Field, called barmasters; and that the barmasters, upon entering into such office, did or [670] ought to take an oath to do justice between the King and the Lord of the field, and between miner and miner; and that it was the duty of each barmaster, either by himself or some other person authorized by him, to attend the measuring of ore at every mine within his district, to see the ore, when fairly dressed and made merchantable, measured out by the King's dish. They

also admitted, that the different sorts of ore got within the liberty of Winster, were known by the names of *bing* or *round* ore, *peazy* ore, *smytham* and *belland*; and said, that the thirteenth dish of *bing* or *round* ore, and *peazy* ore, was due and payable for the duty of *lot*, but that no duty was payable for *smytham* and *belland*. That the *bing* or *round* ore was composed of the richest parts of the ore, and was made merchantable without the use of any other implement than the *chipping hammer*; and that the *peazy* ore, *smytham* and *belland*, were composed of the chippings, waste or refuse of the *bing* or *round* ore, and out of such poor ore, as, from its mixture with earth and minerals, was oftentimes obliged to be cleansed with water to separate it from the earth and rubbish, and always of necessity beat into small pieces and washed, the smallest part of it generally twice over by the use of a sieve, in a vessel filled with water, that being the only method known to the respondents for separating the dirt and rubbish from the ore last mentioned; of which one part went through the sieve, and that which remained in it was put into a riddle, through which all that passed was added to that which went through the sieve, and was called *smytham*; and the other part, being too large to pass through the riddle, was laid by and called *peazy* ore, and was subject to the duty of *lot*. That *belland* was the smallest fort of *smytham*, and arose from such small parts or particles as accidentally or unavoidably, in getting the ore in the mine, and in dressing and cleansing it, fell amongst the dirt and rubbish, and became so intermixed therewith, that it had been usually thrown away as useless, and not capable of being cleansed or separated from the dirt to profit; but of late years, by washing and cleansing after a new method, had, at the expence of about half its value, been rendered profitable to the miner. They also stated, that William Roberts, the appellant's barmaster at Winster, delivered riddles at different mines in the liberty, particularly one at Burning Drake mine, as a riddle of a customary size, and which was left with William Goodwin overseer of that mine, who was also overseer at Portaway; which riddle was of the customary size, and they had marked it *W.G.* and had left the same with their clerk in court, the holes or meshes whereof were of the ordinary common size immemorially used within the liberty of Winster. They insisted, that the said riddle had been immemorially used, not only throughout the liberty of Winster, but throughout all the liberties, parcel of the King's Field, south of the river Wye, within the hundred of High Peak, as a reasonable standard, time out of mind agreed upon and observed between the miners and the Crown and its lessees; and that the holes or meshes of such riddles were of sizes [671] or dimensions well known amongst miners, and had been constantly and immemorially claimed and insisted upon by the miners within the liberty of Winster, as a matter of right, to ascertain and determine what ore should be liable to the duty of *lot*, and had been used for no other purpose whatsoever. That all miners within the King's Field had immemorially taken and pursued (as they had a right to do) what methods they judged most proper for getting, cleansing, dressing, and making merchantable the lead ore got within any of the mines within the King's Field; and that there was no law, usage, or custom to compel or direct the miners in what manner or by what means they should cleanse, dress, or manage the same. That it had been customary time immemorial for the miners of Winster to riddle their ore, without giving notice to the barmaster or his deputy; and that the same had been always done, and that it was not incumbent on the miners to give any such notice, because the ore was publicly riddled, and the barmaster or his deputy, or the agents of the King and his lessees, might attend riddling the same if they thought fit. They admitted, that the duty of *lot*, from the year 1744 to the 25th of June 1750, had only amounted to *one thirteenth of a ninth or tenth part of all the ore got at the mine*; and that a thirteenth part of such ninth or tenth part had been paid for the duty of *lot* to the relator, or his barmaster, from the year 1746 inclusive to the 25th of June 1750. And they also admitted, that the duty of *lot* had only amounted one year with another to *one thirteenth of one eighth or ninth of all ore got at the mine*; and also, that to the 25th of June 1750, each sort of ore, except *belland*, had been sold by them at the same price. They likewise admitted, that the payment of the duty of *lot* might be eluded or avoided by designedly breaking the ore into smaller pieces than was necessary to make the same merchantable; and that it might be beat into such small pieces, as to pass through riddles

with holes of very small size, and made capable of being pulverized; but that it was not for the miners advantage so to break it, because they would be losers thereby.

In September 1753, the veins in Portaway mine became so divided, that the late Duke, as farmer of the mineral duties, and by the mineral laws and customs, became entitled to the veins for a certain extent, and had a right to enter upon and work the same; but on the 3d of December following, it was agreed between him and the proprietors and partners of the mine, that the same should be set by the respondents overseers to their own workmen, for one *cope* or bargain of seven weeks; and that the Duke should be at liberty by his agents to inspect the working of it, and should employ his own labourers and workmen in dressing and making the ore merchantable; and that the riddle which the respondents had before used, and insisted upon as a gage or standard for determining what ore should and what should not be liable to the duty of *lot*, should be used on that occasion, but without prejudice to either party.

[672] Accordingly, on the same day, the veins were set on *cope* for seven weeks, and the ore was got and dressed pursuant to the agreement, and it amounted during that time, after the thirteenth part for the duty of *lot* was deducted, to 549 loads and one dish of *bing* ore, 165 loads and three dishes of *peazy* ore, 440 loads and two dishes of *smytham*, and 62 loads and two dishes of *belland*; so that although the ore was separated according to the riddle contended for by the respondents, near two thirds thereof was made into *bing* and *peazy* ore; and if the weather had not been frosty and unfavourable for dressing ore, a much larger proportion might have been made of those sorts.

In July 1754, a supplemental information and bill was exhibited by his Majesty's Attorney-General and the late Duke, setting forth the several matters last mentioned; to which the respondents afterwards put in their answers, and admitted these facts; but insisted that the mine was richer and the ore stronger, during the experimental *cope*, than it had been at any time before.

To prevent any inconvenience arising from a stop being put to working the mine while the disputes were depending between the parties, it was agreed, on the 24th of July 1750, that the value of the thirteenth dish of all ore got at the mine should be paid into the Bank every six months, in the name of the Accountant-General of the Court of Chancery, to be placed to the credit of the cause, and subject to further order; and accordingly several sums of money, under different orders of the Court, were paid into the Bank by the respondents, (without prejudice,) and afterwards laid out in the purchase of Bank £3 per cent. annuities, subject to further order; which at length amounted to £3705 15s. 6d. Bank £3 per cent. annuities, and £513 7s. 1d. cash.

Pending these several proceedings, the suit became abated by the deaths of the late Duke and some other of the parties; but being duly revived, the cause was at issue, and several witnesses were examined on both sides.

On the 29th and 31st of January, and on the 3d, 5th, 6th, 7th, 8th, 9th, 10th, and 19th of February 1759, the cause came on to be heard before the Lord Keeper Henley; on one of which days his Lordship was pleased to propose to the appellant, his Majesty's Attorney-General on behalf of the Crown, a trial at law, on the following issue; whether the Crown, its lessees or farmers, had time out of mind taken the thirteenth dish of all ore raised and got at the mine; which the said appellant on behalf of the Crown refused to accept, it being apprehended that such issue was wholly immaterial, as the appellants had, throughout the proceedings in the cause, admitted that the miners had been frequently indulged with taking or retaining to their own use the *smytham* or *offal* ore. And therefore, on the said 19th of February, his Lordship ordered, that the information should stand dismissed, as against George Tislington, without costs; and that the Attorney-General declining to try the right of the Crown at law, so much of the information as sought to establish such claim, should stand dismissed without [673] costs: and it was referred to the Master to take an account of what was due to the appellant the Duke of Devonshire for all *bing* and *peazy* ore which had been raised and cleansed since the first working of the said Portaway mine in the year 1744; and it was ordered, that the Master should inquire whether any rough ore, fit and proper, according to the usual and fair course of working the mine, to be made into *bing*

or *peazy* ore, had been converted into *smytham*; and if the Master should find any such ore to have been unfairly worked into *smytham*, it was further ordered, that he should make an allowance to the appellant the Duke of Devonshire, for one thirteenth part thereof: and the consideration of costs, and of all further directions, were reserved until after the Master should have made his report.

The appellants apprehending this decree to be prejudicial to the rights and interests of the Crown, as well as the Duke its lessee, brought the present appeal: and on their behalf it was argued (C. Pratt, C. Yorke), that his Majesty's royal predecessors being seised as lords and owners of the soil of the district called the King's Field or King's Fee, in the hundred of High Peak, had of common right all the minerals within it; and must be presumed to have granted the privilege of searching for and getting the minerals, under certain regulations, and on payment of certain mineral duties. That the commencement of this privilege, from its great antiquity, was not capable of being actually proved; but the evidence arising from the inquisition in the reign of Edward I. which found that his then Majesty was entitled to the thirteenth dish of the ore gained at the mines, ought to have been sufficient to establish and ascertain his Majesty's right, so far at least as to have put the respondents upon shewing a proper exemption of what they called *smytham* or *offal* ore from the payment of the duty of *lot*, the inquisition produced being a record of great authority, and the best evidence which the nature of the case, after such a length of time, would possibly admit. That every custom which tends to abridge or restrain rights flowing from the dominion of the soil, or due at common law, ought to be certain, free from fraud, and to have had a reasonable commencement; but the custom set up by the respondents to exempt *smytham* or *offal* ore from the payment of the duty of *lot*, and which by this decree stood unimpeached, wanted every one of these requisites, and was therefore void in law: for it was not only uncertain, as it did not precisely define and set forth what *smytham* or *offal* ore is, nor what certain quantities or proportions of the ore ought to be exempt from that duty; but it was unreasonable, and productive of the grossest fraud, as it put it in the power of the miner (whose interest it was) to annihilate the duty itself, and totally subvert the right to the thing out of which the exemption itself must be supposed to have sprung: the respondents claiming by their answer a customary method of dressing their ore as they please, by which they might with the greatest facility, at the expence of about one eighth part of the value, break down every part of it into what [674] they call *smytham* or *offal* ore, which was of equal value with the *bing* and *peazy* ore. That instead of proposing an issue to the Attorney-General, to try whether the Crown, its lessees or farmers, had taken time out of mind the thirteenth dish of all the ore raised and got at the mine, the decree ought either to have confirmed the King's right to the reservation claimed, which was part of the ancient royal dominion over the soil and minerals within it, ascertained and established by the inquisition; or to have put an issue upon the respondents, to try the validity of the customary exemption alleged and insisted on by their answer.

But it was objected, that it did not appear by the inquisition, that the duty of *lot* ought to be the thirteenth dish of ore dressed and made merchantable, but of rough ore as it comes out of the mine. To this it was answered, that the true construction of the inquisition must be the thirteenth dish of ore dressed and made merchantable, the words *minera lucrata* therein mentioned importing the same. Besides, the dish immemorially used for measuring the ore, as admitted by the respondent's answer, from the size and dimensions of it, is not adapted nor can be made use of to measure rough ore as it comes out of the mine, the ore in that state consisting of large pieces, frequently intermixed with base minerals, and not capable of being contained in this dish, which has only been used for measuring ore dressed and made merchantable: and the respondents were so conscious of that usage and construction, that they did not by their answer insist upon any other.

It was also objected, that *smytham* or *offal* ore within this district had by custom for time immemorial been exempt from the duty of *lot*: and that *smytham* was well known and distinguished from *bing* and *peazy* ore, by the use of a riddle with holes and meshes of a known customary size. But to this it was answered, that the custom so alleged, if true in fact, was void in law for the reasons before mentioned. That in many parts of the district, where the Duke and his ancestors had let the

mineral duties to under-tenants, there was not the least colour or pretence for the custom; but the duty of *lot* was taken indiscriminately for all sorts of ore, as had been proved, and as the respondents themselves had admitted by their answer. That of common right, and by the inquisition, his Majesty and his predecessors were and had been entitled to the same mineral duties in every part of the district, and had always granted them to their lessees in one lease and under one entire rent, without any distinction whatsoever. That in those parts of the district where the mineral duties had been kept in hand, and received by the Duke and his ancestors, indulgence had been shewn to the miners; and that part of the ore which, from its poverty and the difficulty and expence of separating it from the base minerals in the course of dressing, obtained the name of *smytham* or *offal*, had been frequently excused from the payment of the duty of *lot*, in order to encourage mineral experiments. That riddles having been used as necessary instru-[676]-ments in the cleansing and dressing of ore, as well at times where duty had been paid for the whole, as where an exemption for *smytham* had been claimed, the respondents, the better to cover their frauds in the abuse of the indulgence, had attempted to introduce riddles as gages or standards to determine what ore should be liable to the duty of *lot*, and under that subterfuge, instead of confining the *smytham* ore to what it formerly was, and what they themselves had called it in their answer, (*offal*.) had extended it to all ore which, by dressing as they pleased, they could make small enough to pass through such riddles; and when they found the holes thereof too small for their purpose, they enlarged them at pleasure, but never fixed them at any certain size. So that it was totally uncertain what that usual customary size was, so much urged and so strongly insisted on by the respondents answers. No determinate dimensions were proved or even alleged, and the only riddle produced by the respondents in the cause, as the true standard, was one obtained by contrivance from Roberts the barmaster, three weeks after he was appointed to that office, and after the present disputes were begun, and a short time before the commencement of the suit; and this riddle so obtained was the only one that had been shewn to the respondents witnesses, as the true unerring instrument to decide between the lord and the miner. But after all, if the size of the riddle could be better ascertained than it was, it could not from the nature of the thing be an equal gage to distinguish *smytham* from *bing* or *peazy* ore; because the miner can when he pleases, and with the greatest ease, break down the larger ore into pieces small enough to pass through any riddle whatsoever; and this fraud was proved to have been in fact committed; for when the workmen had made more *bing* and *peazy* ore than the respondents thought well of, though by a regular and proper course of dressing, they caused the *bing* and *peazy* ore to be beat down into *smytham*. That the respondents had been so successful in their attempt of pulverizing *smytham*, that they had made, as appeared by their answer, *nine parts in ten* of the ore got at the mine into what they called *smytham*, which was so far from the nature of *offal*, that it was sold at the same price as the *bing* and *peazy* ore, and thereby eluded the payment of the *lot* for those nine parts; and consequently, instead of paying one dish in thirteen, would only pay one dish in 130 for such duty; although, as a farther proof of the fraud, it appeared that the ore got at the mine, and dressed and separated by the riddle, during the time that the late Duke had the working thereof, produced two thirds of *bing* and *peazy* ore. That the decree had directed an account to be taken, without any rule prescribed in the manner of taking it; the uncertain arbitrary meaning of the word *smytham* not being defined upon the result of the evidence, by any declaration inserted in the decree, nor any gage established as a measure for ascertaining those species of ore out of which the duty in question was to be paid. But supposing there had been any ground to have determined that *smytham* [676] ore ought to be free from the duty of *lot*, as not being dependent upon the will and pleasure of the miner, and more easily definable than it is; and supposing also that the riddle insisted on by the respondents, was the certain gage or standard to distinguish it from the other ore in the course of dressing; yet, as the respondents had been guilty of such gross fraud in dressing the ore to avoid the duty of *lot*, by intermixing and confounding one kind with another, and thereby rendered it impossible for the Duke to prove before the Master, who was directed by the decree to take the account, what particular damage he had sustained; the decree ought to have directed an account to be taken, and the thirteenth dish to have

been paid by the respondents for all the ore got, dressed, and made merchantable at the mine.

On the other side it was insisted (J. Hewitt, R. Wilbraham), that the claim set up by the information and bill of the duty of *lot* for *all* ore, being admitted not to be founded on common right, but on custom only, and the proper evidence of a customary right being usage; and in the present case, the usage being fully proved by the witnesses on both sides, not to extend to all ore, but to the assortments of *bing* and *peazy* ore only, and not to *smytham* or *belland*, there was no foundation for such claim. But if there had been evidence of usage in support of the claim, yet as there was the clearest evidence that the custom did not extend to all sorts of ore; and as claims to rights of inheritance, especially those that are founded on custom, depend on facts, and are properly triable by a jury; and as Courts of Equity never establish customary rights, when controverted, without a trial at law; and as the Attorney-General on behalf of the Crown was pleased to decline such trial; the Court of Chancery had no power to make a decree to establish the customary right insisted on by the appellants, or to decree any account thereon.

As to the inquisition so much relied upon as evidence of the right of the Crown, it by no means proved such right: for, 1st, it appears to have been taken by two persons named, who seem to have been appointed by the Crown by some commission, but no such commission appeared; nor did it appear that these two persons were officers of the mine, or of the Crown, except *pro hac vice*; nor did it appear that any evidence was given thereon, or that any defence or opposition was made thereto; so that the whole proceeding seemed questionable in respect of its authority, and was indisputably no more than an inquiry *ex parte*. 2d, It was very imperfect and defective, not having found the custom of mining, nor the *cope* or forfeitures, which are very considerable, nor *prim gaps*, or several other particulars of the customs which now appeared to subsist; and therefore the respondents might, with equal reason, insist on being discharged from *cope* and other claims of the Crown not found, as the Crown might insist on *lot* of all ore, contrary to established and avowed usage. 3d, The finding in this inquisition did not correspond with the claim of *lot* upon all ore made merchantable, as insisted on by the appellants; [677] nor could it deserve any credit if it had found that all ore generally was *lotable*, in regard the full tenth part of *bing* and *peazy* ore is first set out for tithe, and has never been *lotable* on the south side of the river Wye. And, 4th, The inquisition was not relative either to the *High* or *Low Peak* particularly, which it was admitted by the appellants were different and distinct districts, and governed by different and distinct laws and customs; but to the *Peak* in general. But if this inquisition was less liable to objection, yet it would at most be matter of evidence only; and, as all other ancient evidence in general, liable to be explained and encountered by other evidence of usage, which in the present case totally contradicted and subverted it.

The appellants contended by the information and bill, that if *smytham* was exempt from the duty of *lot*, the miners might beat down all the ore to *smytham*, and thereby totally defeat the Crown of the duty; and that therefore such exemption was inconsistent with and repugnant to the custom, and consequently could not exist: but it appeared from the pleadings and proofs, that *smytham* is an assortment of ore, clearly and certainly known and distinguishable by miners; and that the size of the meshes of the riddles which have been used for separating the same from *peazy* ore within the liberty of Winster, was equally certain and known; and that the respondents insisted upon an exemption of such *smytham* only as was fairly made in the usual and ordinary course and manner of making the ore merchantable. And it was worthy observation, that though there were and had been several hundred mines within the liberties on the south side of the river Wye, and many thousands of men and women employed therein in cleansing the ore and making the same merchantable, yet there was no evidence in the cause, that any complaints had ever been made of any frauds committed in this business, till the present controversy began. That the fraud charged against the respondents, in unfairly working the mine in question, and unduly breaking the *bing* and *peazy* ore into *smytham* and *belland*, in order to avoid the duty of *lot*, implied what was contended for by the respondents, viz. that *smytham* or *offal* and *belland* were in general not liable to the duty of *lot*, and was absolutely inconsistent with the general



right set up by the appellants; but as the particular instances of the pretended frauds were not pointed out in the information and bill, it was impossible for the respondents to exculpate themselves so fully as they hoped to do before the Master, upon the inquiry directed by the decree. That the adventuring in mines is of vast public utility, by employing a multitude of useful hands, and tends greatly to advance the commerce of the kingdom; but such adventures are attended with a very great and certain expence, yet very uncertain as to the profit, and upon an average are attended with loss; consequently, if the custom contended for by the appellants should be established, many miners would be deterred from such hazardous adventures. That when the mine in question was granted to the respondent Wall by the [678] appellant's barmaster, to be enjoyed according to the mineral customs within the liberty of Winster, and when Mr. Wall granted out the several shares to his partners, it was well known to them that, for time immemorial, the customary duty of *lot* had been payable for *bing* and *peazy* ore only, and not for *smytham* or *offal* and *belland*: the same was likewise well known to the lessees of the Crown, when they obtained their leases; it was therefore apprehended, that the respondents ought to enjoy the mine accordingly, as they became adventurers upon the faith and credit of such usage; and if they should be made subject to this *new* claim of the appellants, there would be an end of all dealings in mines. That there were, and for time immemorial had been, many hundred different mines in working on the south side of the river Wye, none of which ever paid or had been called upon to pay *lot* for *smytham* or *offal* or *belland*, and therefore the produce thereof must have been distributed among the respective adventurers, and applied and disposed of in such manner as their several occasions required; but if the appellants should succeed in their present claim, such adventurers and their respective representatives would be liable to account for and pay this duty of *lot* for such *smytham*, which would expose some thousands of families to total ruin and destruction. It was therefore hoped that the decree would be affirmed, and the appeal dismissed with exemplary costs.

AFTER hearing counsel on this appeal for six several days, it was ORDERED and ADJUDGED, that so much of the decree as was complained of by the appeal, should be reversed: and it was further ORDERED that the parties should proceed to a trial at law, at the bar of the Court of King's Bench, by a special jury of the county of Middlesex, at such time as that Court should appoint, on the following issues, viz. 1st, "What part of the lead ore got, dressed, and made merchantable in Winster, in the district called the King's Field, or the King's Fee, within the hundred of High Peak in the county of Derby, is and ought to be deemed *smytham* or *offal*, according to custom used for time immemorial within the said district?" 2d, "Whether by custom used for time immemorial within the said district called the King's Field, or the King's Fee, that part of the lead ore got, dressed, and made merchantable in Winster aforesaid, which is and ought to be deemed *smytham* or *offal*, hath been and of right ought to be exempted from answering to the King, his farmers or lessees, the thirteenth dish thereof for the duty of *lot*?" And that the respondents should be plaintiffs in the said issues, and the appellants, his Majesty's Attorney-General for the King, and the Duke of Devonshire, be defendants therein; and that the said issues should be settled by a Master of the Court of Chancery, if the parties differed about the same: and if, upon such trial, the jury should find any right different from what should be particularly described in the pleadings, the same should be endorsed on the record; and that all court-rolls, court-books, sur-[679]veys, books of accounts, papers, and writings, in the custody or power of the appellants or respondents, or any of them, relating to the matters in question, should be produced before the said Master upon oath, or be ascertained upon the oath of such persons, and be inspected in such manner, and at such time or times before the said trial, as the said Court of Chancery should direct; and that any of the parties should be at liberty to take copies thereof, or of such parts thereof as they should think fit, at their own expence; and that such of them as either side should give notice of, should be produced at the said trial; and that the consideration of the costs of this suit, and of all further directions, should be reserved until after the said trial should be had: and it was further ORDERED, that the said Court of Chancery should give all necessary and proper directions for carrying this judg-

ment into execution; and that any of the parties should be at liberty to apply to the said Court as there should be occasion.\* (Jour. vol. 29. p. 577.)

CASE 12.—TREVOR BORRETT and another,—*Appellants*; JOHN GOODERE,—*Respondent* [16th April 1769].

[In taking an account before the Master, one of the parties is charged with £4000 as the value of a note which he had wilfully destroyed. The Master by his report allows this charge; and upon an exception being taken to the report for so doing, the Court first allowed, and afterwards over-ruled the exception. But upon an appeal, an issue was directed to try the fact of spoliation, and what damage was sustained thereby.]

In 1684, Sir Stephen Evance, with Peter Percival and Stephen Hayter, his then partners, were bankers of the first character in the city of London; and Thomas Frederick Esq. who was at that time a very eminent merchant, kept his cash with them as bankers, and they from time to time purchased East India, African, and other stocks for Mr. Frederick.

[680] In August 1690, Sir Stephen Evance and Co. and Mr. Frederick settled an account of their transactions in stocks and otherwise, on the balance whereof there was due to Sir Stephen Evance and Co. £1217 11s. 4d. for which Mr. Frederick gave a note of that date; and the like course of dealings continued between the parties till the year 1693.

At this time, and for many years afterwards, African stock was in great esteem; and by the bye-laws of that company, no person was capable of being a proprietor, or of holding stock in his name, except he was free of the company: Sir Stephen Evance was a freeman of the company, and a large proprietor: Mr. Frederick was not free of the company until 1719, consequently, until that time, he was incapable of holding any stock in his own name.

In 1691, Sir Stephen Evance purchased three several parcels of African stock for Mr. Frederick; viz. £200 of John Baker, £200 of Samuel Proctor, and £400 of William Shepherd; which, for the reasons before stated, were transferred into the name of Sir Stephen, and incorporated with his own stock; and after such purchases made for Mr. Frederick, Sir Stephen Evance bought several other parcels of the same stock on his own account.

After the purchase of the two first-mentioned parcels of stock, (the latter, though transferred on the 28th of July, was not paid for till the 5th of August following,) the African company made an order, dated the 30th of July 1691, for quadrupling their stock, and that each person should have credit for £400 for each £100 stock of which he was possessed; by which means, the said two parcels of stock were increased to £1600 stock; subsequent to which order, Sir Stephen Evance bought the last parcel of £400 stock of William Shepherd, after it was quadrupled; so that

\* On searching the Register's book (Reg. lib. A. 1760. p. 404) for the subsequent proceedings in this cause, it appears, that the issues were tried on the 25th of April 1761, when the jury found a verdict on both of them for the defendants; and that, on the 6th of June following, the cause was heard on the equity reserved, when the Court ordered the verdict to be established, and that the right of his Majesty, and of the Duke of Devonshire during the continuance of his lease, to the thirteenth dish of all the lead ore gotten out of the said mines, as the duty of *lot*, should be also established: and his Grace waiving any further account of that duty, than such as had been kept pursuant to the agreement of July 1750, under which the sum of £4632 13s. 7d. three per cent. Bank annuities had been purchased; the Accountant-General was ordered to transfer that sum to the Duke; and his costs at law were ordered to be taxed and paid to him; but his Grace generously remitted his costs in equity, though the Court declared that he was equally entitled to those costs.

the stock Sir Stephen Evance was possessed of, in trust for Mr. Frederick, amounted to £2000.

In March 1692, the African company resolved to make an addition to their capital; and that their then members might, before the 10th of May following, pay in so much as would enlarge the stock to one half more than its then credit; and that none but the then adventurers should have liberty to make such addition; and that for every £40 paid before the said 10th of May, the person paying it should have credit for £100 additional stock: and in consequence of this resolution, Sir Stephen Evance paid in the £40 per cent. on his own stock, as well as on the stock of which he was possessed in trust for Mr. Frederick, which increased Mr. Frederick's stock to £3000. Several calls were afterwards made by the company, which were likewise paid by Sir Stephen Evance on his own stock, as well as on what he was possessed of in trust for Mr. Frederick. About the year 1692, great differences arose between Sir Stephen Evance and Mr. Frederick; and under an assurance that a suit in equity to settle those dif-[681]-ferences would be unavoidable, Sir Stephen delivered Mr. Frederick a regular account current of the transactions between them, from the foot of the account of the 15th of August 1690, to that time; in which account, Sir Stephen made Mr. Frederick debtor for the purchase money of the African stock in question, by the following *items*, viz. 1691, 28th July, paid John Baker £736—5th August, paid Samuel Proctor, for African stock, £740—17th, paid William Shepherd £365: and at the bottom of this account it was stated, that there had been paid £40 per cent. by way of call thereon; and on the back Mr. Frederick made the following endorsement, viz. "After a year and a half demanding to inspect the account, this was delivered me 30th September 1693." There being a considerable balance due to Sir Stephen Evance and Co. on this account, and they pressing Mr. Frederick for the balance, and threatening him with an action for it, he in March 1695, brought his bill in Chancery against Sir Stephen Evance and his partners, for a general account of all transactions between them, from the commencement of their mutual dealings; and although Mr. Frederick then had before him the account so delivered by Sir Stephen, every *item* of which was then recent and fresh in his memory, and in which he was made debtor for the sums in question for the purchase of African stock; yet he was so far from attempting to insinuate that the said stock was not bought for him, that on the contrary he charged by his bill, that Sir Stephen Evance advised him to purchase the said stock at extravagant prices.

Soon afterwards, Sir Stephen Evance and his partners brought their cross bill, for an account of all dealings and transactions between them and Mr. Frederick, from the 15th of August 1690, the time of the said stated account.

Sir Stephen Evance put in several answers to the original bill; the last on the 15th of December 1698, which was reported insufficient; but no proceedings were afterwards had to compel him to put in a further answer.

In December 1711, a commission of bankrupt issued against Sir Stephen Evance, under which the respondent John Goodere was the surviving assignee; and soon after issuing the commission, dividends to the amount of 10s. in the pound were paid to the creditors.

That the bankruptcy of Sir Stephen Evance did not arise from any fraud in him, but from his unfortunate connections, most evidently appeared. For, after the administration of his estate, under all the disadvantages attending a commission of bankrupt, and the very expensive suits which were commenced relating thereto, his estate not only proved sufficient to pay all his own and the partnership debts, but even interest on all the debts carrying interest, great part at the rate of no less than six per cent. with a considerable surplus to his next of kin. This misfortune to himself and family truly arose, partly from a mistaken confidence placed by him in one Mr. Lake, in whose name he had placed [682] out great part of his property, without any declaration of trust, and whose representative insisted upon retaining the same as part of Mr. Lake's estate; and partly from the bad behaviour of Mr. William Hales, whom Sir Stephen, in the latter part of his life, had unfortunately taken into partnership.

In August 1712, the assignees of Sir Stephen Evance brought their bill against Mr. Frederick to revive the suit: to this bill Mr. Frederick pleaded the statute of

limitations; the benefit of which, on arguing the plea, was saved to the hearing. But in this plea, a particular fact was stated in the following words; viz. "That about 14 years before (being in 1698) upon a meeting of Mr. Frederick, Sir Stephen Evance, Mr. Joddrell, and others, in order to settle and compose matters, at the Castle Tavern in Fleet Street, upon Mr. Frederick's producing a note from Sir Stephen Evance, or his partners, to Mr. Frederick, concerning a tally or tallies, order or orders, amounting to the sum of £4000, or some such great sum, the said Sir Stephen Evance did get the same into his hands, while he was entertaining Mr. Frederick with a discourse relating to the acquaintance between his father and the father of Mr. Frederick, and telling him that he and Mr. Frederick their sons must not quarrel, or to that effect; and did in a clandestine and fraudulent manner, tear into several small pieces or bits the said note, whereby the same was destroyed; upon which the said meeting broke up in anger."

Before Mr. Frederick put in any further answer he died; possessed of a personal estate to the amount of about £500,000, having made his will, and appointed William Peere Williams and John Borrett Esq. executors thereof; after which, both the suits were revived, and divers witnesses examined.

On the 18th of November 1725, both causes were heard before the Lord Chancellor King, who directed an issue to be tried in the Court of Common Pleas, whether any account was made up and stated in the month of August 1690, between the said Thomas Frederick of the one part, and the said Sir Stephen Evance and Co. of the other part; and if any account was then made up and stated, what was the balance thereof.

In Easter Term 1730, the issue was tried, and a verdict found, that an account was made up and stated between the said Thomas Frederick of the one part, and the said Sir Stephen Evance and partners on the other part, on the 15th of August 1690; and that upon the balance of the said account, the said Thomas Frederick was in arrear to the said Sir Stephen, in the sum of £1217 11s. 4d. being the entire balance appearing upon the face of Sir Stephen Evance's books, and for which Mr. Frederick gave his note, as before stated.

On the 6th of May 1733, the causes came on to be heard before the Lord Chancellor Talbot, for further directions upon this verdict; when it was ordered, that Mr. Frederick's original bill, so far as it sought any account of the dealings or transactions between the parties, before the 15th of August 1690, should be dismissed; and, as between the said Mr. Frederick of the one side, and the said Sir Stephen Evance and Co. on the other, it was referred to the Master, to take an account of all dealings and transactions between them, from the foot of the said account; with the usual directions for payment of the balance, as it should eventually turn out.

In 1757, the master prepared a draft of his report, by which he certified £500 and upwards due to the estate of Sir Stephen Evance; and therein made the estate of Sir Stephen an allowance for the purchase money of the stocks in question, and the payments made by him for calls thereon. But on the 1st of July 1762, the Master, upon the same evidence on which he had prepared the draft of his report, and without the alteration of any one circumstance, made his report, and there certified £9033 19s. 4d. to be due to the estate of Mr. Frederick; and by this report he totally disallowed the payments made by Sir Stephen Evance for the purchase of the said stock and the calls thereon. But among the charges against the estate of Sir Stephen Evance, was the following; "by tallies to the amount of £4000 received at the Exchequer, for the use and on the account of the said Thomas Frederick; the receipt for which sum of £4000 was torn in small pieces by the said Sir Stephen Evance, whereby the same was destroyed."

To this report the respondent took fifteen exceptions; and the appellants took the respondent's third, fourth, and fifth exceptions were, for that the Master was not in his report charged the estate of Mr. Frederick with the several sums paid by Sir Stephen Evance, for the purchase of the several parcels of African stock, and the several subsequent calls in respect thereof; and his 13th exception was, that the Master had charged the estate of Sir Stephen Evance with the said sum of £4000 without specifying the date of the receipt, or the number, dates, or sums of the tallies, which constituted that sum; and for that he had stated the receipt

the said £4000 to have been torn and destroyed by Sir Stephen Evance, whereas there was no sufficient evidence laid before the Master to warrant the fact so stated.

These exceptions came on to be argued before the Master of the Rolls, sitting for Lord Chancellor Northington, when, after a deliberate hearing of five days, his Honour, on the 25th of January 1765, allowed thirteen of the fifteen exceptions taken by the respondent, and amongst the rest the said third, fourth, fifth, and thirteenth exceptions; but declared, that the estate of the said Thomas Frederick was entitled to have credit against the estate of the said Sir Stephen Evance, in account for what the said three parcels of stock produced by sale thereof, by the assignees of Sir Stephen Evance; and also for any dividends which it should appear Sir Stephen Evance or his assignees received before such sale; and his Honour over-ruled all the appellants' exceptions.

[684] The appellants afterwards obtained an order to re-argue all the exceptions; and accordingly, on the 25th and 26th of June 1766, the same were re-argued before the Lord Chancellor; when his Lordship reversed the judgment of the Master of the Rolls, as to the respondent's first and thirteenth exceptions, and confirmed his Honour's judgment as to all the rest.

The respondent obtained an order to re-argue his thirteenth exception, and the appellants likewise obtained an order to re-argue several of the respondent's exceptions which had been allowed, and amongst the rest, the said third, fourth, and fifth exceptions. And on the 30th of April 1767, and several preceding days, the exceptions were re-argued before the Lord Chancellor Camden, who was pleased to confirm the judgment of his Honour the Master of the Rolls and the late Lord Chancellor, on all the said exceptions.

From these two orders, so far as they over-ruled Mr. Goodere's thirteenth exception, the original appeal was brought; and so far as they allowed his third, fourth, and fifth exceptions, the cross appeal was brought.

In support of the original appeal it was said (W. de Grey, C. Yorke), that admitting Sir Stephen Evance, at the meeting before stated, incautiously destroyed a paper produced by Mr. Frederick; yet, if such paper was in itself immaterial, or if Mr. Frederick was in fact no sufferer by the loss of it, there could be no reason assigned, either in law or equity, to justify the charging Sir Stephen Evance with £4000 by way of mulct or fine for such inadvertent act. That this paper being produced by Mr. Frederick, it must be presumed that he had knowledge of the contents of it; yet he did not in his plea venture to say it was a voucher, or receipt for any sum, or that any money due under it was received by Sir Stephen Evance, or that it was not a satisfied receipt, or that by the destruction of it he was in the least damnified. That the extensive dealings between the parties in this species of securities, necessarily produced a large correspondence on that subject, by notice from time to time given to Mr. Frederick, when interest became due on tallies deposited by him with Sir Stephen; of the principal being in course of payment; of the receipt of money lent by Mr. Frederick to other persons on the pledge of tallies; and various purposes of the like nature: to any of which, or to matters antecedent to the 15th of August 1690, it might fairly, and consistent with Mr. Frederick's own account of it, be contended, that this paper was applicable; but none of which, it was presumed, could justify the present charge. But Mr. Frederick's own conduct on the occasion, most fully shewed the contents of the paper to be immaterial. The transaction happened in the presence of Mr. Frederick, Mr. Joddrell his solicitor, and Mr. Watty, who was Mr. Frederick's clerk; yet no attempt was made by any of them to collect the pieces of the paper so torn. At that time two suits in equity were depending between the parties; and if the paper in question had been [685] a voucher or receipt for any sum of money, and destroyed by Sir Stephen Evance, in the fraudulent manner now suggested, could it be supposed that Mr. Frederick, with the able assistance he then had, would not have been advised instantly to have filed a supplemental bill against Sir Stephen, to obtain a discovery, and to ascertain the contents of this paper, and also to examine the witnesses present at the fact? But instead of this, the fact with all its circumstances, which happened in 1698, remained in total silence during all Sir Stephen's lifetime, who lived thirteen years afterwards, without his being ever questioned upon it. That the paper in question was not a voucher for any sum of money, might fairly be in-

ferred from the account delivered by Sir Stephen Evance to Mr. Frederick, after their quarrel, on the 30th of September 1693; and if the paper was a voucher for a tally, the destruction of it after the delivery of that account could answer no purpose; the account itself, together with the books, being as certain a charge upon Sir Stephen as any receipt whatever. And if on the other hand it should be urged, that the sum for which this paper was a voucher was not included in that account, it received the clearest reply; for if Sir Stephen had in that account omitted to give Mr. Frederick credit for £4000 due upon a tally received by Sir Stephen, his clerks must have been assisting in the fraud; and that sum must have been omitted in the account, under an apprehension that several years afterwards, Sir Stephen Evance would have an opportunity of getting that specific receipt from Mr. Frederick, and destroying it. But this was inconceivable. Besides, Mr. Frederick, who had the custody of this supposed receipt at that time, and for six years afterwards, would certainly have judged such omission to be a most material charge in his bill, which was brought to impeach the truth of that account; but there was no charge of that kind in it, which plainly evinced, that the paper so torn was not a voucher.

As to the objection, that this being a case of spoliation, every thing is to be presumed against the spoliator; it was said to be a settled and established principle, that in all cases of spoliation, there must be proof of the existence and contents, as well as of the destruction of the writing, founded upon an evidence of property in the party injured; at least so far as to shew, that it entitled him to a right or interest in something, of which he had been deprived and defrauded by the spoliation: and according to this rule, the respondents ought to shew the paper in question to have been a receipt or voucher for £4000. But in the present case, the whole of Mr. Joddrell's evidence as to the contents of the paper was only information from Mr. Frederick, and Mr. Frederick himself, out of whose hands it came, was silent as to the contents, and uncertain as to the sum. The contents of the paper and the precise sum for which it was insisted to have been a voucher, were extremely material to be ascertained; as it appeared, that there were transactions between the parties, in this particular species of securities, to the amount of £152,670 16s. 9d. in the course of [686] three years. If the paper was a voucher for tallies to the amount of £4000, or any other sum, it was in Mr. Frederick's power to have stated the dates and numbers of the tallies to which it related, it appearing by his books and papers produced before the Master, that he kept accurate accounts of all his tallies; and thereby Sir Steven Evance would have had an opportunity of shewing that he had accounted, or was not liable to account, for the tallies to which the paper related. But as Mr. Frederick, in his plea, designedly avoided any kind of description, either of the particular contents of the paper, or of the tallies to which it was supposed to relate, his representatives ought not to avail themselves of such wilful neglect. That the account delivered on the 30th of September 1693, most evidently shewed the necessity of the respondents being held to a particular description of the tally or tallies, to which they contended the paper destroyed was applicable; because, by that account credit was given to the estate of Mr. Frederick for £81,031 13s. 7d. received by Sir Stephen Evance and his partners for tallies on Mr. Frederick's account, and amongst the rest, for one specific sum of £4000 as received on the 9th of February 1691, for which the respondents had no voucher whatsoever, except the account. It was therefore apprehended, that if the respondents' evidence should be thought to deserve the greatest latitude, by considering the paper destroyed as a voucher or receipt for a tally of £4000; yet, consistently with the strict rules of justice, the receipt or voucher so supposed to have been destroyed, must be considered as the voucher for the very sum of £4000 for which the respondents had credit in the account, and for which they had no other evidence than the account. And this fully shewed the reason why Mr. Frederick could not on his oath say, that the paper destroyed was a voucher for any sum for which he had not received a satisfaction.

On the other side it was insisted (E. Willes, A. Wedderburn), that the fact of destroying the note or voucher for £4000 was sufficiently proved and established by Mr. Frederick's plea, and the deposition of Mr. Joddrell, and no evidence whatever had been produced or given to contradict or impeach the fact of the spoliation and destruction of it: the evidence therefore of such spoliation and destruction ought to be taken in the strongest light against the spoliator, or those who stood in his place,

in *odium spoliatoris*; and be considered as a very gross fraud, and as throwing a strong imputation and suspicion upon the books and accounts of Sir Stephen Evance, and on every other transaction in which he was concerned. That the behaviour of Sir Stephen Evance on that occasion, with all its aggravating circumstances in destroying the voucher for the £4000 tally, while he was amusing Mr. Frederick with an account of the friendship which had subsisted between their two families, was such a dishonest, base, and iniquitous transaction, as could never be excused, or even palliated in a Court of Justice; on the contrary, the law would rather stretch its power and authority, to reach and punish such daring attempts of fraud, which manifestly tend [687] to destroy that mutual confidence which ought ever to subsist between all persons concerned in commercial matters; and on the credit of which, the trading interest of this country has hitherto always been supported.

In support of the cross appeal it was said, that the African stock pretended to have been bought by Sir Stephen Evance in trust for Mr. Frederick, was not bought in his, but in Sir Stephen's own name, and actually transferred to him, who was a member of the African company, and a large dealer in that stock, and deeply concerned in the management of it; nor was any order produced from Mr. Frederick for the purchase of the said stock; and though many dividends thereon were received by Sir Stephen Evance himself, amounting to £269 10s. and particularly £112 prior to the delivery of the account in 1693, yet that sum was never brought or placed to Mr. Frederick's account. That the stock was actually sold as Sir Stephen's own proper stock by his assignee, without the order, consent, or privity of Mr. Frederick's representatives; and by these means Sir Stephen charged the estate of Mr. Frederick with £3621 for the stock and the calls upon it, though by the extraordinary management thereof, it produced only the sum of £95 for which it was sold by the assignee. As to the sum of £400 mentioned in Goodere's fourth exception, being £40 per cent. call upon the African stock, he had not produced or proved any order or consent from Mr. Frederick for the payment thereof, nor did it appear that he was previously made acquainted therewith, nor was there any compulsory order made by the African company for such payment; and upon one of the calls on this stock, Sir Stephen Evance never paid in any thing, not considering himself obliged so to do, but left at liberty to pay his proportion of the call, or not, as he thought proper. And as to the sum of £1380 in the fifth exception pretended to have been paid by Sir Stephen Evance, for thirteen subsequent calls on this African stock, Goodere had not produced, proved, or shewn any order or consent from Mr. Frederick for the payment of those calls, or any of them; and it appeared that they were paid by Sir Stephen after, and some of them for several years after the commencement of the suits between him and Mr. Frederick; when there could be no confidence subsisting between them, and when it could not be presumed that any man would pay money for another, without an express order for so doing; and the last call was paid by Sir Stephen's assignee, who could in no light be a trustee for Mr. Frederick, and when the stock had been reduced to one tenth of its former value; and therefore the assignee ought not to have paid it without Mr. Frederick's consent or privity. That if trustees were to be allowed, even after suits commenced against them by their *cestui que* trusts, to pay such large sums as £400 and £1380 without the order, consent, knowledge, direction, or privity of the persons for whom they are intrusted, it would be in the power of trustees to ruin their *cestui que* trusts, by paying money for them without their knowledge or consent; which would give trustees an unreasonable [688] latitude of power to abuse their trusts, and be of ruinous consequence to the security of trust estates; and in general, nothing seems more unreasonable or unjust, than that it should be in the power of any person to charge another as his debtor, for money pretended to be advanced for his use, without his privity or consent.

There was a supplemental case printed on the part of the appellants in the cross appeal (A. Wedderburn, J. Madock's), stating that it had been lately discovered, that among certain bye-laws made by the African company, on the 23d of November 1697, it was ordered, that no adventurer should be capable of being chosen sub-governor, deputy-governor, or *into the court of assistants*, who should have less than £3200 credit in the company's stock, *in his own name and right*. That it had been proved in the causes, on the part of Goodere, by the deposition of Simon Kelsey, first clerk in the company's accomptant's office, that by the stock books of the company, it ap-

peared that Sir Stephen Evance had credit therein in October 1696, for 184 shares, or £18,400 African stock; and that at a general court of the company held on the 7th of October 1697, it was resolved by the members then present, that there should be an addition made to their then stock of £12 on each share; but that upon such call, Sir Stephen Evance did not advance or pay any money whatsoever. And that at another general court, held on the 1st of August 1699, it was resolved, that each adventurer should pay £3 for each share, which Sir Stephen accordingly paid on the 17th of the same month, on fifty-four shares or £5400 stock, being all the stock then in his name. And by a copy of his stock account proved in the causes, it appeared, that he had no more than £5400 stock in the company, from October 1697 to February 1709. That there was the greatest reason to believe that Sir Stephen Evance reserved to himself this £5400 as his own proper stock, for the purpose of being qualified to be chosen sub-governor, deputy-governor, or one of the court of assistants of the company, as the case might happen: for, upon searching the minute book of the general courts of the company, held in the years 1702, 1706, and in January 1709, it appeared, that Sir Stephen was actually elected one of the court of assistants of the company; which he could not have been, unless he had held £3200 stock in his own name and right.

From whence it evidently followed, that Sir Stephen could not, as contended by Goodere, have £3000 African stock standing in his own name, in trust for Mr. Frederick; for if he had held £3000 part of this £5400 stock in trust for Frederick, he could have had no more than £2400 stock in his own name and right, which by the tenor of the aforesaid bye-law, could not qualify him to be chosen into the court of assistants. It could not therefore be presumed, that any part of the £5400 African stock was the property of Mr. Frederick, but must have been all of it the property of Sir Stephen Evance, and reserved by him as such for the purposes aforesaid; and the rather, because he never gave Mr. Frederick [689] credit for any dividends of this £3000 pretended trust stock, nor for any part of the money received by him on the sale of any part of the residue of the £18,400 stock (over and above the said £5400) sold out by him in September and October 1697: so that either no part of the £18,400 stock was in trust for Mr. Frederick, or if any part of it was bought for him, it must have been part of the stock so sold out in September and October 1697, and Sir Stephen must have considered the remaining £5400 stock as his own property.

On the part of the respondent in the cross appeal it was said (W. de Grey, C. Yorke), that the first and principal question was, Whether the stock in question was bought by Sir Stephen Evance on his own account, or for Mr. Frederick? That it not only appeared by the books of Sir Stephen Evance and Co. regularly kept by their clerks, that Mr. Frederick was made debtor for the purchase of these several parcels or stock, at the times of the respective purchases; but in the account delivered by Sir Stephen to Mr. Frederick, after their differences in 1693, Mr. Frederick was made debtor for the purchase money, and thereby Sir Stephen, in the most effectual manner, declared the trust for him; and in the bill which Mr. Frederick afterwards brought to impeach that account, he was so far from suggesting that the stock was not purchased for him, that he in effect admitted it, by charging that Sir Stephen persuaded him to buy it at extravagant prices, and that he believed it was Sir Stephen's own stock. But the appellants had no occasion to resort to any other evidence than Mr. Frederick's books and papers in their own custody, for the fullest satisfaction on this subject. For in Mr. Frederick's own cash book, he had charged what he paid the broker for his commission for the purchase of this stock, in the following entry: "3d Feb. By African stock 1691-2, paid Aston brokerage of £200 transferred Sir Stephen Evance, being for my account in his name. £1." The original stock quadruple being £800, the brokerage thereon, at 2s. 6d. per cent. the known commission on purchase of stock, amounted to £1. But the evidence did not rest here, for in two different papers of Mr. Frederick's hand writing, purporting to be an account of sums paid by Sir Stephen Evance for him, were the following entries: "28th July 91. £200 African stock, £736 ditto, £200, £740. 6th August £400, after doubling £365;" corresponding exactly with the dates of the receipts produced by the respondent.

The appellants however seemed to rely on the following objections, to shew that the stock was not purchased for Mr. Frederick: I. That no written order was pro-



duced for the purchase of it. II. That the stock was bought in Sir Stephen Evance's name, and never was transferred into Mr. Frederick's name. III. That Sir Stephen had never accounted for any dividends. IV. That his assignees had sold the stock without any authority from Mr. Frederick's representative. V. That supposing the stock to have been transferred into Sir Stephen Evance's name in trust for Mr. Frederick, it did not appear he paid any thing for it, the receipts for the purchase money not having been proved.

[690] As to the first objection, it was a very unfavourable one to be made at the distance of above seventy years from the transaction; and the more so, as in the various purchases admitted to have been made of government securities by Sir Stephen Evance for Mr. Frederick, a direction for the purchase of such securities had in no one instance been produced; and the apparent confidence which subsisted between the parties during the course of these transactions made it unnecessary: but it was apprehended that the facts above stated entirely removed this objection.

The second objection received the clearest answer, it being proved that Mr. Frederick was not free of the company till the year 1719, consequently not capable of accepting a transfer of the stock till that time.

As to the third and fourth objections, there was only one dividend between the purchase of the stock in 1691, and the delivery of the account in 1693; and admitting that this dividend was in fact received by Sir Stephen Evance, as the stock was incorporated with his own, one dividend warrant was made out for the whole; and as Sir Stephen's clerks might not know the proportion due to Mr. Frederick of this dividend, such ignorance most probably occasioned the omission. But the order appealed from had done justice to Mr. Frederick's estate, by directing that it should have credit for the dividends received by Sir Stephen Evance, if any had been received. It was admitted, that the assignees, unacquainted with the trust, had sold the stock in question, with the rest of Sir Stephen's stock; but if there was satisfactory evidence that he was a trustee as to this stock for Mr. Frederick, it was apprehended, that neither the omission of giving credit for the dividends, nor the assignees ignorantly selling the stock itself, would any more destroy the trust by reason of the loss attending the stock, than it would have done, if the stock had been sold to great advantage.

As to the fifth objection, it scarcely called for any answer, as it must be presumed that some monies were paid for these parcels of stock. However, the particular prices were ascertained by Mr. Frederick's own memorandums; and it could not be expected that any clearer evidence could be given after so great a length of time.

But it was further objected, that no written order was produced from Mr. Frederick, directing the payment of the calls; and that these calls were not compulsory. At this distance of time, and for the reasons before stated, the first part of this objection ought not to have any weight. Mr. Frederick must know that Sir Stephen was possessed of this stock in trust for him; and from the nature of the transaction he could not be ignorant of the calls. The account of 1693 informed him, that Sir Stephen had at that time paid a call of £40 per cent.; of which, in his bill, brought to impeach that account, Mr. Frederick never complained, nor did he give Sir Stephen notice to discontinue any future calls; and therefore Sir Stephen acted the part of a faithful trustee, though he and Mr. Frederick were not then in a state of friendship, by shewing the same attention to his property that he shewed to his own, in [691] answering the calls on both. As to the second part of this objection, it was admitted, that the prior calls were voluntary; but the latter were attended with penalties in case of default of payment, such as a forfeiture of dividends, and a prohibition of the transfer of the stock. But it was apprehended, that where a trustee exercises a discretionary power *bona fide*, and in the same manner as he acts with regard to his own property, he always receives the protection of a Court of Equity; and the present case afforded a much stronger argument for this protection, as it appeared, that Mr. Frederick had full notice of the first call of £40 per cent. and never made the least objection to it. And the fair and honest execution of discretionary acts of this kind by trustees, has not only constantly received the indemnity of Courts of Equity, but they have also been the objects of legislative care; particularly with respect to the voluntary subscription made by trustees of the long annuities into the

South Sea Company in the year 1720, pursuant to an invitation only from the court of directors for that purpose.

After hearing counsel on these appeals, it was ORDERED and ADJUDGED, that the orders complained of in the original appeal, so far as they over-ruled the appellant's thirteenth exception, should be reversed. And it was further ORDERED, that the parties should proceed to a trial at law, in the Court of Common Pleas, upon the following issue: "Whether Thomas Frederick, Esq. was damnified to the amount of £4000, or any other and what sum, by Sir Stephen Evance having torn a paper at the Castle Tavern in Fleet Street, sometime after the suits between the said Sir Stephen Evance and the said Thomas Frederick were begun?" And if the jury should find that the said Thomas Frederick was damnified to a less amount, the *postea* was to be indorsed accordingly. And it was further ORDERED, that the respondent in the original appeal should be plaintiff at law, and that the appellant should be the defendant; who was forthwith to name an attorney to accept a declaration, appear, and plead to issue; and that the issue should be settled by a Master in case the parties differed about the same. And it was further ORDERED, that the consideration of the order made by his Honour the Master of the Rolls, allowing the said thirteenth exception, and also of all further directions and costs, should be reserved till after the said trial. And it was further ORDERED and ADJUDGED, that the orders complained of by the cross appeal should be affirmed: and that the Court of Chancery should give all necessary and proper directions, for carrying this judgment into execution\*. (M.S. Jour. *sub. anno* 1768-9, p. 771.)

[692] CASE 13.—SIMON COLLINS,—*Appellant*; WILLIAM SAWREY and others,—*Respondents* [10th February 1772].

[Wherever the question of right in a suit commenced in a Court of Equity is a mere legal question, the Court does right in sending it to law to be tried upon a proper issue; even though the whole of the evidence is written evidence, and the question depends upon the construction of that evidence.]

\*\* DECREE of the Court of Exchequer AFFIRMED.\*\*

Before the act of parliament aftermentioned, there was founded in the parish church of Tamworth, a college or collegiate church, consisting of one dean, five prebendaries, and one lay vicar choral; and the dean and prebendaries were parsons of the whole parish of Tamworth.

By an act of parliament 1st Edward VI. c. 14. all manner of colleges, free chapels, and chantries, being, or *in esse*, within five years next before the first day of that parliament, (except such as are therein excepted,) and all manors, lands, tenements, rents, tithes, pensions, portions, and other hereditaments belonging to them, were vested in possession in the King, his heirs and successors. And the King, his heirs and successors, were authorized to appoint commissioners under the great seal of England, which commissioners, or any two of them, were directed to make and ordain a vicar to have perpetuity for ever, in every parish church, being a college, free chapel, or chantry, that should come to the King's hands by virtue of that act; and to endow every such vicar sufficiently, having respect to his cure and charge; the same endowment to be to every such vicar, and his successors for ever, without any other licence or grant of the King, the bishop, or other officer of the diocese. And the commissioners, or two of them, had authority to assign in every great town or parish,

\* On searching the Register's book (Register, Lib. A. 1769, p. 477), it appears, that the issue was tried on the 16th of June 1769; when the jury found, that the estate of the said Thomas Frederick was *not* damnified in the sum of £4000, or any other sum, by the destruction of the paper in the said issue mentioned. And the cause being heard for further directions and costs, on the 13th of December following, the Court held the said 13th exception to be good and sufficient, and allowed the same accordingly.

where they should think necessary to have more priests than one, for the ministering the sacraments within the same town and parish, lands and tenements belonging to any chantry, chapel, or stipendiary priest, to be to such person and persons, as the commissioners should assign or appoint, to continue in succession for ever, for and towards the sufficient finding and maintenance of one or more priests within the same town or parish, as by the commissioners should be thought necessary or convenient.

By virtue of this act, the collegiate church of Tamworth was dissolved, and the possessions belonging thereto, together with the parsonage of the said church and parish, came to the possession of King Edward VI. and he issued his commission to Sir Walter Mildmay and Robert Kelway, and others, who, in pursuance of the act, assigned a salary of £20 a year to the vicar of Tamworth, and another salary of £16 a year to two priests, (viz. £8 each,) to assist the vicar of Tamworth. These salaries were to be paid [693] out of the possessions of the said college; and a mansion house, now called the college or vicarage house, and a garden, in Tamworth, part of those possessions, were assigned for the habitation of the vicar, and as part of his endowment.

The said college and deanery, and the right of patronage of the church and vicarage, and the possessions of the college, (except the house and gardens allotted to the vicar,) having descended to Queen Elizabeth in right of her crown, she, by letters patent, dated the 22d of October, in the 23d year of her reign, granted to Edmund Downing and Peter Aysheton, and their heirs for ever, the said college, deanery, and prebends, and the advowson, donation, and right of patronage of the vicarage and church of Tamworth, and all tithes, great and small, in Tamworth aforesaid, subject to the several yearly reservations therein mentioned; and (amongst them) of the sum of £20 payable yearly to the vicar of Tamworth, for his stipend or salary, and £16 for two curates there, for their salaries, payable by the Receiver-General of the county, or at the receipt of the Exchequer; and if the grantees paid them, the Queen covenanted to allow the same.

By indenture dated the 21st of February in the 25th year of the same reign, the said Edmund Downing and Peter Aysheton granted the said college, deanery and prebends, and the advowson and right of patronage of the vicarage and church of Tamworth, to John Morley and Roger Rant, in fee simple.

By another indenture dated the 10th of May in the said 25th year of Queen Elizabeth, Morley and Rant granted the said deanery of Tamworth, or prebends of Amington and Wigginton, and the tithes thereto belonging, and the advowson and right of patronage of the vicarage and church of Tamworth, to Thomas Repington Esq. the ancestor of the respondent Repington, in fee simple.

Thomas Repington being thus seised of the premises, and particularly of the said advowson and right of patronage, did by settlement, dated the 2d of November, in the 1st year of King James I. made on the marriage of John Repington his son, with Margaret Littleton, covenant, that he and his heirs would stand seised of divers premises therein mentioned, (of which the deanery and deanery house in Tamworth, and the advowson and right of patronage of the vicarage and church, as belonging to and usually enjoyed with the deanery and deanery house, were parcel,) to the use of the said John and Margaret, and their heirs male in special tail; with remainder to Humphry Repington his second son, in tail male; and with divers remainders over.

John Repington and Margaret his wife, having by means of the last-mentioned deed, become seised of the premises comprised therein, he, by deed dated the 28th of August in the 7th year of King James I. nominated and appointed Samuel Hodgkinson to be vicar of Tamworth for his life, if he should so long exercise the place, and preach there once every fortnight at least. This nomination was made on the resignation of the vicarage by Roger Molde, [694] who had been the vicar from the 20th year of Queen Elizabeth, by her grant and nomination.

The said John Repington (then Sir John) died in the year 1625, leaving Sir John Repington, his son and heir; and he by indenture, dated the 12th of November 1629, did, upon the cession of the said Samuel Hodgkinson, nominate and appoint Thomas Blake to the said vicarage for his life, in manner aforesaid; and Blake held the same till his death.

The last-named Sir John Repington died in the year 1662, leaving Seabright

Repington his only son; and he, on the death of Blake, by indenture dated the 17th of December 1663, nominated and appointed Samuel Langley to the vicarage. Langley held it during his life; and upon his death, Seabright Repington, by indenture dated the 19th of June 1694, nominated and appointed Samuel Collins to the said vicarage, and he held it till his death in the year 1710; and thereupon Edward Repington, (the eldest son of Seabright Repington, who was then dead,) by indenture dated the 8th of January 1710, nominated and appointed George Antrobus to the vicarage.

On the 2d of January 1715, the said George Antrobus, by the description of curate of Tamworth, made oath and declared before the commissioners appointed by the bishop for taking the clear improved yearly value of every parson, vicar, curate, etc. officiating in any church or chapel, that the maintenance of the curate of Tamworth did not arise yearly to above £16, payable out of the Exchequer; and that the maintenance of the preacher did not arise yearly to above £20, payable in the same manner; and thereupon, in pursuance of the act of the 1st George I. the bishop certified that the contents of the said declaration were true.

The said George Antrobus, during his life, continued sole incumbent of the vicarage, and received not only the said salary of £20, payable yearly to the vicar, but also the said salary of £16 a year, or £8 a year to each of the two priests or curates, under the denomination of the salary of the curate of Tamworth, with all other stipends and benefactions given from time to time to the ministers and curates of the church, by several persons, after the dissolution of the college. And he, in right of the vicarage, held the mansion house, garden, barn, and appurtenances, which had been assigned for the residence of the vicar, from the time he became vicar till his death in the year 1724.

On the death of George Antrobus, Edward Repington, by indenture dated the 29th of December 1724, nominated and appointed to the said vicarage Robert Wilson, who continued vicar till his death, which happened in the year 1758, and received during that time the said salaries of £20 and £16, and all the other stipends and benefactions; and he likewise enjoyed the mansion house, garden, barn, and appurtenances.

Edward Repington died in 1735; and on his death, Edward Repington, his nephew and heir at law, became seised in tail of the said advowson and right of patronage, and all the other pre-[695]-mises, by virtue of the intail created by the deed of settlement before stated: and he, upon the death of the said Robert Wilson, by an instrument under his hand and seal, dated the 1st of December 1758, addressed to the Bishop of Litchfield and Coventry, after reciting that the parish church of Tamworth, with the perpetual curacy, was then void by the said Robert Wilson's death, and that the same of right belonged to his nomination, did certify to the bishop, that he nominated the respondent William Sawrey to the said perpetual curacy, and he prayed the bishop to grant his licence to the respondent to officiate in the said church. This instrument was, on the 7th day of the same month of December, delivered to the bishop, but he did not think proper to grant such licence.

The last-named Edward Repington died, leaving Charles Repington his brother and heir, who, on his death, became seised of all the premises, under the aforesaid intail: and Edward Repington, having in his lifetime made a will, and appointed his said brother Charles executor of it, the latter upon the death of his brother, proved his will, and became his personal representative.

The said Charles Repington, by indenture dated the 5th of May 1759, reciting, among other things, that the vicarage or created vicarage of Tamworth, with the perpetual curacy of Tamworth, was become void by the said Robert Wilson's death, did give and grant to the respondent William Sawrey, the said vicarage, together with the said curacy, and did nominate and appointed him to be vicar of the said vicarage, and curate of the said curacy, for his life, upon the terms before mentioned. And by another indenture of the same date, reciting that the said church and curacy were void by the said Wilson's death, and that the same had become void in the lifetime of the last-named Edward Repington, and that he had made his will and appointed the said Charles Repington sole executor, who had proved the same, and that it then belonged to him to make a donation and grant of the said

church to a proper curate or clerk in Wilson's room; the said Charles Repington did give and grant the said pariah church and curacy to the respondent William Sawrey.

On the 8th of December 1764, Charles Repington died, leaving the respondent Charles Edward Repington, his eldest son and heir, an infant; and he, upon his father's death became seized of the advowson and right of patronage of the said church of Tamworth, under the aforesaid intail.

Queen Elizabeth, by letters patent dated the 10th of October, in the 30th year of her reign, reciting the commission granted by King Edward VI. to Sir Walter Mildway and Robert Kelway, and their proceedings under it, did grant, that from thenceforth there should be a grammar school in Tamworth, and that the bailiffs of the town should be incorporated for ever, by the name of the Guardians and Governors of the Grammar School of Elizabeth Queen of England, in Tamworth; and she thereby granted, among other things, that the said guardians and governors, and the twenty-four capital burgesses for the time being, or the major part of them, might nominate, appoint, and admit a fit and learned preacher to serve in the church of Tamworth, and also two ministers or curates to serve therein for ever, as often as the same should be void, with the consent and allowance of the Earl of Essex, or the heirs male of his body, or the under steward of the Earl, or his said heirs male, to such admission. And she thereby also granted to the said guardians and governors a stipend of £20 a year, payable to the preacher serving in the said church for ever; and another stipend of £16 a year, payable for ever, to two ministers or curates serving in the church, by the hands of the receivers general of the crown, in the counties of Stafford and Warwick, in like manner as they were theretofore paid for such use. And she thereby granted to them all that her messuage with the appurtenances in Tamworth, and a garden, wherein the late vicars of the college of Tamworth used to dwell; and in which messuage the preacher and curates of the town are therein mentioned to have inhabited at the time of making these letters patent, to hold to them and their successors for ever, for the habitation of two ministers or curates serving there for ever.

King Charles II. by his letters patent dated the 17th of February, in the 16th year of his reign, made grants to the bailiffs of Tamworth, similar to those contained in the last mentioned letters patent of Queen Elizabeth, and incorporated them in the same manner.

The respondents, the guardians and governors, by deed poll under their common seal, dated the 1st of December 1758, did by virtue, as well of the letters patent of the 30th of Queen Elizabeth, as of the letters patent of King Charles II. with the consent and approbation of Lord Weymouth their high steward, nominate, appoint, and admit the appellant to serve in the said church as minister and curate there, and gave and granted to him the offices of preacher, minister, and curate of the church, and all profits and stipends thereto belonging, to hold for his life. Lord Weymouth signed an indorsement on the deed, testifying his consent; and the appellant, on the 9th of the same month, exhibited the deed to Mr. Lowndes the auditor, and caused it to be enrolled with him.

The guardians and governors also, by another deed under their common seal, dated the 5th of January 1759, addressed to the Lord Bishop of Litchfield and Coventry, reciting, that the church of Tamworth, with the perpetual curacy, was then void by the death of Wilson, and that the same of right belonged to their gift and nomination; did certify, that they thereby, with the consent of their high steward, nominated the appellant to the perpetual curacy, with the stipends thereto belonging; and prayed his Lordship to grant him a licence for the same. Lord Weymouth signed his consent, and the Bishop granted the appellant a licence according.

In Easter Term 1759, Charles Repington sued out a *quare impedit* against the respondents the guardians and governors, the [697] twenty-four capital burgesses, and the appellant; and three several issues were tried thereon by a special jury, at the summer assizes for the county of Stafford in 1761, upon which trial, all the issues were found for the plaintiff Charles Repington; whereupon the respondent Sawrey entered upon the duty of the said living, and took possession of the keys of the church, and officiated therein, and served the chapel belonging thereto. But the appellant Collins got possession of the vicar's house, and occupied the same, and received the salaries of £20 per ann. and £16 per ann.

In Michaelmas Term 1761, the respondent Sawrey brought an ejectment in the Court of Common Pleas, on his own demise, against the appellant, in order to recover the possession of the vicarage house and garden; and the same came on to be tried at the summer assizes in 1763, for the county of Warwick; and upon the trial, the appellant's counsel insisted, that the respondent ought to prove either admission and institution, or a licence from the bishop, but the respondent not being prepared to prove a licence, a verdict was found for the appellant. However, in Easter Term 1763, the judgment upon the verdict in 1761 was arrested, by reason of a mistake in the pleadings.

In Michaelmas Term 1763, the respondent William Sawrey exhibited his bill in the Court of Exchequer against the appellant, the respondents the guardians and governors, Frederick Lord Bishop of Litchfield and Coventry, and the said Charles Repington; praying, that the appellant might be decreed to come to an account with him for all sums of money, stipends, rents, surplice fees, and other perquisites due and usually paid to the vicars of the said church, which had been received by him or any one to his use, from the time the respondent Sawrey was nominated vicar; and also for the rents and profits of the vicarage house, and all other the lands and estates belonging to the vicar, received by the appellant or paid to his use; and might be decreed to pay to the respondent Sawrey what should appear due on the balance of such accounts; and that the appellant might also be decreed to deliver up to him the possession of the said house and lands, and that he might be quieted in the possession thereof; and that the appellant might deliver up to the said respondent, the parish registers and all other papers in his custody relating to the church and parish, and usually kept by the vicar: and that in case the respondents the guardians and governors, and the appellant, and the bishop, or any of them, should pretend any right or title to the advowson, donation, or right of patronage to the vicarage or curacy: or in case any doubt should arise touching the nature of the incumbency of the church, or whether the same was a donative vicarage or a perpetual curacy, or in whom the right of patronage, donation, nomination, presentation, or appointment of the vicar, preacher, minister, curate, or curates of the church was then vested, and to whom the same did then of right belong; then that such right, and the several matters aforesaid, might be tried in one or more proper issues, to be directed by the Court. And that [698] the bishop might be decreed, if the same should appear necessary, to grant the respondent Sawrey licence to preach in the church, or admit him to the same; and in case he had granted any licence to the appellant, that he might be decreed to recal it.

The appellant Collins put in a demurrer to part of this bill; and for cause of demurrer said, that the plaintiff's pretended right to the several accounts prayed in the bill, and the payment thereof, and the rents and profits, and possession of the vicarage house and lands, was merely a right subsisting at law, and only and properly triable by a jury, and to be determined by the common law.

This demurrer, on argument, was over-ruled by the Court, on the 10th of December 1764; and soon afterwards, the respondents the guardians and governors, and the twenty-four capital burgesses, put in a plea and answer; and by their plea insisted, that the plaintiff's right (if any he had) to the said church and cure, was matter triable at law; but, on arguing this plea, it was over-ruled on the 25th of February 1767: from which orders neither Collins or the corporation thought proper appeal, but afterwards put in their respective answers to the bill, and thereby insisted, that upon the construction of the several grants of the crown, under which the Repington family, and the corporation, respectively claimed the right of nomination, such right belonged to the corporation; and the appellant Collins hoped, that his right under their nomination would be established.

Pending the suit, Charles Repington died, and was succeeded in his estates by the respondent Charles Edward Repington, against whom the proceedings were revived.

The cause being at issue, came on to be heard before the Barons in June 1767 and they having taken time to consider, did, on the 24th of November following order and decree, that it should be referred to a trial to be had between the parties at law, in a feigned action to be for that purpose brought in the office of pleas of the Court, to try the several issues following: 1st, Whether Charles Repington, brother

and heir at law of Edward Repington, or any person claiming by, from, or under them, or either of them, was before and on the 5th day of May 1759, seised of or entitled unto the advowson of the vicarage and church of Tamworth? 2d, Whether the respondent William Sawrey was before and at the time of exhibiting his bill in the cause, lawfully appointed vicar of Tamworth? 3d, Whether the same respondent was entitled to the house formerly belonging to the vicars choral of Tamworth? And, 4th, Whether the same respondent was entitled to the stipends or salaries of £20, £8, and £8, of the curates of Tamworth, or any or either, and which of them? And the usual directions were given concerning such trial.

From this decree the appellant appealed; and on his behalf it was argued (W. de Grey, E. Thurlow, A. Wedderburn), that the ancient law had so much regard to plenarty, and to the peace of the church, that if the clerk of an usurper was admitted, the rightful patron lost his turn of presenting for [699] that vacancy: but the statute of Westminster 2d, gave the action of *quare impedit*, provided it be brought within six months after the church becomes vacant. That in the present case, Mr. Repington the patron had availed himself of that action, and it had been determined against him: it was immaterial on what point it was so determined, because the determination was conclusive. But if after the six months elapsed, and after the patron had failed in his suit, and was precluded from commencing any other, his clerk might prefer his bill in a Court of Equity, praying issues to be directed to try a right which was merely legal, and for an account of the profits of a benefice which the incumbent, who had been duly instituted, had a legal right to retain; the policy of the law, in giving the action of *quare impedit*, and in limiting the time in which it should be brought, and the damages to be recovered by it, would be entirely defeated: and upon this ground it was apprehended, that the Court of Exchequer, as a Court of Equity, ought not to have retained the respondent Sawrey's suit, but his bill should have been dismissed.

Supposing however that the subject matter of the bill was properly within the jurisdiction of the Court, and that the respondent Sawrey was entitled to every part of the relief prayed by his bill; yet the order directing these issues was conceived to be very improper: for the questions to be tried by them depended upon *written* evidence, which was before the Court; and principally upon the construction and effect of the grant to Downing and Aysheton: and therefore the Court ought not to have directed issues to be tried before a single judge, by a jury at an assize, but should themselves have determined the cause; as the evidence, to which both parties referred themselves, was fully before them.

On the other side it was contended (J. Dunning, J. Madocks), that the Court of Exchequer, as a Court of Equity, had a jurisdiction to entertain the suit; the relief prayed being an account of profits received by the appellant, and for a delivery of the parish registers and other muniments belonging to the church, all which were heads of relief proper for a Court of Equity. The bill also prayed, that the bishop might recal his licence to the appellant, and grant one to the respondent Sawrey; which it was presumed the bishop would think fit to do when the right was determined. And as the relief depended upon the question of right, the bill therefore further prayed that issues at law might be directed to determine the right, as incidental to the relief prayed: and the question upon the right being a legal question, the Court had directed such issues as would effectually decide it, and be a foundation for granting the relief prayed by the bill. As to the objection, that the right being a matter merely triable at Law, a Court of Equity ought not to have entertained the bill; it had already been determined and over-ruled both upon the plea and the demurrer, and therefore to persist in it any farther was vexatious. The relief prayed was such as a Court of Equity alone could decree, and therefore the bill ought not to have been dismissed: and the question of right being a legal [700] question, the Court did well in sending it to law to be tried; reserving the consideration whether they should relieve the party or not, till the event of the trial should be known.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (MS. Jour. *sub anno* 1772, p. 77.)

CASE 14.—Earl of POMFRET & Ux.,—*Appellants*; THOMAS SMITH and others,—*Respondents* [18th March 1772].

[Courts of Equity have for many years past adopted a practice which has been extremely beneficial to the suitors; for where they see the dispute between the parties is a mere question at law, and must be ultimately determined there, instead of putting the parties to a diffuse examination of witnesses in Equity, they have, by interlocutory orders, either directed an issue, or given the party liberty to bring an action within a limited time, and reserved the consideration of all further directions till after the verdict. And after a verdict has been found, it has been the uniform practice of the Court, for the party in whose favour the verdict has been obtained, to set down the cause for the further directions reserved by such interlocutory order.]

By the order made on hearing the former appeal between these parties \*, the appellants were at liberty to bring such action as they should be advised to try the question of right; but no time being thereby limited for bringing such action, and the appellants not taking any immediate steps for that purpose, the respondents, on the 25th of April 1771, moved the Court of Chancery, that the appellants might be ordered to bring an action and deliver a declaration before the last day of the then present Easter term; but it being alleged by the counsel for the appellants, that the nature of the action to be brought required mature consideration, the Court did not think fit to make any order on the motion.

On the 15th of May following, the appellants gave a notice that the Court of Chancery would be moved on Friday then next, being the first general seal after Easter Term, or so soon after as counsel could be heard, that an injunction might be awarded to restrain all the defendants in the original cause, their servants, workmen, and agents, from opening any mine or mines, or working any mine or mines already opened, within those ten meares or bounds, parcel of the land in dispute, that had been set out by the said defendants to their under lessees; and likewise to restrain them from carrying off or wasting and destroying any ore already raised out of the mines within the said ten bounds or meares, or from smelting or wasting and destroying any ore which they had removed and carried off from thence, to any [701] other place or places; and from selling and disposing of the same, or any part thereof. And on the 13th of June 1771, (the notice having been saved to that day,) the Lord Chancellor made an order, the minutes whereof were as follows; viz. "Refer it to the Master, to take an account of the clear profits of the duty ore which have been received by the defendant Smith, or by any other person by his order or for his use, from the under lessees, since the 2d of December 1769; for the better taking of which account, the parties are to produce before the Master, upon oath, all books, papers, and writings in their custody or power relating thereto, and are to be examined upon interrogatories as the Master shall direct; who, in taking the said account, is to make unto the parties all just allowances: and let Mr. Smith pay what shall be reported to have been so received by him into the Bank, with the privity of the Accountant-General of this Court, to the account of this cause, in a fortnight after the Master shall have made his report; and let the same, when so paid, be laid out in the purchase of Bank £3 per cent. annuities, in trust in this cause, subject to further order; but in default of Mr. Smith's paying what shall be reported to have been so received by him by the time aforesaid, the plaintiffs are to be at liberty to apply to this Court for an injunction."

On the 17th of the same month, the appellants gave notice to move the Court, that the minutes of the said order might be rectified in the following particulars: by adding [instead of the words "To take an account of the clear profits of the duty ore, which have been received by the defendant Smith, or by any other person by his order or for his use"] the following words, agreeable to the former order of the 2d of December 1769; viz. "To take an account of the duties or shares which are reserved from the under lessees to the lessors, and which have been received by the

\* See tit. Trial, New Trial, Ca. 5.



defendants Thomas Smith, Leonard Hartley, John Parke, and Ralph Parke, the lessors, or by any other person or persons by their order or for their use, and which, without their wilful default or neglect, might have been received: " and by adding [instead of the words "Let Mr. Smith pay what shall be reported to have been so received by him into the Bank"] the following words; viz. "Let Mr. Smith, Leonard Hartley, John Parke, and Ralph Parke, pay what shall be reported to have been so received by them, into the Bank: " and by adding [instead of the words "But in default of Mr. Smith's paying what shall be reported to have been so received by him, by the time aforesaid"] the following words; viz. "But in default of Mr. Smith, Leonard Hartley, John Parke, and Ralph Parke, paying into the Bank what shall be reported to have been so received by them, by the time aforesaid."

And upon the 2d of July 1771, the motion was moved, when upon hearing the said order of the 2d of December 1769 read, [702] and what was alleged by the counsel for the parties, the Lord Chancellor made the following order; viz. That the order of the 13th of June last be varied, and be as follows; viz. "That it be referred to the Master, to take an account of the clear profit of such duty or shares of the ore dug within the ten meares or bounds in question, as are reserved from the under lessees to the lessors, agreeable to the order of the 2d of December 1769, received by the defendant Thomas Smith, or by any other person by his order or for his use, since the said 2d of December 1769; and for better taking the said account, the parties are to produce before the Master, all books, papers, and writings, in their custody or power, relating thereto, and are to be examined upon interrogatories as the Master shall direct; who, in taking the said account, is to make unto the parties all just allowances: and it is ordered that the said defendant Thomas Smith do pay what shall be reported to have been so received by him into the Bank, with the privity of the Accountant-General of this Court, to be placed to the credit of this cause, in a fortnight after the Master shall have made his report; and that the same, when so paid, be laid out in Bank £3 per cent. annuities, in the name and with the privity of the said Accountant-General, in trust in this cause; and he is to declare the trust thereof accordingly, subject to the further order of this Court; and for the purposes aforesaid, the said Accountant-General is to draw on the Bank, according to the form prescribed by the act of parliament for the relief of the suitors of this Court, and the general rules and orders of this Court, in that case made and provided; but in default of the said defendant Thomas Smith's paying what shall be reported to have been so received by him, by the time aforesaid, the plaintiffs, the Earl and Countess of Pomfret, are to be at liberty to apply for an injunction."

This last order being still unsatisfactory, the appellants again applied to the Court to have it varied; but the Court, on the 9th of July, refused so to do: and therefore the appellants filed replications in the original cause, and proceeded to sue out a commission for the examination of witnesses; and which being executed, and the depositions returned, publication would have passed by rule on the 12th of February 1772, had not the respondents, by an order of the 10th of that month, enlarged the same till the first day of the next Easter Term.

In Trinity Term 1771, the respondents renewed their former application to the Court, that the appellants might be ordered to bring an action, and deliver a declaration within a limited time; but the Court again declined making any order for that purpose.

The respondents, upon notice being given them by the appellants, that they should move to dismiss the cross bill for want of prosecution, did, in July 1771, file replications; and presented a petition, stating the order of the 2d of December 1769, the trial [703] thereupon had at York, the appellants motion for a new trial which was refused, the order of the 4th of December 1770, the order of the House of Lords of the 5th of March 1771, the order of the 18th of March 1771, whereby the same was made an order of the Court of Chancery; and also stating, that the appellants had not thought proper to bring an action pursuant to the said order, although the respondents had twice moved the Court of Chancery for that purpose, in order that the same might be tried in the then next Michaelmas Term; and praying, that the said cause might be set down to be heard before the Lord Chancellor,

for further directions reserved by the order of the 2d of December 1769. Upon which petition, the Lord Chancellor, on the 18th of July 1771, was pleased to order, that the cross cause should be set down to be heard before his Lordship, for further directions reserved by the order of the 2d of December 1769, next after the rehearings and appeals already appointed; but the same was to be set down in four days, or else this order was to be of no effect.

In pursuance of this order, the cause was accordingly set down; whereupon the appellants moved to discharge the order; but on debating that motion upon the 17th of December 1771, the Lord Chancellor was pleased to order, that the appellants should take nothing by their motion.

Afterwards, on the same day, the cross cause came on to be heard; when the Lord Chancellor made the following order; viz. "Upon opening and debate of the matter, and hearing the said order dated the 2d day of December 1769, and the said order dated the 4th day of December 1770, and the *postea* read, and what was alleged by the counsel on both sides, his Lordship doth order, that unless the defendants the Earl and Countess of Pomfret do bring such action as they shall be advised, in order to try the question of right between the parties, and proceed to trial thereon at the bar of the Court of Common Pleas, by a special jury of the county of York, the next Easter Term, or at such other time as that Court shall appoint, the injunction issued against the plaintiffs, to restrain them, their servants, workmen, and agents, from opening or working any mine within the parcel of land in dispute, beyond those ten bounds and meares that have been set out by the plaintiffs to their under lessees, be dissolved: and it is further ordered, that so much of the said order of the 2d day of December 1769, as directs the duties or shares reserved from the under lessees to their lessors, arising out of the ten meares or bounds that have been set out as aforesaid, to be paid into the Bank, be discharged; and the plaintiffs be at liberty from thenceforth to receive such duties and shares from their under lessees, as at the time of making the said order were, and since that time have, and for the time to come shall become due and payable to them respectively: but in case the said defendants shall bring such action, and proceed to trial thereon [704] as aforesaid, then his Lordship doth reserve the consideration of all further directions until the said trial shall be had; and any of the parties are to be at liberty to apply to this Court, as there shall be occasion."

From these several orders of the 13th of June, the 2d, 9th, and 18th of July, and the two orders of the 17th of December 1771, the present appeal was brought (E. Thurlow, J. Dunning); because, as to the first of these orders, the injunction awarded by the order of the 2d of December 1769, and revived by the order of the House of Lords on the former appeal, was suspended as to the ten meares therein mentioned, upon these terms only; viz. that the produce thereof, payable by the under lessees to the respondents, (namely, the 6th part of the ore, and 40s. the fodder,) should be paid from time to time into the Bank; upon default whereof, the appellants were at liberty to apply for injunctions: therefore, on such default being proved, the Court, in pursuance of the said revived orders, should have awarded an injunction as to the said ten meares. But this first order varied the terms upon which the injunction was suspended, to the prejudice of the appellants; by giving the respondents and their under lessees leave to work the ten meares, upon the terms of paying into the Bank something less than half the produce thereof, which was payable to the respondents, whereby the remainder was not so effectually secured to answer the event of the cause. And as to the two subsequent orders of the 2d and 9th of July, because, with an immaterial difference in the expression, they both preserved the objectionable sense of the first.

As to the order of the 18th of July, and the first order of the 17th of December 1771, refusing to discharge that order, it was said, that the order of the 18th of July directed the cause to be set down as for a final decree, before it was decreed in part, or ripe for hearing, or even at issue, whereby the appellants were deprived of all opportunity of supporting their answer by evidence. That the consideration of the directions referred to in the said order, was reserved in an interlocutory order of the 2d of December 1769, and could only be taken up regularly on some other interlocutory order, and upon motion. And if it had been so taken up as

it ought, many affidavits would have been offered to shew that the order then made would be inconvenient to justice.

And as to the last order of the 17th of December 1771, it was said, that the *postea* was read in evidence as a satisfactory verdict between the parties, although the House had reversed the order refusing a new trial, and the appellants had no opportunity of shewing by evidence that it was improperly obtained, and inconclusive. That by ordering the appellants to go to trial at a time when it was impossible to have a view, and a satisfactory trial, and under the penalty of dissolving the injunction then depending against the respondents, it reversed the order of the House, instead of giving further directions to carry it into execu-[705]-tion. Whereas, the only directions necessary for carrying that order into execution, was the directing a new trial to be had in pursuance thereof; but the present order left the former verdict in force, although the House had reversed the order of the Court, refusing the appellants a new trial. That upon the former applications in the months of April and May, when a view might have been had, the Court declined urging the appellants on to trial, because it would break in upon the order of the House, which none but their Lordships can add to, vary, or explain, and would be inconsistent with it; yet now the Court had enjoined the appellants to try an action in Easter Term, in opposition to that order, and when a view was impracticable, and in default, that the respondents should be let into possession, which would be equal to a decision against the appellants; for in that case the respondents would be at liberty to work out the mine, leaving the appellants only the satisfaction that the profits might be received back upon an account in the Court of Chancery. That the appellants, desirous of bringing the question upon the merits to a fair and speedy decision, did immediately after the order of the House was made, proceed to examine their witnesses in the original cause, whose depositions were now returned, and the cause was ordered to be set down and heard in the next Term, and would be heard in course if the respondents did not continue, as they had hitherto, to delay the cause by enlarging publication; upon the hearing of which cause, an issue must be directed, finally to try and decide the right between the parties; and therefore the trial of an action to affect the injunction only, would be nugatory.

On the other side it was said (A. Wedderburn, R. Perryn), that the order of the 2d of December 1769, which directed the trial and the payment of the duty or shares into the Bank, was made in the cause wherein the present respondents were plaintiffs, and to which suit Scott and the other under lessees were not parties. The Court directed that the rent, or which was equivalent to rent, the shares or duties payable to the landlord, should be paid into the Bank to abide the event of the question at law. The 40s. a fodder was not payable to Mr. Smith, nor could he claim any part of it. The only thing he was entitled to under his lease to Messrs. Hartley and Parkes, was one sixth part or share of the lead or ore which should be raised from the mines in any part of the premises, clean dressed and made merchantable. When the respondents Messrs. Hartley and Parkes made the bargain with Scott and the other under lessees, they made them agree to pay the sixth part or share to Mr. Smith, the original lessor; and therefore, when Lord Camden pronounced this order of the 2d of December 1769, he permitted the respondents and their under lessees to work within the ten meares or bounds, they paying from time to time such duty or shares (which excluded the idea of 40s. a fodder, that being neither a duty or share) as were reserved from the under lessees to the lessors, into the Bank. But as the reservation under [706] the lease was a sixth part of the ore, clean dressed and made merchantable, it was impossible for the respondents to comply with the words of Lord Camden's order, by paying the shares or duties themselves into the Bank. The duty ore was to be smelted and carried to various parts of the kingdom to market, and the net produce, after a deduction of all necessary expences, was the only thing which the respondents could pay into the Bank. The order therefore of the 13th of June did, agreeable to the principles of equity and justice, direct the account to be taken before the Master of the net produce of such duty ore, which was certainly the intention though not the words of the order of the 2d of December 1769; and the fodder duty could not be the object of the Court, as the under lessees were no parties to that suit, nor could the owner of the inheritance,

whoever should eventually prove to be so, compel the payment of it; it being *res inter alios acta*. That the order of the 2d of July, which was made upon the appellants motion to rectify the minutes of the last order, was still more explicit; for it directed the account and payment of the clear profits of the duty ore, reserved from the under lessees to the lessors, *agreeable to the order of the 2d of December 1769*. And this, it was presumed, would answer every purpose contended for by the appellants; and therefore it was conceived, that the application to the Court, on the 9th of July, to vary the minutes of the two former orders, and that the same might be made *agreeable to the order of the 2d of December 1769*, was nugatory; and that the Court did right in refusing such motion. That the order of the 18th of July for setting down Mr. Smith's cause for further directions, was not applied for till after the end of Trinity Term, and when near five months had elapsed from the date of the order of the House of Lords, which gave the appellants leave to bring action to try the question of right, and under which they had not taken one step, though pressed thereto by the respondents; and it could not be conceived to be the intention of the House, to permit the appellants to avail themselves of that order, so as to make it operate as an injunction upon the proceedings of a Court of Justice, when the appellants themselves had deserted the mode of proceeding thereby pointed out; and therefore it was hoped, that the order of the 18th of July was perfectly just and regular.

As to the objection, that the respondents should have proceeded in their cause, by replying to the answer, examining witnesses, and setting it down in common course for hearing, so as to have had a decree upon arguing the merits; and that it was irregular to set down a cause for further directions, after a verdict obtained, when such directions were reserved by an interlocutory order only; it was answered, that Courts of Equity have for many years past adopted a practice, which has been extremely beneficial to the suitors; where they see the dispute between the parties is a mere question at law, and must be ultimately determined there, instead of putting the parties to the expence of a diffuse [707] examination of witnesses in equity, they have by interlocutory orders, either directed an issue, or given the party liberty to bring an action within a limited time, and reserved the consideration of all further directions till after the verdict. And after a verdict has been found, it has been the uniform practice of the Court, for the party in whose favour the verdict has been obtained, to set down the cause for further directions reserved by such interlocutory order. The whole stream of precedents support this practice, nor can there be a single instance produced, where the party, after a verdict found under an interlocutory order, has proceeded in his cause by replying to the answer, and entering into an examination of witnesses, either in support of, or in contradiction to such verdict; as the depositions of such witnesses could not be read, either to support or falsify it; and therefore it was conceived, that the motion made by the appellants, on the 17th of December, to discharge the order of the 18th of July, was properly refused by the Court. That the other order of the same date, pronounced upon hearing the cause for further directions, was founded upon the highest principles of equity; for the Court by that order had, in the only mode in which it could, endeavoured to carry the judgment of the House of Lords into execution; it had supplied an omission (as the respondents presumed to submit) in that judgment; it had fixed a time in which the appellants should comply with their Lordships order; and in failure of that compliance, had directed that which it was presumed their Lordships would have done, by dissolving the injunctions against the respondents, continuing those against the appellants, and letting the respondents into the enjoyment of their property, of which they had been in the peaceable possession for upwards of thirty years: and it was submitted, that it could be no excuse for the appellants at the bar of the House, to say that they were complying with their Lordships order, by prosecuting their suit in a Court of Equity, at an immense expence to both parties, when that order had pointed out the only mode which in the judgment of the House it was proper for the appellants to pursue; namely, by bringing an action to try the question of right between the parties, and which they had totally neglected to do.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order of the 13th of June 1771, should be affirmed, with the following variations:

after December 1769, leave out, "which have been received by the defendant Thomas Smith, or by any other person by his order or for his use, from the under lessees, since the 2d of December 1769." After, "and it is further ordered that," leave out "the said Mr. Smith," and insert, "Thomas Smith, Leonard Hartley, John Parke, and Ralph Parke." And it was further ORDERED, that the order of the 18th of July 1771, to set down the cross cause for further directions, should be discharged; and that the order of the 17th of December 1771, made in the cross cause, should be reversed; [708] but without prejudice to the respondents renewing the applications made by them to the Court of Chancery, on the 25th of April 1771, and in last Trinity Term, or any other application of the like tendency.\* (M. S. Jour. *sub anno* 1772. p. 317.)

CASE 15.—WILLIAM BOUCHIER and another,—*Appellants*; GEORGE TAYLOR,—*Respondent* [7th March 1776].

[The jurisdiction of the Ecclesiastical Courts in cases of intestacy and in testamentary cases was transferred to the Court of Probate (now under the Jud. Act, 1873—36 and 37 Vict. c. 66. ss. 3, 34,—the Probate Division of the High Court of Justice) by the Probate Act, 1857 (20 and 21 Vict. c. 77. ss. 3, 4.)]

After a Sentence in the Ecclesiastical Court, determining the question of who are the next of kin of an intestate; and granting letters of administration to the person found to be such next of kin; the Court of Chancery is precluded from directing any issue to try that question.

\*\* DECREE of the Court of Chancery REVERSED.\*\*

On the 11th of March 1743, Mrs. Ann Millington spinster, died intestate; and in Easter Term 1744, the appellant William Bouchier, and his sisters, Frances Hersent wife of Peter Hersent, and Anna Maria Denison mother of the appellant William Denison, being cousins-german once removed, and as they apprehended, the only next of kin to the intestate, applied to the Prerogative Court of the Archbishop of Canterbury, to have letters of administration of her personal estate granted to the appellant William Bouchier. But they were informed that caveats had been entered on behalf of Ursula Hanyold and Theresa Dutling and others, claiming to be next of kin of the intestate; and thereupon several proceedings were had in the Prerogative Court, in support of the interests of the appellant William Bouchier and the other claimants; and in this state of litigation, letters of administration, dated the 24th of March 1745, were granted to Henry Lascelles *pendente lite*.

In Hilary Term 1746, Alice Merchant, by her proctor, appeared and intervened in the said suit; alleging, that she was cousin-german and next of kin of the intestate Ann Millington, as being the only surviving child of Francis Millington, brother of Sir Thomas Millington Knt. the father of Ann Millington; and shortly after the exhibiting such claim, she died, having a few days before her death made her will dated the 20th of April 1746, whereby she gave all her real estate, and the residue of her personal estate, to the respondent George Taylor and Hannah his wife; and appointed Thomas Sebastian Turst and Walter Jobber her executors.

[709] Turst and Jobber, soon after the death of Alice Merchant, proved her will in the Prerogative Court of Canterbury; and on the 26th of May 1747, appeared by their proctors, and as executors of Alice Merchant, whom they alleged to be the cousin-german and next of kin of the said Ann Millington, became parties to the suit about administration to her.

All the parties, except the appellant William Bouchier, and Thomas Sebastian

\* Mr Brown (the original Editor) was informed, that there was another trial at law in this cause, on which a verdict was found in favour of the respondent Smith; and that, in consequence thereof, a final decree was made in the Court of Chancery. But no traces of these subsequent proceedings were found by him in the Register's book.

Turst, and Walter Jobber, and Robert Evans, Thomas Crowter, Catherine Brookes, and John Grasset one of the executors of Margaret Grasset deceased, having withdrawn their several claims, or forborne to appear therein, several allegations were exhibited as well as on behalf of the appellant William Bouchier as Thomas Sebastian Turst and Walter Jobber, and also on the behalf of Robert Evans, Thomas Crowter, Catherine Brookes, and John Grasset; and witnesses were examined on behalf of all parties: afterwards, publication having duly passed, the cause was heard on the 15th, 16th, and 17th days of January 1754, before Sir George Lee Judge of the Prerogative Court; but at this hearing Robert Evans, Thomas Crowter, Catherine Brookes, and John Grasset, made default in appearing. On the 23d of the same month the Judge made his decree, and was pleased to declare, that Robert Evans, Thomas Crowter, and Catherine Brookes, had failed in the proof of their pretended interest; and that John Grasset had failed in the proof of Margaret Grasset having been the cousin-german or next of kin of Ann Millington; and that Thomas Sebastian Turst and Walter Jobber had failed in the proof of Alice Merchant's having been the cousin-german or next of kin of Ann Millington; and was pleased to pronounce against the interest of Turst and Jobber, and to pronounce and decree for the interest of the appellant William Bouchier, that he was the lawful cousin-german once removed, and as far as it appeared to the Court, the next of kin of Ann Millington; and also to decree letters of administration of the goods, chattels, and credits of the said Ann Millington, to be granted, under proper bond, to the appellant Dr. Bouchier: and the Judge was also pleased to condemn Robert Evans, Thomas Crowter, Catherine Brookes, and Thomas Sebastian Turst, and Walter Jobber, in the costs of the said suits respectively, so far as concerned the proceedings on their respective interests therein.

From this sentence the proctor for Turst and Jobber dissented, and entered a protest of appeal, but such appeal was never prosecuted; and therefore, soon after the sentence, letters of administration of the personal estate of Mrs. Ann Millington were granted to the appellant William Bouchier, as he was cousin-german once removed, and next of kin; in which it was mentioned, that the letters of administration granted to Henry Lascelles were determined by his death and the determination of the suits.

About four years after pronouncing this sentence, viz. on the 20th of October 1758, the respondent George Taylor and Hannah his wife (having procured themselves to be admitted to sue in [710] *forma pauperis*) filed their bill in Chancery against the appellant William Bouchier and others; praying, that the appellant Bouchier might account with the respondent and his wife, for all the personal estate of the intestate Mrs. Ann Millington; and that the will of Alice Merchant might be carried into execution, and the trusts thereof performed. For this purpose the bill charged, amongst other things, that Thomas Millington, heretofore of Newbury in Berks, died in October 1630, leaving a widow named Mary, and four sons, viz. John, William, Thomas, and Francis late father of the said Alice Merchant; and two daughters, named Mary and Elizabeth: and that another son of the said Thomas Millington of Newbury, named Humphry, was born after his father's decease, and soon after died; and that the said Thomas Millington of Newbury made his will, dated the 9th July in the 7th year of his Majesty King Charles I. wherein he gave several legacies to his wife and four children, John, William, Thomas, and Francis; and that the said John and William Millington, two of the sons of the said Thomas Millington of Newbury, died long since, William without issue, and John leaving one son named John, who also died without issue. That Thomas the third son of Thomas Millington of Newbury, studied physic at the university of Oxford, and became famous in his profession, and received the honour of knighthood from King Charles II. and in 1679 married Ann Hannah King widow, by whom he had issue one son, named Thomas, and three daughters, named Mary, Ann, and Frances, which Frances died in the lifetime of her father: that Sir Thomas Millington died on the 5th of January 1703-4, in the 74th year of his age, a widower, having first made his will in favour of his children, Thomas, Ann, and Mary; and that Thomas, son of Sir Thomas, died in 1714, a bachelor, having made his will as in the bill mentioned; that Mary Millington, daughter of Sir Thomas, died in 1735, intestate; and that Ann Millington died the 11th of March 1743-4, unmarried and intestate,

seised of a real estate to the amount of £2000 per annum, and possessed of a personal estate to the amount of £60,000 and upwards. That Francis Millington, fourth son of Thomas Millington of Newbury, and younger brother of Sir Thomas Millington, and father of Alice Merchant, in 1655 married Alice Cleaver of Bloxham in Oxfordshire, and did then go to live at Bloxham, and about the 5th of May 1702, died there, aged 72 years; and that he had issue by Alice his wife three sons, named Robert, Edward, and Francis, and seven daughters, named Frances, Elizabeth, Mary, Elizabeth, (the other Elizabeth being before dead,) Alice, Ann, and Sarah, all of whom, except Alice, died before the intestate Ann Millington; and that Alice intermarried with Daniel Merchant, and survived him, and was the only child of Francis Millington of Bloxham, who survived the intestate Ann Millington; and that upon her death, Alice Merchant became entitled to all her personal estate, as her cousin-german and only next of kin, and being so entitled, applied to the Prerogative Court of Canterbury for ad-[711]-ministration of the intestate's personal estate; but the same being contested, and suits being instituted by the appellant Dr. Bouchier and several others, and those suits not being determined in her lifetime, she was not able to obtain the same. The bill then stated the death and will of Alice Merchant, and the proving it by her executors Turst and Jobber, and their becoming parties to the suits in the Prerogative Court, and the Judge's decree therein, and the protest and appeal from it; and charged, that Turst and Jobber, being much hurt in their circumstances by the great expences they had been at in the said suits, and being only mere executors, declined to prosecute such appeal at their own expence: it was also stated, that Turst died in 1754, and that Jobber refused to proceed or prosecute the appeal, unless the respondent and his wife would be at the expence thereof, which they, being in low and reduced circumstances, were by no means able to support.

To this bill the appellant Doctor Bouchier, Frances Hersent, and Anna Maria Denison, in Hilary Term 1759, put in their joint plea upon oath, and thereby alleged that Ann Millington died intestate and unmarried, and without leaving any father or mother, brother or sister, uncle or aunt, nephew or niece, or cousin-german, to their knowledge or belief. They also stated in their plea, their application to the Prerogative Court for the granting administration of the personal estate of Ann Millington to the appellant Dr. Bouchier, the suits instituted in the said Court about such administration, and the proceedings and decree or sentence therein, and the granting of administration to the appellant Dr. Bouchier, as being the cousin-german once removed and next of kin of the intestate Ann Millington; and that they were advised, that the Court of Chancery had not any jurisdiction, nor ought to hold plea of the validity of any letters of administration granted in the Ecclesiastical Courts of this kingdom, but that such matters wholly belonged to the Ecclesiastical Courts; and therefore they pleaded the sentence of the Prerogative Court of Canterbury in bar to the said bill.

On the 27th of April 1759, this plea being argued before the Lord Keeper Henley, his Lordship was pleased to order, that it should stand for an answer, with liberty for the plaintiffs to except thereto, (except as to the account and discovery of the personal estate of Mrs. Ann Millington,) but at the same time reserved the benefit of the plea till the hearing of the cause.

Accordingly the plaintiffs took exceptions, and the appellant Dr. Bouchier, and his sisters Frances Hersent and Anna Maria Denison, in Trinity Term 1759, put in full answers. By their answers they declared, that they did not know, nor could form any belief, whether Alice Merchant was the daughter of a person named Frances Millington, but verily believed, that her father, or the person in the bill called her father, was not the brother of Sir Thomas Millington; and insisted that the sentence of the Prerogative Court of Canterbury was evidence sufficient to shew, [712] that Alice Merchant was not the first cousin of the intestate Mrs. Millington. They also stated, that the real estate of Mrs. Ann Millington descended to Thomas Woodward, Thomas Bouchier, and Anne and Mary Towerson, as her heirs at law, they being the descendants and great grandchildren of Mary Millington, the sister of Sir Thomas Millington and aunt of the intestate Ann Millington; and that they were in possession thereof under a decree of the Court of Chancery, and a verdict in the King's Bench on an issue directed out of the former Court.

On the 17th of June 1760, the plaintiffs replied to all the answers; but no further proceedings were had in the cause for five years and upwards, and till after the death of the plaintiff Hannah Taylor, and of the defendants Anna Maria Denison and Walter Jobber.

On the 31st of October 1765, the respondent filed his bill of revivor and supplement, against the appellant Dr. Bouchier, and the appellant Dr. Denison as administrator of his mother Anna Maria Denison, and also against Mary Foster as administratrix of Walter Jobber, to have the proceedings revived against them: and by way of supplement stated, that Thomas Millington of Newbury, who was therein charged to be the father of Sir Thomas Millington and of Francis Millington of Bloxham, had a daughter named Elizabeth, by his second wife, and that Elizabeth intermarried with Dr. Joseph Ford of Combe, in Oxfordshire; and that Alice Merchant went to live with him, and called and owned Mrs. Ford to be her aunt, and that Mrs. Ford called and owned the said Alice to be her niece; and that Dr. Ford and Francis Millington called each other brothers; and Dr. Ford and his wife called the family of the Bouchiers, at Hanborough, cousins. It was also alleged, that Sir Thomas Millington and Francis Millington of Bloxham were, and were always reputed to be, brothers; and that Francis Millington and his family received great assistance from Sir Thomas Millington towards their support: and that the children of Sir Thomas visited the children of Francis as relations, and made them several presents: and further, that Dr. Thomas Bouchier and Frances his wife, the father and mother of the appellant Dr. Bouchier, also visited Francis Millington and Alice his wife, and called themselves cousins. The bill also stated, that Walter Jobber, one of the executors of Alice Merchant, in 1747 went to Newbury in Berks. and searched the register of the parish of Newbury, and found an entry of the baptism of Elizabeth daughter of Thomas Millington of Newbury, and procured a certificate of it by Mr. Robert Penrose the rector of Newbury, and delivered such certificate to Mr. Farrer, then the proctor for him and Turst, the other executor of Alice Merchant. That Walter Jobber afterwards ceased to employ Mr. Farrer as his proctor, and employed another proctor; and that Mr. Farrer, on delivering up his papers to Jobber, alleged that the certificate was mislaid and could not be found. That Jobber again went down to Newbury to search the register there, but, on such second search, found the leaf [713] whereon the baptism of Elizabeth Millington was entered, torn out of the register book, and therefore could not obtain a certificate. That the appellants pretended, that the wife of Dr. Ford was not a daughter of Thomas Millington of Newbury, but that Dr. Ford married Elizabeth Thoms; but that they knew there were two persons who lived at Combe, and were called Dr. Fords, one being Joseph Ford, who was a clergyman and rector of Hanborough, and was married to Elizabeth Millington daughter of Thomas Millington, and was afterwards deprived of his living in Oliver Cromwell's time, and quitted the gown and studied physic, which he afterwards professed at Combe to the time of his death: and the other being one Joseph Ford, who was an apothecary at Combe, and husband of Elizabeth Toms.

In Hilary Term 1766, the appellants put in their answer to this bill. The appellant Dr. Bouchier, in his answer, denied that, to his knowledge or belief. Thomas Millington of Newbury had by his second wife, or any wife, a daughter named Elizabeth, or any other daughter, besides Mary mother of Frances, the wife of Dr. Thomas Bouchier deceased, and grandmother of the appellant Dr. Bouchier. He also denied, that Elizabeth daughter of Thomas Millington of Newbury, or any daughter of Thomas Millington, did ever intermarry with Dr. Joseph Ford of Combe in the county of Oxford; or that Alice Merchant, one of the daughters of Thomas Millington of Bloxham, ever went and lived with him occasionally, or ever called or owned any wife of Joseph Ford to be her aunt, or that any wife of Joseph Ford ever called or owned Alice Merchant to be her niece; or that Dr. Ford and Francis Millington of Bloxham called each other brothers; but said, that he did not know whether there was any other relationship between them. He also said, that he believed there was a distant relationship between Dr. Ford and Dr. Thomas Bouchier, the father of the appellant Bouchier, but did not know what it was; nor did he believe that there was a great friendship between them, or that they ever made presents to each other. He said, he believed that Walter Jobber might go to Newbury



in February 1746-7, and that if he did search the register of the parish of Newbury, he found an entry of the baptisms of Mary, John, William, Thomas, and Francis, children of Thomas Millington of Newbury; but he did not believe, that Jobber did, or could then, or at any other time, find any entry of the baptism of any daughter of Thomas Millington of Newbury, named Elizabeth; or that he procured such certificate as in the bill was mentioned to have been signed by the Rev. Mr. Penrose, the rector of Newbury; and he was the further confirmed in this belief, because he had received the following letter from Mr. Penrose:

"SIR,

Newbury, Berks, Feb. 12, 1746-7.

I was very much alarmed by some gentlemen, who came to this town yesterday to consult our register about the children of Mr. Thomas Millington. They apprehended, that Mary, the eldest daughter, was born in 1615; and finding that the leaf [714] in the register for that year was torn out, and many names wanting, they immediately concluded it was done with design, and left the town in that opinion. As soon as I was informed of this discovery, I immediately determined to make you, Sir, acquainted with it, as I understood that your claim was derived from the said Mary Millington. But upon sending for the clerk, (who has in this parish always kept the register,) and examining very carefully, I soon found that the gentlemen were in an error. The entry of Mary Millington, who was born many years after they apprehended, is still in the register. I thought myself obliged to write this to you, Sir, as I did not know either the names or abode of the gentlemen, to obviate any impression that you might receive from a report that our register had been fraudulently castrated.—I am, Sir, your most obedient humble servant, Thomas Penrose, rector of Newbury."

The appellant Bouchier also said by his answer, that Dr Joseph Ford, who practised physic at Combe, intermarried with one Elizabeth Toms, daughter of Martin Toms of Barton in the county of Bucks, and that he was the only Dr. Ford who practised physic; but that whether he was ever an apothecary, or kept a shop, or sold medicines, the appellant did not know. And that Joseph Ford, the elder, who was father of Dr. Joseph Ford of Combe, was a clergyman, and rector of Hanborough about 1636, and continued so till he went to Mexbury in the county of Northampton, of which place he was also rector, and there resided till his death in December 1665, having been rector of Mexbury about eighteen years. That he never to his remembrance had heard, nor did he believe, that Dr. or Mr. Ford, who was rector of Hanborough, was ever deprived of his living at the time of the grand rebellion, or that he ever quitted the gown, or read or studied physic, or that he ever practised or professed physic at Combe or any where else; or that Joseph Ford, the son, ever was a clergyman, or enjoyed any benefice in the church, or was deprived of any church preferment; or that the said Joseph Ford, the father, ever intermarried with any daughter of Thomas Millington. But he had been informed, and believed, that Joseph Ford, the elder, in June 1637, surrendered a copyhold estate at Hanborough to the use of himself for life, with remainder to the use of his wife Bridget and her heirs; from which it appeared, that her Christian name was not Elizabeth. That the suggestion in the bill, that Alice Millington, afterwards Merchant, went to live with the said Joseph Ford and his wife, and occasionally called or owned Mrs. Ford to be her aunt, and that Mrs. Ford called and owned Alice to be her niece, appeared to be without the least foundation of truth, from the following circumstances; viz. that Joseph Ford died in 1656, and Dr. Bouchier was not married to Frances his wife, niece of Sir Thomas Millington, till 1681; and that Alice was not born till 1685.

[715] The respondent having replied to the answers of the appellants, examined some witnesses; but all the witnesses who were formerly examined for the appellant Dr. Bouchier in the Prerogative Court being dead, no proofs were taken on the part of the appellant.

On the 11th of March 1774, the cause was brought to a hearing, as against the appellants only, before the Master of the Rolls, several orders having been previously obtained by the appellants, for proving the death of witnesses examined in the suit about administration to Mrs Ann Millington, in the Prerogative Court, and copies of allegations and depositions there; and also a decree in Chancery in two causes, about the right to the real estate of the intestate Mrs. Ann Millington, one between Charles Hitchman plaintiff, and James Grasset and other defendants, and the other

between Charles Hitchman plaintiff, and Thomas Bouchier and other defendants, and particularly a *general* order for reading *the proceedings in the Prerogative Court*. On this hearing, his Honour was pleased to order that the parties should proceed to a trial at law in the Court of King's Bench, in the next Trinity Term, or the sittings after, or at any such other time as the Chief Justice of that Court should appoint, on the following issue; viz. whether Francis Millington of Bloxham, father of the intestate Alice Merchant, was brother of Sir Thomas Millington in the pleadings mentioned? And the plaintiff there was to be plaintiff at law, and the appellant Bouchier was to be defendant; and his Honour reserved the consideration of costs and all further directions till after the trial.

The appellants conceiving that they were aggrieved by this order, and that no issue ought to have been granted, but that the respondent's bill should have been dismissed, appealed to the Lord Chancellor Bathurst, and the appeal was heard before his Lordship on the 21st of July 1775; when his Lordship was pleased to order, that the issue directed by the Master of the Rolls should be varied, and should be, "Whether the testatrix Alice Merchant was the cousin-german and next of kin of Ann Millington in the pleadings mentioned, at the time of the death of the said Ann Millington." His Lordship also ordered, that the trial of the issue should be at the bar of the Court of King's Bench, in Hilary Term then next, or at such other time as that Court should appoint; and with this variation, the order of the Master of the Rolls was affirmed.

From this decree the appellants appealed; and on their behalf it was said (E. Thurlow, A. Wedderburn, F. Hargrave), that there were two general grounds, on which it was conceived the issue to try *whether Alice Merchant was the cousin-german and next of kin of the intestate Ann Millington*, ought to have been refused; *one*, that the sentence of the Ecclesiastical Court, by which the letters of administration were granted to the appellant Dr. Bouchier, excluded the Court of Chancery from the power of directing an issue; the *other*, that if the Court had the power, yet, under the particular circumstances of the present case, it ought [716] not to have been exercised in favour of the respondent. And it would be proper to view the case in *both* these lights.

It must be conceded, that so far as regards the granting of administration, and all suits for contesting the right to it, the Spiritual Courts are possessed of a *sole* and *exclusive* jurisdiction. Another thing equally uncontrovertible is, that the same Courts have also a jurisdiction in respect to the *distribution* of intestate's effects, but this differs from the *former*, because it is merely *concurrent*; the Court of Chancery having a jurisdiction over the *same* subject. And from these two positions flowed the objections to the Court of Chancery's power of interference in the present case: for upon an investigation into the consequences which must arise from such an interference, it would appear to operate, both as an *invasion* of the Spiritual Court's *sole* jurisdiction, and as an *undue controul* of its *concurrent* one. In the suit in the Spiritual Court, about the right to *administer* to Mrs. Ann Millington, the question was precisely the same as that which the respondent wanted to litigate in the bill he had brought in Chancery for the benefit of a *distribution*. Had Dr. Bouchier and Alice Merchant claimed the administration to Mrs. Millington, as her relations in *equal* degree, the Ecclesiastical Judge would have had a right to prefer Dr. Bouchier, on the supposition that his pedigree was not controverted, or being controverted, was well proved, without coming to any decision on the relationship set up by Alice Merchant; and if the Judge had proceeded on that principle, her claim would have been as unimpeached, and as open to litigation in a suit for distribution, either in the same Court, or in the Court of Chancery, as if Dr. Bouchier had never obtained the administration. But the case which really existed, was quite of a different kind. According to the pedigree on which Alice Merchant founded her pretensions, she was *first cousin* to the intestate, whereas Dr. Bouchier only claimed to be *first cousin once removed*; and this inequality of claimed relationship rendered it impossible to avoid pronouncing sentence on Alice Merchant's pedigree; because if it was true, it was beyond the power of the Ordinary to give the administration to Dr. Bouchier. The consequence of this in argument seemed decisive against the jurisdiction of the Court of Chancery over the cause of distribution instituted by the respondent. The object of his proceeding in that Court was to have Alice Merchant declared the next

of kin of Mrs. Ann Millington at her death ; but this object could not be attained, without contradicting the sentence of the Ecclesiastical Court, which declared that Turst and Jobber, the executors of Alice Merchant, had failed in proving her the next of kin, and therefore gave the administration to Dr. Bouchier. Should such a contradiction be allowed of, it would wholly counteract the decision of the Spiritual Judge, by disappointing Dr. Bouchier, and those in the same interest, of the fruits of that decision, and by depriving them of the benefit of distribution, to the benefit of which they would otherwise be necessarily entitled. Thus, under colour of exercising a jurisdiction in a question of [717] distribution, the Court of Chancery would indirectly impeach and subvert the foundation of a sentence granting administration, and prevent its beneficial consequences to the appellants ; and therefore would in effect invade the sole jurisdiction of the Spiritual Court in point of administration, as much as if it was to repeal the administration itself.

But it was further proper to consider, that as in the present case, the question determined by the sentence in the suit about *administration* was the same as if the suit had been for *distribution*, so the effect of it ought to correspond, and be the same in point of *conclusion* ; because the principles on which a sentence in one suit for distribution operates as a bar to another for the same purpose, is, that the same person shall not try the same question, in respect to the same subject, in two different suits ; and this applies equally to a sentence in a suit for administration, when the point adjudged is the same as it would have been if the parties had contested about distribution. Accordingly, in the Ecclesiastical Court, this would have been the effect of such a sentence granting administration, and there it would be pleadable in bar to a suit for distribution ; and the effect ought to be the same in the Court of Chancery, both on account of the justice and reasonableness of the rule, and for the sake of producing uniformity in the exercise of concurrent jurisdictions. The sentence granting administration to Dr. Bouchier being then to be considered as a sentence in a suit for distribution, it could scarce be contended, that such a sentence would not be a bar to a second suit for distribution, though instituted in another Court ; for that would be arguing for a right to resort to two concurrent jurisdictions successively for the trial of the same question, and if allowed, would give occasion to clashing and contradictory determinations ; and the Court *last* applied to could not proceed with any effect, without preventing the execution of the sentence of the Court *first* applied to ; which would be assuming a most unreasonable controul over a Court having equal cognizance of the cause, and would in fact amount to an exercise of *appellate* jurisdiction.

At the hearing before the Lord Chancellor, it was objected, that Alice Merchant being dead at the time of the sentence in the Ecclesiastical Court, Dr. Bouchier was then become as near of kin as any other person ; and therefore it was competent for the Spiritual Judge to prefer him to the administration, without deciding anything as to distribution. But this objection was without the least foundation ; for it was settled soon after the statute of distribution, that the right to administration which exists *at the death of the intestate*, is transmissible ; and that the representatives of that person who was *then* next of kin, have the same right to it as such person, if living, would himself have. The sentence granting the administration to Dr. Bouchier, was full evidence of the practice of the Ecclesiastical Court in this respect ; for as a foundation for giving him the administration, the sentence *previously* declared, that the executors of Alice Merchant had failed in prov-[718]-ing her next of kin ; from whence it must be inferred, that if they had not so failed, the administration would have been granted to them.

It might also be objected, that the respondent was not a party to the suit in the Ecclesiastical Court, and therefore ought not to be bound. But there was a very obvious answer to this : Turst and Jobber, the executors of Alice Merchant, as trustees for the respondent, and all others beneficially interested under her will, were the proper persons to contest with Dr. Bouchier ; and the respondent, as residuary legatee of Alice Merchant, was as much bound by the event of the suit with her executors, as if he had been a party ; unless he could shew, that the executors had pleaded *faintly*, or in any manner carried on the suit *collusively*. Executors are ranked by the civilians amongst the *legitimi contradictores* ; i.e. persons, who having the *primary* and *principal* right, may prosecute or defend suits, so as to conclude others, whose rights are

of the *secondary* and *dependent* kind; which is the reason for allowing such third persons to intervene. A writer of great authority on the civil law\*, in explaining where *res inter alios acta* shall bind third persons, says, *sua natura ac propria vi necet vel prodest sententia aliis, quam inter quos lata est, quoties lis tractatur cum legitimo contradictore, a quo ceteri jus summ tanquam a fonte derivant ac recognoscunt*. He next explains the term of *legitimus contradictor*, by adding, *is, quem legitimum contradictorem appellamus, unde præjudicium vel commodum, quod ex tali sententia quoad tertium aboritur, decimus plenius esse, atque rei, etiam quoad hunc, judicata vim obtinere; neque enim tertio, qui inititur juri legitimi contradictoris, eoque ad causam suam uti necesse habet, eandem questionem denuo retractare licet*. The same author then proceeds to illustrate the doctrine by examples; and, amongst them, we find the case of an *hæres factus, or scriptus*, who, so far as concerns the personal estate, answers to an executor amongst us, and legatees; in respect to whom he says, *pariter si scriptum, hæredem superaverit is, qui legitimam vindicabit hæreditatem, etiam legatariis ac fidei commissariis nocebit sententia, ut demonstrat Papinianus; totum enim legatorum jus dependet ab institutione hæredis, unde vires capit testamentum, quæ an recte se habeat vel non, inter scriptum et legitimum hæredem disquiri debet. Cui quidem questioni hodie locus tantum foret, si ex alio capite, quam injusta præteritione vel ex hæreditione liberorum vel parentum, testamenti jus impugnatur; his enim casibus, annullata institutione, cætera fervantur*. If then, as in the case here supposed, sentence against the executor in respect to the constitution of the will itself, on which the right to the *whole* property of the testator depends, is binding upon the legatees; *a fortiori* ought a sentence, which, as in the present case, only decides as to a *part* of the property claimed under Alice Merchant's will, to be so? But it is not peculiar to the civil law, or the practice of our Ecclesiastical Courts, that sentence against an executor binds the legatees; for in this instance, our Temporal Courts adopt a like rule. Decrees in the Court of Chancery against executors, are conclusive [719] against legatees, and all others beneficially interested in the personal estate, though the latter are not parties to the suit, unless the executors plead faintly, or *collude*; and judgments against executors in the Courts of Common Law have a like effect, though in them legatees *cannot* be parties. Nor could the respondent reasonably complain of any hardship, in applying the rule to his case. He could not allege *ignorance* of the pendency of the suit there; for it appeared by the supplemental bill, and by the answer to it, that he had a correspondence with Dr. Bouchier on the subject, soon after the death of the intestate Mrs. Ann Milington; and in truth, he was a most active person in the affair from the beginning: which was proved by several of the witnesses examined by Turst and Jobber, in the Ecclesiastical Court; who deposed, that they gave their evidence at the instance of the respondent. If he had been satisfied with the manner in which Turst and Jobber litigated the affair, he might, by the rule of the Ecclesiastical Court, have *intervened*, by an allegation *pro interesse suo*, and so have made himself a party to the suit. As to faint pleading or collusion, it was not so much as suggested by the respondent, that either of them was imputable to Alice Merchant's executors in their suit with Dr. Bouchier.

It might also be objected, that Turst and Jobber, against whom the sentence of the Ecclesiastical Court was pronounced, refused to prosecute an appeal, and suffered the fifteen days allowed for that purpose to elapse, without using the opportunity; and that as the respondent was not a party, the suit and appeal could not be carried on by him; and therefore it would be very hard to bind and conclude him by a sentence, from which he was not at liberty to appeal. But it should be recollected, that mere hardship will not vary the legal effect of a sentence in the Ecclesiastical Court; and upon that it was, that the question, whether the Court of Chancery hath the power to grant an issue, must turn. Besides, if there was any hardship in the case, it had entirely proceeded from the respondent's own conduct, and he had brought it upon himself. The suit in the Ecclesiastical Court, between Dr. Bouchier and the executors of Alice Merchant, was pending for seven or eight years after her death; and, during the whole of that time, the respondent was at liberty to have made himself a party; and if he had done so, he would have had the same right to an appeal, as if he had been a party from the beginning.

\* *Erici Mauritiæ dissertatio de jure interventionis*. Sect. 15.

Another objection might be, urged, that the Lord Keeper's order upon the appellants plea to the jurisdiction, having been acquiesced in by answering, it was now too late to use the sentence of the Ecclesiastical Court, either as excluding the jurisdiction of the Court of Chancery, or as a bar to the relief prayed by the respondent. But by attending to the words of the Lord Keeper's order it appeared, that so far from deciding upon the effect of the sentence, and over-ruling the plea, he only ordered that it should stand as an answer, with liberty for the respondent to except to it, and expressly reserved the benefit of the plea till the [720] hearing. By this manner of proceeding, his Lordship, though he held the sentence insufficient to preclude the respondent from the benefit of an answer, yet reserved the final consideration of the sentence till the hearing of the cause; and consequently, left the appellants at liberty to avail themselves of it in every other way, except by avoiding to answer.

But however clear the Chancellor's power might be in point of *jurisdiction*, however unavailing the proceedings of the Ecclesiastical Court in point of *conclusion*, the appellants still hoped that the case of the respondent was not such as entitled him to an issue. In the instance of suits for the distribution of an intestate's effects, the power of the Court of Chancery to direct issues to try who were the next of kin, seems peculiarly to be a matter of *discretion*; the Courts of Common Law not being competent to such suits, and consequently the trial by jury being unattainable, except through the special interposition of the Lord Chancellor. Now in the present case there was a concurrence of the strongest circumstances to influence the exercise of discretion against the respondent. Some credit and respect were surely due to the sentence of the Ecclesiastical Court, in a case so confessedly within the peculiar sphere of its jurisdiction; more especially, where a sentence was pronounced, as it was in the case in question, after a long and expensive litigation of ten or eleven years, and after an examination of every witness, and the hearing of every kind of evidence which the utmost diligence of the most adverse parties could adduce, while the business was recent; more than *one hundred* witnesses having been examined in that *single* branch of the suit in the Prerogative Court, which concerned the claim of Alice Merchant. But this was not the only trial which the question now in controversy had undergone. The same question was agitated in the year 1754, respecting the *real* estate of the intestate Mrs. Ann Millington; and it being tried by a jury, at the bar of the Court of King's Bench, upon an issue directed out of the Court of Chancery, a verdict was given against the very identical pedigree which the respondent now set up; and that verdict was afterwards confirmed by a decree. And though the competitors for the *real* estate were different persons from those now contending for the *personalty*, and therefore the verdict and decree were not binding upon the respondent, yet the knowledge of those proceedings, which were referred to in Dr. Bouchier's answer to the respondent's original bill, and had been resorted to by the respondent, in order to make use of the depositions taken in the suit about the real estate, and were read at the hearing of the present cause, tended to make the sentence of the Ecclesiastical Court still more satisfactory, and ought therefore to have some weight in the scale of discretion. To this sentence, and this verdict of a jury, against the pedigree on which the respondent founded himself, might be added the extreme weakness of the evidence brought to support his claim, and the great strength of that produced against it. And it might also be observed, that [721] some of the witnesses, who swore to circumstances the most material, if they had been true, to prove the relationship of Alice Merchant to the intestate Ann Millington, grossly and apparently perjured themselves. This would account for the Spiritual Court's condemning Turst and Jobber in costs; a severity, which as they were only executors in trust for the respondent, they would scarcely have experienced, if the court had not deemed them guilty of improper conduct in making use of such evidence. And several exceptionable witnesses having acknowledged that they were examined at the instance of the respondent, made it difficult to free him from a suspicion of the like criminality.

Nor should the great length of time, during which there had been an acquiescence on the part of the respondent, or the tardy manner of prosecuting his suit when it was commenced, be forgotten. The sentence of the Ecclesiastical Court

in favour of Dr. Bouchier, was pronounced in January 1754; but the respondent and his late wife did not file their original bill till October 1758, so that near five years intervened without any attempt against the appellants; within which time, Dr. Bouchier, relying on the sentence and the acquiescence therein, had actually made a distribution. In Trinity Term 1759, the appellants put in full answers; but the respondent did not reply till June 1760, and, by this delay, almost another year was lost. After replying, there was a further delay of more than five years, for the respondent did not take one step in the cause till October 1765; and, in the subsequent stages of it, there was an unnecessary delay on his part of more than seven or eight years more. This acquiescence, and these dilatory proceedings on the part of the respondent, were very disadvantageous to the appellants; for in consequence thereof, and of the remote period of time to which most of the material facts of the case related, many of them having happened more than seventy years ago, the appellants would be driven to resort to the depositions taken in the Ecclesiastical Court, instead of having the benefit of *viva voce* evidence; which they could have had, if the respondent had not been so late in first making his claim, and so dilatory in the prosecution of it. Upon the whole, therefore, the appellants presumed to hope, that a question which had been tried and decided upon in two instances, once by the Ecclesiastical Court, and once by a jury, might now be suffered to continue undisturbed; and that a *personal* property, which had already been the subject of controversy for upwards of *thirty-two* years, might at length be quietly enjoyed, without opening the door to further litigation.

On the part of the respondent it was contended (C. Ambler, A. Macdonald), that the single question in the cause, "Whether Alice Merchant was at the time of the death of Ann Millington, her next of kin," was a fact properly and constitutionally to be determined only by a jury; and that as the Court of Chancery would not, in such case, have made a decree, without first directing an issue, and having the point determined at law; so that Court, which has a concurrent [722] jurisdiction with the Ecclesiastical Courts in matters of this nature, ought not to be bound by a sentence of the Ecclesiastical Court, as to the fact of the next of kin, which the Ecclesiastical Court had not the power finally and constitutionally to determine, not being invested with power to direct an issue. And therefore, although the Court of Chancery could not, in case on the trial of the issue a verdict should be found for the respondent, set aside the administration; yet the Court might decree the administrator to be a trustee for, and accountable to the respondent. The sentence pronounced by the Ecclesiastical Court was only in the nature of an interlocutory decree, and not a definitive sentence; for it declared, that the appellant Bouchier was the natural and lawful cousin once removed; and, as far as appeared to the Court, the next of kin to Ann Millington: so that any nearer relation which might afterwards appear would be entitled to the effects of Ann Millington. That as Walter Jobber, the surviving executor of Alice Merchant, refused to proceed in the appeal, the respondent and his wife had it not in their power to proceed therein, being no parties to the suit in the Ecclesiastical Court; and could therefore only have relief in a Court of Equity. And the decree of the Court of Chancery, insisted on by the appellants answer, ought in no respect to affect the respondent; the question thereby determined being only as to the heir at law, and not as to the next of kin of Ann Millington; and the respondent, or any person under whom he claimed, not being a party to that suit. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed; and that the respondent's bill should be dismissed. (MS. Jour. *sub anno* 1775-6, p. 426.)

## JUDGMENT.

[723] Sir ROBERT CLERKE,—*Appellant*; GEORGE MOORE,—*Respondent*

[26th November 1718].

[A. and B. jointly confess a judgment to C. for £400, and afterwards file a bill against him to set it aside, as unfairly obtained, and for an injunction in the mean time. C. having got an order for time, the injunction issued of course; but on putting in his answer, he moved to dissolve the injunction, and being told it was dissolved, he took B. in execution upon the judgment; but being afterwards informed, that the plaintiff, by filing exceptions to his answer, had continued the injunction, he immediately discharged B. out of custody; the judgment being joint, it was insisted that the discharge of one from the execution, operated at law as a discharge of both; and therefore A. and B. brought an *Audita Querela* in B. R. to be relieved against the judgment upon the ground of such discharge. But on a bill filed by C. the Court decreed him the whole £400, with his costs, both at law and in equity, and ordered a perpetual injunction to stay all proceedings on the *Audita Querela*.]

\*\* DECREE of the Court of Chancery AFFIRMED.\*\*

\*\* Salk. 92: Carth. 303.\*\*

On the 25th of March 1685, one Henry Payne, together with Sir Simon Foxon, became bound to the respondent in a bond of £2000 penalty, conditioned for the payment of £1000 and interest; but the money not being paid, the bond was put in suit against Payne, who being sued to an outlawry, was arrested thereon in Trinity vacation 1687; and having turned himself over to the Fleet prison, the respondent obtained judgment against him, in the Court of Common Pleas, for £2000 debt, besides costs of suit.

In Easter Term 1688, when the respondent was just going to charge Payne in execution upon this judgment, (which if he had then done, he would probably have recovered his whole debt,) the appellant interfered, and desired the respondent not to charge Payne in execution during that term; alleging, that if he did, it would not only be of great prejudice to Payne, but also to the appellant himself; because he was then engaged in several affairs at Court, of great advantage to the appellant, and by which Payne would get money enough to pay the whole debt; and as a farther inducement for the respondent's compliance with this request, the appellant proposed, in the presence of one Ambrose, the respondent's then attorney, to pay the respondent £300 in part of the said debt, in a little time, if he would forbear charging Payne in [724] execution upon the judgment: and on this promise and undertaking, the respondent was prevailed upon to delay the said execution for all that term.

But the term expiring, and no part of the £300 being paid, application was made to the appellant by one Peele, his own attorney, for the payment of this money; whereupon, the appellant gave the said Peele a letter to be delivered to the respondent, dated the 15th of May 1688, in the following words; viz. "Mr. Peele, Mr. Payne desires till the day after Midsummer-day for payment of the £300, and upon that day, if not before, I will see it performed; for the rest, he will do all along as Mr. Moore and I can agree; he presents his service to Mr. Moore, and thanks him for this civility, and assures him he will serve him as much as this: I have great reason to believe I shall end the whole affair much sooner than you can expect. Pray give my service and thanks to Mr. Moore for his civility to my friend. Yours. R. Clerke."

Notwithstanding this letter the money was not paid, but the respondent was from time to time amused with fresh promises; so that he was prevented from taking out execution during the whole of Trinity Term, and the long vacation following. In Michaelmas Term however, the respondent's patience being quite exhausted, he caused Payne to be charged in execution upon the judgment; who thereupon procured himself to be turned over to the King's Bench prison, from whence he soon afterwards found means to escape; and having for some time concealed

himself at the appellant's house in Northamptonshire, he went from thence, accompanied by one of the appellant's brothers, to the borders of Scotland, and afterwards took up his residence in France.

The respondent being informed of this escape, brought his action against William Lenthall Esq. the then Marshal of the said prison, and obtained judgment for £2000, besides costs; and this judgment having been affirmed on a writ of error, the respondent sued out an *elegit* thereupon; and under that execution he received, by the sale of Lenthall's household goods and stock, (the rest of his estate being covered by a prior mortgage,) £416 3s. 1d., which, after a deduction of the sheriff's fees, etc. was reduced to £322 12s. 5d.

The appellant still neglecting to pay the £300 according to his promise, the respondent, in October 1690, caused him to be arrested; whereupon he sent for the respondent and assured him, that he would pay the money by the first day of the then next Hilary Term; and in the mean time, freely and voluntarily offered, that he, and Peele his attorney, would execute a warrant to confess judgment for the whole sum: the respondent declined accepting this offer till he had advised with Ambrose his attorney; which having done, he the next day agreed to it, and thereupon the appellant and Peele executed the warrant; and judgment being accordingly entered for £400 debt, besides costs, the appellant was forthwith discharged from the arrest.

[725] The £300 not being paid at the time limited, the respondent sued out a *capias ad satisfaciendum* against both the appellant and Peele, upon the judgment: but before either of them could be taken, they, in Easter Term 1691, filed their bill against the respondent in the Court of Chancery, praying that the judgment might be set aside, as having been obtained unfairly, and for no real consideration; and that in the mean time the respondent might be restrained from suing out execution thereon.

The respondent not having answered in time, an injunction issued of course: but after the answer was filed, a motion was made for dissolving the injunction, and the respondent being informed that it was dissolved; gave orders to the sheriff's officer to take Peele in execution upon the judgment, which was accordingly done: the respondent however, being afterwards told, that the plaintiffs, by filing exceptions to his answer, had continued or revived the injunction before Peele was so taken in execution, and that thereby the respondent had been guilty of a contempt of the Court; he immediately, on receiving this information, gave the following order both to the sheriff and the officer; viz. "Whereas you have in your custody the body of Mr. Peter Peele, at my suit, by virtue of the within warrant; and there being an injunction served on me by the defendants, I desire you to set him at liberty; for which this shall be your sufficient discharge and warrant. Given under my hand this 12th of May 1691. George Moore." In consequence of this order Peele was discharged out of custody, and the respondent paid all the expences.

Soon afterwards, the appellant took an unfair advantage of this transaction; for the judgment being jointly against himself and Peele, the discharge of the one from the execution operated at law as a discharge of both; and therefore he brought an *audita querela* in the Court of King's Bench, to be relieved against the judgment, upon the ground of Peele's being so discharged.

The respondent therefore, on the 20th of February 1698, filed his bill in the Court of Chancery against the appellant and Peele, for an injunction to stay the appellant's proceedings upon the *audita querela*, and to set the same aside; also to have liberty to proceed upon the said judgment, or to be decreed a satisfaction for the principal-money and interest due thereon.

The defendants severally answered this bill, admitting the facts therein stated; but the appellant contended, that the discharge of Peele was a discharge of himself; and Peele admitted that he had paid the respondent no money, and that the proceedings on the *audita querela* were without his privity.

Peele afterwards dying, the suit was revived against his administrator; but the progress of it was greatly delayed by the appellant's neglecting to proceed in the suit instituted by him, to impeach the validity of the respondent's judgment. An order was therefore made on the 20th of July 1716, that both the causes [726] should be heard some time in the then next Hilary Term; and both sides were, by consent,



to appear *gratis* to hear judgment, on six days notice to their respective clerks in Court; but one cause was not to hinder the other.

The appellant, notwithstanding this order, neglected to set down his cause for hearing; so that the respondent's cause was heard separately on the 22d of June 1717, before Mr. Justice Eyre, in the absence of the Lord Chancellor Cowper; when the Court declared, there was evidence that there was a note given by the defendant Sir Robert for £300, and that he was arrested thereon, and gave judgment; and therefore, the defendants were decreed to pay the plaintiff the £400 penalty of the said judgment, together with his costs, both at law and in equity; but Peele's administrator was not to be obliged to pay towards the same, more than the assets of Peele come to his hands would extend to satisfy; and a perpetual injunction was awarded, to stay all proceedings at law on the *audita querela*.

From this decree the defendant Sir Robert appealed; insisting (T. Lutwyche, W. Peere Williams), that he never was indebted to the respondent in any sum of money whatsoever; nor was he in any manner legally liable to answer the debt of Payne. That the foundation of the decree seemed as if the appellant had given a note for the said £300; when, in truth, he never signed any such note, nor was the same proved in the cause. As to the objection that it was against equity to insist upon the discharge of the judgment by the *audita querela*, because Peele was only discharged in obedience to the Court of Chancery; it was said, that the appellant by his answer, did not insist upon the discharge by the *audita querela*, otherwise than to have it examined, whether any thing was due from him at the time of giving the judgment; and therefore he offered, by his answer, to try that matter at law. And as to the not prosecuting his own bill, he had no reason to do it for the purpose of being relieved against the judgment, because he had the law with him. In regard therefore, that it was now upwards of twenty-six years since the said judgment was unjustly extorted from the appellant, and about twenty since the respondent filed his bill, which he never thought fit to bring to hearing till the 22d of June 1717; and as the judgment was obtained without any just foundation of a debt, the appellant hoped, that the decree would be reversed, and the bill dismissed with costs; or if there should be any doubt whether the appellant was indebted to, or liable to pay the respondent £300 at the time of the judgment, he was willing to submit to a trial at law, upon an issue to be directed, to determine that matter.

On the other side it was contended (R. Raymond, S. Mead), that it would be very hard if the respondent's submission to the authority of the Court of Chancery, should be the occasion of his losing the benefit of the judgment; and it was highly equitable that the Court of Chancery should exert its authority in support of the respondent's right, against the appellant's attempt to extinguish a just demand, by tak-[727]-ing advantage of the respondent's obedience to an injunction of the Court. That the £400 decreed to the respondent, was all the satisfaction he was ever like to have for the said debt of £1000 as the execution against Lenthall, did not reimburse the respondent the charges which he had been at in the suits against him and Payne. And that all the delay in the case had been occasioned by the appellant, who kept the respondent back from proceeding to hear his cause, under a pretence that he could not get forward in his own cause; when at last it appeared, that the appellant had not the least equitable foundation for relief.

AFTER hearing counsel on this appeal, the question was put, "Whether the said decree should be reversed?" which being resolved in the negative; it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree therein complained of, affirmed: and it was further ORDERED, that the appellant should pay to the respondent the sum of £30 for his costs in the House. (Jour. vol. 21. p. 14.)

# REPORTS of CASES upon Appeals and Writs of Error determined in the High Court of Parliament. By Josiah Brown, Barrister-at-Law. Second Edition by Tomlins. Vol. V.

## LEASES.

[1] CASE 1.—RICHARD WOOLLASTON and another,—*Appellants*; Attorney-General and others,—*Respondents* [17th June 1715].

Lands lying in the county-palatine of Lancaster, become forfeited for being granted to superstitious uses, and afterwards A. obtains a lease thereof under the Great Seal; this is a good lease, and need not be under the Duchy Seal.

The forfeiture accruing to the King *jure coronatæ*, and not as Duke of Lancaster; and the estate therefore being no part of the possessions of the duchy when the lease was made.

DECREE of the Court of Exchequer AFFIRMED.

The site of the monastery of Furnes, and the manors, lands, tenements, and hereditaments, thereunto belonging, lying within the county-palatine of Lancaster (being the estate in question,) were by act of Parliament, 32 Hen. VIII. taken out of the survey of the Court of Augmentations, and put under the order, survey, receipt, letting and setting of the Chancellor, officers and ministers of the county-palatine of Lancaster, to which they never before belonged.

King James I. being seised of these premises, as parcel of the duchy, on the 2nd of May, in the 5th year of his reign, granted the same, under the duchy seal, to Robert Earl of Salisbury and his heirs, to be held in common socage of the manor of Endfield, which is a manor belonging to the duchy, under a yearly rent of £76 13s. 2d. And the same King, on the 21st of December, in the 12th year of his reign, granted the said yearly rent of £76 13s. 2d. to William Earl of Salisbury, and his heirs; to be held in common socage of the manor of East Greenwich, which is a manor belonging to the Crown.

The ancestors of Sir Thomas Preston became afterwards seised of this estate under grants from the Earls of Salisbury; and Sir Thomas, being a papist, conveyed the same on the 6th of May 1674, to Francis Lord Carrington, and Richard Walmesley Esq. and their heirs; but Thomas Preston Esq. the respondent Elizabeth's late husband, and who was the next heir of Sir Thomas in the male line, being a protestant and having discovered that this grant was made in trust, for unlawful and superstitious uses; filed an information in the Court of Exchequer, in the name of the attorney-General, in order to avoid the grant, and procure the premises to be conveyed to the Crown.

After this cause had been several times heard, and after a trial at bar, finding the grant of Sir Thomas Preston to have been made [2] for superstitious uses; it was on the 20th of May 1682, decreed, that the trustees should convey the premises to then Majesty King Charles II. And in pursuance of this decree, a conveyance was made on the 24th of February following, made accordingly.

Mr. Preston, having been at great expence in discovering the grant, and in

secuting the suit to set it aside; and the merits of his pretensions on that account, having been fully heard and examined into before King Charles II. in council; his Majesty, on the 28th of June 1683, was pleased, in consideration thereof, to grant Mr. Preston a lease of the premises, under the Great Seal of England, for a term of seven years, at a yearly rent of £400 payable in the Exchequer.

King James II. having, by letters patent under the Great Seal of England, dated the 3d of June 1687, granted the inheritance of this estate, and also the said reserved rent of £400 to one Francis Plowden, and his heirs; and Mr. Preston having soon afterwards made a new discovery, that this grant was also made for superstitious uses; King William and Queen Mary, in consideration of Preston's good services, and of the great charges by him expended and to be expended in recovering the premises, were pleased, on the 7th of June 1689, to make a new lease to him thereof, for 21 years, from Lady-day 1690, at the yearly rent of £200, payable at the Exchequer; and also paying £190 13s. 4d. per ann. in discharge of certain fee-farm rents issuing out of the premises. This lease was duly inrolled with the Auditor of the Crown for the county of Lancaster, pursuant to a covenant therein for that purpose contained; and there was a clause also inserted, that the same might be passed under the seal of the duchy; but Mr. Preston being advised it was not necessary, made no use of this liberty.

Mr. Preston afterwards, in order to avoid King James's grant to Plowden, and re-vest the inheritance of the premises in the Crown, was at the sole expence of prosecuting a commission out of the Petty-Bag Office, in Chancery; and by an inquisition taken thereon, it was found, that Plowden held the said premises in trust for superstitious uses; and accordingly judgment was given in the Court of Chancery, for vacating the letters patent of King James; and in consequence of this judgment, the inheritance became re-vested in the Crown.

Hereupon, Preston applied in 1694, to King William for a further lease of the premises, as a recompence for his additional expence and services in this latter prosecution; and the nature of this claim being examined and reported by Mr. Traverse, the then surveyor-general, his said Majesty was pleased, by indenture under the Great Seal of England, dated the 27th of April 1695, in consideration of Preston's said services, and of a fine of £300 actually paid, to grant him a new lease of the premises for fifteen years, commencing from Lady-day 1711, when the former lease for 21 years would expire; under the same rents and covenants, as were reserved and contained in such former lease. This last [3] lease was also inrolled with the Auditor of the Crown for the said duchy of Lancaster, and contained a clause, that it might be passed under the duchy seal, if necessary; but this was not done, because the doing it was deemed unnecessary.

Some time afterwards Mr. Preston died; whereupon the respondent Mrs. Preston, his widow and executrix, became entitled to the benefit of both the said leases; but in January 1709, the appellant Woollaston, upon a petition to Queen Anne, suggesting that the estate was *duchy lands*, and that Preston's lease for 21 years would determine at Lady-day 1711; obtained a lease *under the duchy seal*, for twenty-nine years and a half from that time, under a rent of £200 per ann. payable in the *duchy*; and subject to the said fee-farm rents of £190 13s. 4d. And this lease he afterwards (as alleged) mortgaged to Mr. Lake, the appellant Sir Biby Lake's testator, for securing £2000.

In consequence of this lease, Mr. Woollaston made several attempts to disturb Mrs. Preston in the possession of the premises, under pretence that the same were parcel of the possessions of the duchy; and that the lease of April 1695, being granted under the *Great Seal* only, and not under *the seal of the duchy*, was void.

Mrs. Preston therefore, in Hilary term 1710, filed an information in the Court of Exchequer, in the name of the Attorney-General, against both Mr. Woollaston and Sir Biby Lake, in order to establish her title under the fifteen years lease, and to be quieted in the possession.

To this information the defendant Woollaston put in both a plea and demurrer: by his plea he stated, that by an act of Parliament, 1 Hen. IV. the duchy and county-palatine of Lancaster, the *jura regalia*, and all honours, manors, lands, and hereditaments, thereunto belonging, were severed from the Crown; and that by virtue of such *jura regalia*, all forfeitures of lands within the said duchy and county-palatine came and belonged to the Duke of Lancaster. That by another act, 2 Hen. V. the said

duchy and county-palatine, and all honours, lands, hereditaments, parcel thereof, in the hands of his then Majesty, or of his late deceased father, by any right, escheat, forfeiture, or otherwise, as well thentofore, as by that act united thereto, should for ever thereafter remain to the King and his heirs, as parcel of the said duchy; and that whensoever, and as often as any other honours, lands or hereditaments, within the said duchy or county, should come to the King, or his heirs, by any escheat, forfeiture, recovery, remainder, descent, or other title; the same should at the same time, and as soon as the same should so come, be united and incorporated with the said duchy, and should be ordered and governed by the officers of the duchy, and should pass under the duchy seal. That by another act, 3 Hen. V. no gifts, grants, or releases of any honours, manors, lands, and hereditaments, then parcel, or which thereafter should be parcel of the said duchy, or within the same, or appertaining thereto, or to any of the [4] inheritances thereof, either for life, years, or otherwise, should pass under the Great or Privy Seal, or any other the seals of the said King, his heirs or successors, save the *duchy seal* only; and that all gifts, grants, leases, or releases, that should at any time thereafter be made of any such hereditaments as aforesaid, then parcel, or which should thenafter be parcel of the said duchy, or which should thenafter be within the same, or appertaining thereto, *under any other seal*, are thereby declared to be void. That by an act, 32 Hen. VIII. the estate in question was annexed to the said duchy, and enacted to be for ever thereafter within the survey, rule, and jurisdiction thereof; and by another act in the same year, it was enacted, that the said premises should have the like liberties, franchises, and privileges, as other duchy lands. The defendant then pleaded his said lease under the seal of the said duchy: and that the lease for fifteen years to Mr. Preston, being passed under the Great Seal of England only, was void. And he demurred, for that the matters in question were properly triable at law.

This plea and demurrer being argued on the 11th of November 1711, the plea was ordered to stand for an answer, and the benefit thereof reserved till the hearing; but the demurrer was over-ruled.

On the 26th of January and 18th of February 1712, the cause was heard; when the Court took time to consider and deliver their opinions, till the 18th of June 1713: on which day the Court were unanimously of opinion, and accordingly declared, that the lease made of the premises to the said Thomas Preston deceased, under the Great Seal of England, was a good lease, and ought to be established; and therefore it was ordered, that an injunction should issue, to quiet the relator Preston, and all claiming under her, in the possession of the premises in question for the residue of the said fifteen years, against the defendants, and all claiming under them; and that the defendant Woollaston should pay the relator her costs, to the time that the other defendant Sir Biby Lake was made a party to the suit; and that the costs subsequent to that time should be paid by both the defendants.

From this decree the defendants appealed; and on their behalf it was insisted (T. Lutwyche, W. Peere Williams), that by virtue of the said several acts of Parliament King William was seised of the premises in right of his duchy of Lancaster, and that the respondent's lease, being under the Great Seal only, was void; or, if there was any doubt of this, the appellants ought not to have been concluded therein without a trial at law; and for which very purpose they had brought an ejectment, but were stopped by an injunction of the Court of Exchequer from proceeding therein. That supposing the premises to be duchy lands, and the fifteen years lease set up by the respondent to be void at law, as being made under the Great Seal, when it should have been under the duchy seal; there could be no reason for a Court of Equity, or of revenue, to make that lease [5] good, which so many acts of Parliament had, by express words, made void. That the covenants contained in this lease for quiet enjoyment, etc. could give no title to the respondent in equity; for as the lease itself was void at law, being made of *duchy land* under the *Great Seal*, so the covenants contained in that lease were void also; and it would be a mere evasion of these several statutes to say, that though the lease is void and shall not bind the King at law, yet it shall in equity; and that the covenants for quiet enjoyment, which are no more than usual covenants in all leases, shall be good to bind the King, though not under the duchy seal. That the £300 paid as the consideration for this lease occasioned no alteration; because the several acts of Parliament, whereby such grants were declared void, made no

distinction between grants on good consideration, and voluntary grants; but made void all grants whatsoever of duchy lands under any but the duchy seal. That in this case, the payment of the £300 fine, or any pretended merit of the respondent's family, in discovering these lands to have been granted to superstitious uses, ought to be less regarded; because the fine had not only been long since re-paid by the perception of the profits, but a sum of £2000 at least had been raised by the respondent's testator, from the sale of timber growing on the estate; and to which fact, the appellant offered to read evidence at the hearing, but was refused. That the respondent had the less reason to insist on any relief in this case, in regard the former lease of the said premises for 21 years, made to her testator, was under the duchy seal; and the warrant for passing this very lease for fifteen years directed that it should also be passed under the duchy seal, as well as the Great Seal; as therefore it seemed to have been the wilful neglect of the testator, without any intervening accident, to omit the passing this lease under the duchy seal, there could be no ground for a Court of Equity to aid the respondent in a matter arising by such wilful neglect, and against the express words of several acts of Parliament; especially as by granting the lease to the appellant Woollaston, it was out of the power of the Crown to make the respondent's lease good. And lastly, that the other appellant, Sir Bihi Lake, was a mortgagee of the premises, for no less than £2000, without notice of the respondent's interest; and in case this decree should stand, he would be wholly deprived of his security.

On the other side it was contended (J. Jekyll, E. Northey), that this estate, or any of the rents or revenues thereof, was never under the survey, order, or management of the officers of the duchy; and though it lay within the county-palatine, yet the forfeiture for superstitious uses accrued to the King *jure coronae*, and not as Duke of Lancaster. That it was conveyed accordingly by the trustees of those superstitious uses, pursuant to the decree of the Court of Exchequer, and had ever since been deemed parcel of the possessions of the Crown. That the rents reserved upon the several leases granted to Mr. Preston were made payable in the Exchequer, and not in the duchy; and as he was a real purchaser of the fifteen years [6] term, for a fine of £300 actually paid near fifteen years before its commencement; if there were any defects in this lease, the respondent, as his executrix, was entitled in a Court of Equity to have the same supplied; especially against the appellants, who claimed under a subsequent voluntary lease, without any fine or sum of money having been paid for the same. Besides, the appellant Woollaston obtained this lease unfairly and by surprise, her Majesty not being informed how the title of the estate then stood; for he had totally omitted to take notice in his petition, of the title of the Crown, under the decree of the Court of Exchequer, or of the conveyance made in pursuance thereof, or that the rent reserved upon the former leases was constantly made payable in the Exchequer. Lastly, that the appellant had mispleaded the several acts of Parliament relating to the duchy, and set the same forth otherwise than they were; for, upon reading those acts, it plainly appeared, that they related only to such honours, lands and hereditaments, as were parcel of the possessions of the duchy at the time of making them, and not to any lands or hereditaments which should afterwards come, or be united to the said duchy; and therefore none of these statutes could possibly affect the estate in question, it being no part of the possessions of the duchy when they were made.

ACCORDINGLY, after hearing counsel on this appeal, and also the joint opinion of the Judges, delivered by the Lord Chief Justice of the Court of King's Bench, as to the validity of the lease of the 27th of April 1695, in regard the same passed only under the Great Seal; it was ORDERED and ADJUDGED, that the appeal should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 20. p. 77.)

CASE 2.—SHEM BRIDGES,—*Appellant*; JOHN HITCHCOCK and another,—*Respondents* [24th June 1715].

In a lease the lessor covenants, that if, at the expiration of the term, the lessee should be desirous of taking a further lease, the lessor would grant such further lease, without any fine, *and under the same rent and covenants only*, as in this lease. A new lease is desired and prepared, but it contains a covenant to grant a further lease at the end of the new term; the lessor objected to this covenant, as being in the nature of a perpetuity upon his estate; but the objection was over-ruled.

DECREE of the Court of Exchequer AFFIRMED. See *post*. Ca. 4.

[Mew's Dig. viii. 820; x. 963. Explained in *Iggulden v. May*, 1804, 7 East. 237.]

The appellant being seised of a mill-house and watergrist-mill, called Ember Mill, in the county of Surry, which was greatly out of repair; and one Stapleton being desirous to take a lease of these premises, the appellant, by indenture, dated the 6th of September 1693, demised the mill, mill pools, dams, banks, and waters, with the appurtenances, to Stapleton, for 21 years from [7] Michaelmas 1693, at the yearly rent of £41 10s. payable quarterly: and by this lease Stapleton had liberty to convert the said mills into any mills, except powder and paper mills; so as, at the end of the term, they should be reconverted into corn mills; also to take down the old mill-housing, so as he did, in a year, build up others as good in their stead, and in the place where the old mill-house stood: he had likewise liberty of cutting a way through a *peninsula* at Mr. Wincopp's ground, for the purpose of bringing water in a straight course to the mills, so as that it might be *always* enjoyed as a water-course; but if it could not be procured to be so enjoyed, then the lessee was to preserve the old water-course, and have it cleansed at the end of the term: as the appellant covenanted, "that if the lessee, his executors, administrators, assigns, or any of them, should, at any time thereafter, before the expiration of the term thereby demised, be minded to renew and take a further lease of the premises; that then, upon application made, at any time before the last six months of the said term, the appellant, his heirs or assigns, should grant such further lease as should by the lessee, his executors, administrators, or assigns, be desired, without any fine to be demanded therefore, and *under the same rents and covenants only* as in this lease."

By an indorsement on this lease, of even date, Stapleton declared it to be for joint use of himself and one Trummer; and by articles, dated the 15th of February 1693, the respondents became jointly concerned with them therein: and afterwards, the four partners pulled down the corn mill-house, and erected a substantial brick mill-house in its stead; and also a mill-house and mills for manufacturing of brass and iron, and several other buildings; in the doing whereof they expended upwards of £1800.

In December 1694, Stapleton disposed of his share in the premises to respondent Hitchcock, and Trummer at the same time disposed of his share to other respondent Wetherhed; who soon afterwards disposed of a moiety of interest to one Walter Kent, of whom the respondent Hitchcock purchased it; so that he became entitled to three fourths of the premises, and Wetherhed to the fourth.

In October 1705, the respondent Hitchcock obtained of Mr. Wincopp, a lease of the peninsula for a long term of years; and made a cut through it in order to carry the river in a straight course to the mills, according to the liberty reserved in the appellant's lease; he also kept the old course open and preserved, pursuant to the covenant therein contained.

There being about two years rent in arrear, the appellant, in Michaelmas 1710, brought an ejectment; whereupon, in Hilary term following, the respondents filed their bill against him in the Court of Exchequer, for an injunction against the ejectment; and to compel him to grant a further lease, under the same rent and covenants as in the first lease.

[8] Pending these proceedings, the rent in arrear was tendered and accepted; so that the respondent Hitchcock (who had now got the whole interest in the premises) reasonably expected to obtain a new lease, without further trouble: but in Trinity term 1714, the appellant thought proper to file a cross bill; suggesting, that the banks of the river, opposite his dwelling-house, were raised, and that by the high penning of the water at the mills, his house and estate were greatly damaged; that the old course of the river was changed, and that there was not a new mill-house erected in the room of the old one; and therefore praying, that he might not be compelled to grant any new lease of the premises, till he was relieved in these particulars.

Both these causes were heard in December 1714; when the Court decreed the appellant to execute a new lease to the respondent Hitchcock, for 21 years from Michaelmas then last, under the same rent and covenants as in the old lease; which new lease was to be settled by one of the Barons, in case the parties differed; the cross bill was ordered to stand dismissed, and the costs, in both causes, were to be paid by the appellant.

Pursuant to this decree, the new lease was settled by the Lord Chief Baron, and contained a covenant to grant a further lease at the end of the new term; the costs were taxed at £116 13s. 4d. and an attachment issued against the appellant for non-payment of them, and also for non-performance of the decree, in refusing to execute the new lease.

The appellant therefore appealed from the decree; insisting (T. Powys, T. Lutwyche), that it was erroneous, and ought to be reversed; for that the covenant for a further lease, after the expiration of the new lease, was in the nature of a perpetuity upon the appellant's estate; and might, according to the decree, be demanded from time to time continually; which was contrary to the intent and meaning of the covenant in the first lease, and of the parties thereto. That Stapleton had only a liberty of converting the said mills, into mills for working copper, brass, or wire, and was to leave them in the situation of corn mills again, at the end of the term; but not to convert them into mills for working of iron, which required a greater strength and quantity of water: he had liberty also to pull down the mill-housing, so as he did, within a year, build others as good in their room; but the mill-house, which had been built, had neither chimneys, cieling, windows, partitions, or floors, nor was any part of it fitted for the dwelling of a corn miller; and yet the respondent Hitchcock was not decreed to finish the same, or make it fit for a miller to dwell in, whenever the mills should be re-converted into corn mills. That the new cut made through the peninsula, was only enjoyed by a lease for six years, which would determine in a short time; whereas, by the covenant in the lease, it was to be procured to be enjoyed *always* with the mills: but this not being done, nor the respondent decreed to cleanse and preserve the old course of [9] the river, the same would be choked up and lost before the end of the term, and thereby the mills would be destroyed, which was expressly contrary to the agreement by the lease. That although the appellant made full proof of the annoyances, by raising the banks of the river opposite his dwelling-house, and the high penning of the water; yet the decree contained no direction, that the respondent should take down the banks, and make them as they were before; nor was any mark ordered to be fixed for penning the water, or provision made respecting the damage, which the appellant had sustained in his house and grounds. And, that the appellant was decreed to pay costs in both causes, although he offered, both by his answer and cross bill, to make a new lease for 21 years; and although there was a considerable arrear of rent unpaid at the time of bringing the original bill.

To all this it was answered (E. Northey, R. Raymond), on the other side, that the covenant entered into by the appellant, to grant such further lease as should be demanded, under the same rent and covenants only as in the original lease, was the only foundation and encouragement which the parties had, for expending so much money upon the demised premises as they had done; and accordingly, it was the true intent and meaning of the covenant, that the lessee should be at liberty to renew, as often as he should require. That, in fact, the appellant's house or estate had not been damaged by the high penning of the water; nor had the banks

opposite his house been raised since the mills were built, which was above 20 years ago; on the contrary, the banks were actually worn away, and the roots of several trees planted upon them appeared above ground; and on making an experiment, at the appellant's request, by penning the water for four days together, to overflow his meads, it could not be done; the water running through the banks opposite his house, in no less than thirteen different places. That the old course of the river was still preserved, notwithstanding the cut through the peninsula; that there was a substantial house built for a corn miller, on the same place where the old house stood, which, with other buildings erected on the premises, cost about £1800; and that as all the pretences of damage sustained by the appellant were merely fictitious, and wholly unsupported with evidence, he was justly decreed to pay the respondent his costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 20. p. 87.)

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[10] CASE 3.—RICHARD LEE,—*Appellant*; LORD VERNON,—*Respondent*  
[11th March 1776].

It has long been an established practice to consider those who are in the possession of lands under leases for lives or years, as having an interest beyond the subsisting term, and this interest is usually denominated the *tenant right of renewal*; which though not any certain or even contingent estate, there being no means of compelling a renewal, yet it is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements.

ORDER of the Court of Exchequer AFFIRMED.

King Charles II. by indenture of lease, dated the 8th of January 1661, under the seal of the duchy of Lancaster, in consideration of the many good and faithful services done to his Majesty by Edward Vernon Esq. then one of the gentlemen of his Majesty's privy chamber, did give and grant to the said Edward Vernon the parks of Hanbury and Tutbury, in the county of Stafford, to hold the same from Michaelmas 1661, for the term of 31 years, at the yearly rent, for Hanbury park, of £51 5s. 9d. and for Tutbury park, of £35 10s.

By indenture of lease, dated the 8th of July 1662, under the seal of the duchy of Lancaster, King Charles II. granted to Sir Thomas Morgan, the said parks of Hanbury and Tutbury, with the appurtenances, to hold the same from Michaelmas 1692 (at which time the former lease granted to Mr. Vernon would expire) for a term of 21 years, at the yearly rent, for Hanbury park, of £5 2s. 6d. and for Tutbury park, of £3 11s. And his Majesty did, by the same indenture, grant and assign to Sir Thomas, the rents reserved by the lease of 1661.

By indenture of lease, dated the 8th of July 1678, under the seal of the duchy of Lancaster, reciting the two former leases, and taking notice, that the lease granted to Sir Thomas Morgan was then become vested in the said Edward Vernon; King Charles II. in consideration as well of £140, as of many good and faithful services thencefore done to his Majesty by the said Edward Vernon, and in consideration of the rents therein reserved, did give, grant, and demise, unto the said Edward Vernon, all that park, called Hanbury Park, being parcel of his Majesty's honour of Tutbury, and duchy of Lancaster, in the county of Stafford; and also all that park, called Tutbury Park, or the Little Park, under the castle of Tutbury; and also all the ground and soil of the said parks, with the herbage and pannage thereof respectively (except timber trees, and woods, mines, quarries, and plaister pits, in or upon the premises, with free ingress, egress, and regress, for the using thereof at all times); to hold the same, from the 29th [11] day of September 1713 (at which time the former term of 21 years granted to Sir Thomas Morgan would expire) for the term of 63 years, under the yearly rent of £8 13s 6d. payable at Lady-day and Michaelmas, by equal portions.



In 1687 the said Edward Vernon died, leaving issue only two daughters, Mary and Elizabeth, both of whom died without issue, and unmarried.

After the death of the said Edward Vernon, the last mentioned lease of Hanbury and Tutbury parks became in 1723, by divers meane assignments, vested in the appellant's late father, Richard Lee Esq. for the remainder of the said term of 63 years, who was accordingly in possession thereof until the time of his death, which happened in October 1748; he left a widow, and the appellant his only son, then about five years old; and by his will, (after disposing of such parts of his real estates as were not settled upon his marriage) he gave all his personal estate to his wife Apollonia Lee, and appointed her sole executrix, which she soon after proved in the Prerogative Court of Canterbury, and by virtue thereof, entered upon the premises comprised in the said lease, and held the same to the time of her death, which happened in May 1763; and by her will she gave to the appellant her son, all the rest and residue of her personal estate, to be paid or delivered up to him, at his age of 21 years, or marriage.

Under this bequest, the appellant enjoyed the leasehold premises in question; which lying in sight of the respondent's family-seat at Sudbury, in the county of Derby, on the opposite side of the river Dove, and being likewise contiguous to the lands and castle of Tutbury, held by lease from the Crown, under the duchy seal, the term and interest in which the respondent had purchased; he, in the year 1755, applied in person to Lord Edgumbe, then Chancellor of the duchy of Lancaster, and represented to him, that he (the respondent) was the heir-male of the said Edward Vernon, and in possession of the family-seat by inheritance from Henry Vernon his great grandfather, and that the said leasehold estates had been disposed of out of the family, by the said Edward Vernon, or his representatives, and were very desirable to be enjoyed with the respondent's said seat; and therefore the respondent requested of Lord Edgumbe, as a matter of favour, that a reversionary lease of the said parks might be granted to him, to commence on the expiration of the lease then subsisting.

With this request Lord Edgumbe thought proper to comply; and accordingly, by indenture, dated the 12th of May 1755, under the seal of the duchy of Lancaster, his Majesty King George II. in consideration of a fine of £200, demised the said two several parks, and the soil and ground thereof, with their appurtenances, to the respondent; to hold the same to him, his executors, administrators, and assigns, from Michaelmas 1776, at which time the term of 63 years, granted by the said lease of 1678, would expire, for the term of nine years and an half, under the several [12] rents following, (that is to say,) for Hanbury park, the yearly rent of £51 5s. 9d. and for Tutbury park, the yearly rent of £35 10s.; and which said rents were thereby reserved to be paid at Lady-day and Michaelmas in the accustomed form. And for this lease the respondent paid £200, by way of fine, and the further sum of £31 14s. 6d. for fees and charges.

In the year 1765, the respondent presented a petition to Lord Strange, then Chancellor of the duchy of Lancaster, praying a grant to him of the said parks and premises for such further term, as, together with the terms then subsisting, would make up 21 years. And in the years 1766 and 1768, two petitions were presented by the appellant to Lord Strange, praying, that a lease might be granted to him of the said parks for ten years and a half, to commence from the 5th of April 1786, when the lease now in question would expire, or for such other term as to his Lordship should seem meet.

In pursuance of an order made by Lord Strange, the matter of these petitions, on the part both of the appellant and the respondent, came on to be heard before his Lordship in the presence of counsel for the parties, on the 8th of April 1768; when his Lordship declared that the tenant right, or Lord's favour of renewal of the lease of the said parks, was in the appellant; and his Lordship was pleased to dismiss the petition of the respondent, and to suspend for the present all proceedings upon the matter of the appellant's petition, so far as the same respected the new leases prayed.

In Hilary Term 1773, the appellant filed a bill against the respondent in the Court of Exchequer, by which he prayed, that the respondent might be declared a trustee for him as to the lease granted in 1755, and might be decreed to assign the same to the appellant for his own use and benefit; the appellant thereby offering to

pay the respondent the fine of £200, and all reasonable expences incurred in obtaining the said lease, together with interest for the same, from the respective times of payment thereof. And as a ground for such relief, the bill charged, that when the said lease was obtained the appellant was an infant of seven years of age; that the respondent had presented the petition, upon which the said lease was granted by Lord Edgumbe, as Chancellor of the duchy, without the privity of the appellant's mother, in whom the possession of the premises then was; that no mention was made in that petition, as usual in such cases, of any term or interest subsisting in another person, nor any notice given to the appellant's mother of the application for such lease; but on the contrary, the whole transaction was industriously concealed from her; and that the petition preferred to Lord Edgumbe for obtaining such lease had unduly stated, that the respondent would have been entitled to the premises if Edward Vernon had not disposed thereof; but the appellant charged, that the respondent was not of kindred to the said Edward Vernon.

[13] On the 17th of April following, the respondent filed a demurrer to this bill; on the argument of which two of the Barons were of opinion that the demurrer should be allowed, and the other two were against the allowance of it; thinking, that the appellant ought to have the satisfaction of an answer to the bill, especially to such part thereof as sought a discovery of facts. And therefore in May 1773, the respondent filed his answer to the bill, in which he admitted, that when the said lease was granted to him, the appellant was an infant; and that he did not give notice to the appellant's mother when he applied to Lord Edgumbe for a grant of the said lease; but the respondent denied that he had industriously concealed the transaction from her, and insisted, that he was not in any respect bound to disclose it to her, or to inform Lord Edgumbe that the appellant's mother had at that time any interest in the premises demised to him; for that he had been informed and believed, that until Lord Strange became Chancellor of the duchy of Lancaster, no certain rules had ever obtained with respect to granting leases of duchy lands; but that the Chancellor of the duchy, for the time being, had always been used to grant leases of estates held thereof, to such persons as he thought fit, without regard, and without giving notice to the lessee or tenants in possession thereof respectively; and though the respondent believed, that previous to the grant of the said lease to him, and after his personal application to Lord Edgumbe, and his compliance with the respondent's desire, a petition had been presented to Lord Edgumbe, to the effect stated by the appellant in his bill; yet that such petition was prepared as a matter of course, and in compliance with the forms of the office, without the respondent's direction or privity, and to the best of his remembrance was not signed by him; and he declared by his answer, that he never did assert, either to Lord Edgumbe or any other person, that he should have been entitled to the said leasehold premises, had they not been disposed of by the said Edward Vernon; nor did he obtain the said lease on any such or the like suggestion, but merely as being heir male of the said Edward and Henry Vernon, and of the senior branch of the Vernon family, and in possession of the family-seat and estates in the neighbourhood of the said leasehold premises, and as a matter of friendship from Lord Edgumbe, and a favour from the Crown to the respondent, whose relation, Edward Vernon, originally obtained the grant of the said parks from King Charles II. in consideration of many acceptable services, and in particular of money, to a considerable amount, advanced to the King during his exile at Breda.

To this answer the appellant replied, and passed publication, but did not examine any witnesses.

On the 24th of February 1775, the cause was heard, when the Court was equally divided: the Lord Chief Baron Smythe and Mr. Baron Eyre being of opinion, that the bill should be dismissed; Mr. Baron Perrot and Mr. Baron Burland being of opinion, [14] that the respondent should be declared a trustee of the lease in question for the benefit of the appellant.

In consequence of this equal division, the cause was to have been heard before the Right Honourable the Chancellor, and the Barons of the Exchequer; but before it came on, Mr. Baron Hotham was appointed to succeed Mr. Baron Perrot; and the cause was thereupon set down for re-hearing before the Barons only: and coming on accordingly upon the 19th of June 1775, the Court were given to understand, that in case Mr. Baron Hotham should be of opinion for the appellant, the cause could re-

ceive no decision, the other Barons declaring they had no reason to alter their former opinions; and in case Mr. Baron Hotham should be of opinion with the respondent, that the appellant intended to appeal; the Court therefore, for the sake of expediting the parties, recommended a dismissal of the bill without further argument, in order that the appellant might forthwith appeal. And it was thereupon ordered, that the bill should be dismissed, but without costs.

Accordingly the present appeal was brought; and on behalf of the appellant (A. Wedderburn, G. Hill, F. Hargrave), it was said to have been long an established practice, to consider those who are in possession of lands under leases for lives or years, as having an interest beyond the subsisting term; and this interest is usually denominated the *tenant-right of renewal*; which, though according to language and ideas strictly legal, is not any *certain*, or even *contingent* estate, but only a *chance*, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in *sales*, and is often an inducement to accept of it in *mortgages* and *settlements*. This observation is more especially applicable to leases from the crown, the church, colleges, or other corporations, and indeed from private persons, where the tenure is of ancient date; and there have been frequent renewals, or, what are in effect the same, successive enlargements of the terms in being, by reversionary grants; and therefore such leasehold property is seldom made the subject of entail or mortgage, without express provisions for procuring renewals. This *tenant-right of renewal*, as it is termed, however *imperfect* and *contingent* in its nature, being still a thing of value, ought to be protected by the courts of justice; and when those who are entitled to its incidental advantages, whether by purchase or other derivation, are disappointed of them by fraud, imposition, misrepresentation, or *unfair practice* of any kind, it is fit and reasonable that this injury, which may in many instances be of great extent and magnitude, should have redress; as well as that there should be remedies when rights more perfect and certain are violated. Accordingly, our Courts of Equity have so far recognised the *tenant-right of renewal*, as frequently to interpose in its favour by decreeing, that *new* or *reversionary leases*, gained by *means* or *supposition* of the *tenant-right of renewal*, should be for the benefit of the same persons as were interested in the *ancient* [15] lease; and that those who procured such new leases, and were legally possessed of them, should be trustees for that purpose. There is a great variety of authorities on this head; but the cases which have hitherto occurred have principally been of two kinds; some being cases of persons not having any *beneficial* interest in the *old* lease, as guardians and executors; and others being cases of persons having only *partial* and *limited* interests, as tenants for life, mortgagors and mortgagees; and in cases of both descriptions, those who have procured a new lease in such situations, have been uniformly declared trustees for the persons beneficially interested in the ancient lease, either wholly or in part, according to the particular circumstances; the Court ever presuming, that the new lease was obtained by means of the connection with, and a reference to the interest in the ancient one, without in the least regarding, whether the persons renewing intended to act as trustees, or merely for their own emolument.

The appellant's case, however, was not only within the scope of the *general* doctrine, but even seemed a subject peculiarly proper for relief in a Court of Equity. At the time of the respondent's applying for the reversionary lease, which he procured in 1755, the *tenant-right*, or favour of renewal, was clearly in the appellant's mother; and her pretensions to this right or favour were the stronger, because before those under whom she derived her title had bought the situation of Mr. Edward Vernon, the original lessee, for the large price of £2800 there had been two successive renewals, and the length of the subsisting lease necessarily led to such a permanent connection with the property, as might well render the Crown particularly disposed to prefer those in possession to mere *strangers*. But of the advantages which might have arisen from a *tenant-right of renewal*, thus strongly recommended by favourable circumstances, the appellant's mother was injuriously deprived, by the *improper* manner in which the respondent solicited the Crown in favour of himself, and by the *false pretences* which were made use of to ensure success to his application. For, that he might appear to have the *tenant-right of renewal*, it was *untruly* asserted in his petition to the Crown, that he was *next of kin*

to Mr. Edward Vernon the *original* lessee; the respondent himself now admitting, that he *was not next of kin*, though the allegation of his being so, was the *only* avowed pretension on which he founded his application for the new lease. And, that the attention of the Crown might not be drawn more than was unavoidable, to the *tenant-right of renewal* in the appellant's mother, the mention of her name as the lessee in possession was cautiously omitted; and the sale by Mr. Edward Vernon to those under whom she claimed, was *obscurely* hinted at, with a generality so artfully expressed, as to produce the effect of a suppression of truth, under the colour and semblance of a full and candid disclosure. Besides, in order to prevent the respondent's application from meeting with any interruption by the appellant's mother, he avoided giving her the least notice or [16] intimation of his design; and from the rapidity with which the grant of the reversionary lease to him was precipitated, it seemed as if the forms of office were made subservient to his views of surprise and concealment. Thus, by *privacy*, *hurry*, and *misrepresentation*, the *suggestio falsi*, and the *suppressio veri*, the transaction in every stage and in every part, notwithstanding the palliating colours with which it was attempted to hide imperfection, betrayed its *genuine* form, and attracted observation by all the striking marks of an *unfair proceeding*. Such without doubt it was deemed by the North Auditor of the duchy, when he framed his report upon the respondent's petition for a *second* reversionary lease, in terms so pointedly explanatory of the unfavourable circumstances which had attended the grant of the *first*;\* as such it was still more avowedly reprobated by Lord Strange, when, after a solemn hearing, he dismissed the same petition, and declared the *tenant-right* or favour of renewal to be in favour of the appellant. These acts of condemnation operated the more forcibly against the respondent, because they proceeded from persons whose official situations gave them the best opportunity of knowing how far, in the progress of the respondent's first application, the usual and proper forms had been partially deviated from, or unduly accelerated; and therefore had so much more weight and authority, than the unproved allegations of an interested party, as not to leave room for a competition.

The *unfairness* of the whole proceeding being then *apparent*, what was there to prevent a Court of Equity from extending its arm of protection in relief of the party injured? The false suggestion *admitted*, the suppression *imputed* could not be called into the service of the respondent for any other purpose than misleading the Crown to suppose that *tenant-right of renewal* to be in him, which in fact was, and was now conceded to be, in the appellant's mother; and the lease to the respondent being the fruit of this deception, it brought the case not barely within the *spirit* of the *general* doctrine, on which other cases of the same kind have been adjudged, though surely that alone ought to suffice, but even within the very *letter* of it; or to express it justly, more perfectly and fully within the reach of *both*, than any instance which had yet occurred. In most, if not all of the former cases, the Court *presumed* that a *supposition* of *tenant-right* was the means of procuring the new lease, and the foundation of the grant; but in the present case, it was unnecessary to resort to presumption; for the fact of the respondent's thus obtaining the new lease, [17] and of the Crown's granting it, was in evidence, and his own words proved it; the only pretence in his petition for the new lease having been a misrepresentation, calculated to draw a veil over the *real* tenant-right, which existed in the appellant's mother, and in its place to raise the *shadow* of a tenant-right in himself, by the derivation of a pretended proximity of blood. In the other cases, the new lease was simply gained by supposition of a *tenant-right*; but here the new lease was so gained, with all the aggravating circumstances of deception of the Crown which granted, and surprise of the party to whose prejudice that deception was practised: so that the present case

\* The substance of this report was, that the premises were held by the appellant, but there being no covenant contained in the lease of the 30th of Charles II. for inrolling any assignment in the Auditor's Office, the parties concerned had not inrolled the same, and therefore he could not state them; that the reversionary lease obtained by the respondent in 1755, was granted upon a particular of the premises only, without any previous report; that on perusal of the particular, he found no notice taken, by whom the premises were then held, or in whom the *tenant-right of renewal* was; and that it did not appear to him, whether the then lessee had any previous notice of such grant to the respondent.

seemed to fall as well within the *general* head of fraud and imposition, as within the *particular* doctrine applicable to the ordinary cases of *tenant-right*.

The principal objections urged in favour of the respondent, would admit of the most obvious answers. In order to free himself from the imputation of any intentional misrepresentation, it was said, that the respondent meant to found his pretensions to the favour of a new lease, not as being Mr. Edward Vernon's next of kin, but as being his heir-male. So far as this explanation merely tended to exculpate the respondent personally, and to preserve his character inviolate, the appellant not only acquiesced in it himself, but even wished that it might prevail with others; he being anxious for the high rank and dignity of the respondent, and much concerned that any hardness of language should be necessary in the argument of the appellant's case, and wholly indisposed to have such severity in the least extended, beyond the attainment of that justice, which was the object of his suit. But if by this explanation, it should be attempted to influence the point in controversy with the respondent, the appellant must resist its effect. The words *next of kin* in the respondent's petition, apparently referred to the nature of the ancient lease; which being for a term of years, was transmissible to personal representatives, and not to heirs; and therefore required, that the respondent's title should be framed as *next of kin*, in order to give the colour of a *tenant-right*. Nor was it to be conceived, that the petition was expressed in terms so exactly corresponding to the property, and so peculiarly adapted to insinuate a *tenant-right*, without design and premeditation; and though the pretensions of the respondent might receive this shape from the officer of the duchy, who negotiated the business as the respondent's agent; yet the petition being presented by authority from him, he must be responsible for all the incidental disadvantages in point of interest; a construction which he could not consistently complain of as a hardship, so long as he persevered in claiming the consequential benefits. Another objection relied on by the respondent was, that a *privity*, arising from connection of estate, or from some personal trust and confidence, was an essential ingredient in cases of *tenant-right*, hitherto adjudged; and that there was no such *privity* between the respondent and appellant, they being strangers to each [18] other. But the force of this argument depended partly on supposition; for it does not appear, that all the cases were determined merely on the ground of *privity*. Besides, if they were, still that ground necessarily involved a principle of decision, which would reach the case now in question. In the case of trustees, and persons having particular interests in the ancient lease, relief is given, because the Court presumes, that such persons, when they procure new leases, obtain them on the supposition of a *tenant-right*; and if they do, they cannot, consistently with fair dealing and good conscience, claim the benefit of them, in opposition to those interested in the ancient lease. But the present case was stronger; for the gaining the lease by means of such a supposition was in proof, and as that supposition was created by a *false* representation, the circumstances of unfairness, were of a more gross kind, and even brought the case within the general doctrine of fraud and imposition, independently of any aid from the particular cases of *tenant-right*. It had also been objected, that if the lease to the respondent was procured by fraud, imposition, or any undue practice, the Crown was the party injured, and might avoid the grant. But it was sufficient to observe, on the part of the appellant, that whether the deception which was made use of to obtain the lease, was or was not of such a kind as might entitle the Crown to avoid it; the appellant, and not the respondent, who injuriously assumed his place and situation, ought to have the benefit of the lease, while it was suffered to continue in force.

On the other side it was contended (E. Thurlow, R. Perryn), that such a *tenant-right* or claim of renewal as was now insisted on, had not been countenanced or protected, either by the common or statute law of this kingdom, or by any determination of Courts of Equity. Indeed it could not exist, without consequences highly prejudicial to the free enjoyment of leasehold property; without invading the undoubted privilege which every landlord is entitled to, of granting leases to whom, and upon what terms he pleases. A *tenant-right* in fact, is not any real or valuable interest; it is no more than a right to expect a favour, which may either be totally withheld, or may be extended to another, without injury: and where no injury is done, even though a loss should have been sustained, our law does not furnish any redress. In

the present case, there was no ground on which the jurisdiction of a Court of Equity could properly be exercised in making the respondent a trustee for the benefit of the appellant. Courts of Equity will not declare a trust, where, from the nature of the transaction, there does not exist any. But the claim of the respondent to the lease of 1755 was from the beginning directly adverse to and inconsistent with the right of renewal claimed by the appellant. The respondent never acted, or pretended to act, in any degree of trust for the appellant, but obtained the lease in question professedly as a stranger to the appellant, and for his own benefit. If there had been fraud used by the respondent in obtaining this [19] lease, the Crown, who was injured, had a right to resume it. The Crown therefore ought to be a party to this suit, otherwise its rights would be determined without any opportunity of being heard in defence of those rights.

Should it be objected, that the appellant was an infant when the respondent obtained the lease in 1755, it was answered, that his interest did not commence till the death of his mother in 1763, and consequently he was not entitled to complain of a transaction, which happened while the estate was the absolute property of another, and he was as much a stranger to it as the respondent was, before the year 1755.

But it is said, that the respondent gave no notice of his application for a lease to the appellant's mother; nor did he take any notice of her subsisting term in his petition. There is no rule either of law or equity, which makes notice in such cases necessary. The usage has not been to give such notice in applications for leases under the duchy of Lancaster. Before the year 1764, no rule respecting *tenant-right* ever subsisted as to the duchy tenants; nor is there any rule now subsisting to controul the Crown, or the Chancellor of the duchy, in respect to duchy leases, or whereby the Crown or its Chancellor is bound to observe or admit a *tenant-right*. The respondent, therefore, ought not to suffer for not observing a rule which had no existence when his lease was granted. The mention of a subsisting term in another is unusual and needless, because the lessees of the duchy are always known to the Chancellor and officers of that Court; the accounts of the receivers and ministers, in which every rent is particularly stated, being yearly passed; and that the subsisting term under the lease of 1678, was known to the Chancellor of the duchy, was apparent by the lease itself being recited at large in the respondent's lease of 1755; and the reversionary term made to commence on the expiration of the lease so recited.

It is also said, that the petition presented by the respondent contained an untrue allegation, which induced Lord Edgumbe to grant the lease; and that the respondent ought not to benefit by his own misconduct. But to this it might be answered, that Lord Edgumbe had consented to grant the lease before the petition was presented, and for reasons not urged in the petition. It was merely to comply with the form of office, and without the respondent's privity, that the petition was presented; and if the allegation complained of had really any weight, the respondent should rather be declared a trustee for the benefit of the personal representative of Edward Vernon, than for the benefit of the appellant.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the order therein complained of, affirmed: without prejudice to any application which the appellant had made, or might make, to the discretion of the officers of the Crown, as to the manner of their executing, in this case, the trust reposed in them by his Majesty. (MS. Jour. *sub anno* 1775-6. p. 447.)

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[20] CASE 4.—JOHN BATEMAN & Ux.,—*Appellants*; SOPHIA MURRAY, Widow, and others,—*Respondents* [18th February 1779].

[Mew's Dig. viii. 839. See 19 & 20 Geo. III. (Ir.), c. 30: *Lennon v. Napper* 1802, 2 Sch. and L. 682.]

In a Lease of lands in Ireland for three lives, there is a covenant for perpetual renewal, on tendering a certain fine to the lessor or his heirs, within three months after the death of each life. The lessee suffers all the lives to drop without applying for a renewal, or making any tender of the fines, until a considerable time had elapsed after the death of the last life, and then files

a bill in the Court of Chancery in Ireland against the heir of the lessor, to compel a renewal for three other lives. That Court decreed accordingly; but on an appeal the decree was reversed. Whenever a Court of Equity is resorted to for relief against the lapse of time, it is incumbent on the party applying to allege and prove some favourable circumstances in excuse for the omission; but in this case no such circumstances appeared, and therefore the right of renewal was considered in point of law to be no longer subsisting.

DECREE of the Irish Chancery REVERSED.

Similar to the above decision was the determination of the Court of King's Bench in *Rubery v. Jervoise*, 1 *Term Rep.* 229; which case was as follows: A. and B. covenant in a Lease for sixty-one years, "that at any time within one year after the expiration of twenty years of the said term of sixty-one years, upon the request of the lessee, and his paying £6 to the lessors, they would execute another Lease of the premises unto the lessee for and during the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years: and so in like manner at the end and expiration of every twenty years during the said term of sixty-one years, for the like consideration and upon the like request, would execute another lease for the further term of twenty years, to commence at and from the expiration of the term then last before granted." The Court determined that the lessee could not claim a further term of twenty years, after the end of the Lease, having omitted to claim a further term at the end of the first and second twenty years in the Lease.

Edward Edwards, of Castle Darge, in the county of Tyrone, Esq. grandfather to the appellant the Countess of Rosse, being seised in fee of the towns and lands of Claraghmore and Claraghlogan, and of the small town of Sheagully, in the parish of Loughfill, barony of Omagh, and manor of Hastings, in the county of Tyrone, did, by indenture bearing date 28th October 1685, and made between him of the one part, and Thomas M'Causland gentleman of the other part, in consideration of the rents, fines, reservations, covenants, payments, and agreements therein expressed, give, grant, enfeoff, and to farm let unto the said Thomas M'Causland, the two townlands of Claraghmore and Sheagully, as the same were meared and bounded in the possession of the said Thomas M'Causland, situate in the proportions of Claraghmore, manor of Hastings, and county aforesaid (saving to the said Edward Edwards, his heirs and assigns, all mines, minerals, and royalties whatsoever; with free liberty to the said Edward Edwards, his heirs and assigns, to fish, foul, hunt, and hawk in the [21] premises, and every part thereof, for ever thereafter); to hold to the said Thomas M'Causland, his heirs and assigns, from the first day of November then next in fee-farm for ever, viz. for and during the natural lives of the said Thomas M'Causland, Andrew M'Causland his eldest son, and John M'Causland his second son, and the longest liver of them, according to such disposition as should be made by the said Thomas M'Causland, by his last will or otherwise; yielding and paying every year, for ever, to the said Edward Edwards, his heirs or assigns, the rent or sum of £15 sterling, with two year old bullocks, and one fat mutton, over and besides all manner of subsidies, taxes, and impositions whatsoever, charged or to be imposed on the premises by act of parliament or otherwise, (the rents due to his Majesty only excepted,) the said yearly rent to be paid on the first of May and first of November, in equal portions.

In this lease there were covenants by Thomas M'Causland, that he, his heirs and assigns, would do suit and service at the courts leet and courts baron of the manor, and to appear and pay at every court leet, to the seneschal or deputy for the time being, sixpence sterling, and for every under-tenant or cottier inhabiting on the premises, three-pence sterling apiece, and that he and they who should inhabit on the premises should grind all their grain, that should grow and be expended on the same, at the mills of the said Edward Edwards in Claraghmore, and pay the sixteenth grain for the toll or moulder thereof, on forfeiture of 10s. sterling. There was also a provision, that if the said yearly rent should be unpaid twenty days, it should be lawful for the said Edward Edwards, his heirs or assigns, to distrain for the rent and arrears, and for the customs, fines, and forfeitures, with 12d. in the pound for a *nomine poenae*. There was also an agreement, that at the death or decease

of any of the lives above mentioned, then, upon the payment of a fine or sum of £7 10s. sterling, tendered and paid unto the said Edward Edwards, his heirs or assigns, within three months next after such death and decease, he or they should add another life instead thereof, by new deed indented unto the said Thomas M'Causland, his heirs or assigns, *continuing three lives for ever*, upon the payment of the said fine or sum of £7 10s. sterling, at the fall of every life. It was also agreed in the lease, that Thomas M'Causland, his heirs or assigns, were not to alienate or sell their or any of their interests in the premises, or any part thereof, to any person or persons whatsoever, without the licence of him the said Edward Edwards, his heirs or assigns, first had and obtained, in writing under his or their hand and seal.—It was also agreed upon between the parties, that the said Thomas M'Causland, his heirs and assigns, should make appear at every Easter court-leet, and view of frankpledge, to be held for the said manor, by two sufficient witnesses duly sworn, that the said three lives were then alive and in being; and if the said Thomas, his heirs or assigns, should, at any Easter [22] leet, neglect to prove the said lives in being as aforesaid, then it should and might be lawful for the said Edward Edwards, his heirs or assigns, to distrain the premises, or any part thereof, for the said fine or sum of £7 10s. sterling, until he should be thereof fully paid, although all the said lives should be in being.—Lastly, it was agreed, that all difference of meares and bounds that should happen to arise between the said Thomas M'Causland, his heirs and assigns, and his and their neighbours, should on their parts be wholly referred to the award and determination of him the said Edward Edwards, his heirs and assigns.

By indenture, bearing date the 16th of November 1708, between Thomas Edwards of Castle Gore, in the county of Tyrone, Esq. eldest son and heir of the said Edward Edwards deceased, of the one part, and James Murray gentleman, of the other part; reciting the deed of the 28th October 1685 *verbatim*; and that Thomas M'Causland had conveyed his estate and interest in the lands and premises unto Andrew M'Causland, his heirs and assigns, under the reservations and covenants above mentioned; and that the said Andrew M'Causland, having become seised thereof, had, by indenture dated 13th March 1697, in consideration of £100, conveyed the lands and premises to Francis Swetenham, being seised, had, by indenture dated the 4th August 1699, in consideration of £160, conveyed the lands and premises to James Murray, his heirs and assigns, under the same limitations for lives, and under the same reservations of rent, covenants, and agreements, as in the deed above mentioned is contained: and reciting, that two of the *cestuique vies*, or lives, in the deed of 28th October 1685, viz. Andrew M'Causland eldest son of Thomas M'Causland, and John M'Causland second son of him the said Thomas, had of late years gone beyond the seas, and no certain account could of late be had of them, but that they were believed to be dead; and if not, yet in regard the said James Murray could make no proof at the court-leet of the manor of Hastings for some years, by two good witnesses, of their being alive, as by the deed he ought; therefore the said James Murray was willing and desirous to pay the two fines for the two lives aforesaid, and to have two others named and inserted in their place and stead, according to the terms in the said recited deed, and no further to insist on their two lives aforesaid, but that the same should from thenceforth cease and determine, as if they were naturally dead; and in their place and stead to insert and put in the lives of him the said James Murray, and George Murray his son: It was witnessed, that the said Thomas Edwards did thereby, on the terms and conditions in the said recited deed, ratify and confirm the said deed, and the lands thereby demised, according to the true intent and meaning of the same, unto him the said James Murray and his assigns, during the further lives of him the said James Murray and George Murray his son. By this deed also the said James Murray for himself, his heirs and assigns, covenanted to [23] pay the rents reserved by the said deed, and to observe, perform, fulfil, and keep all and singular the covenants, conditions, and agreements therein mentioned, on the part of the lessee, his heirs or assigns; to be paid, observed, performed, and kept, according to the true intent and meaning of the same; and that the said Thomas Edwards, his heirs and assigns, should have free ingress, egress, and regress, at all times, into the demised premises; to cut down and carry away the woods and underwoods growing, or that should thereafter grow thereon; and to make charcoal of the said woods and underwoods; and to wheel



dust, and cover the said coals, without any let, trouble, or hindrance of him the said James Murray, his heirs or assigns, or any claiming by, from, or under him or them. Further, it was agreed upon, by and between the said parties, that the said Thomas Edwards should not cut down such trees or sally as the said James Murray should plant on the premises, provided the said James Murray should not plant where any wood or underwood was then growing.

Thomas Edwards died in 1721, leaving Hugh Edwards his eldest son and heir at law, who, as such, became seised of the manor of Hastings, and of the reversion in fee of the lands in lease to James Murray.

In April 1724, James Murray assigned his lease to trustees, to the use of his eldest son George Murray, subject to an annuity to himself and his wife Alice, during their joint lives, and the life of the survivor.

In October 1730, the rents and duties to Mr. Hugh Edwards being greatly in arrear, he came to an agreement with James Murray and his son George for the purchase of their interest in the town and lands of Claraghmore and Sheagully; and the following agreement was entered into and signed by the said James Murray, George Murray, and Hugh Edwards, viz. "A memorandum of an agreement made and concluded by and between Mr. James Murray and George Murray of Claraghmore, in the parish of Lonfield and county of Tyrone, of the one part, and Hugh Edwards of Castlegore Esq. of the other part, this 21st day of October, in the year of our Lord 1730, viz. That the said James and George Murray have sold, and by these presents made over, all that and those the lands of Claraghmore, Claraghloghan, and Sheagully, with all the edifices and appurtenances thereunto belonging, as specified in said James Murray's deed of freehold of said lands, unto the said Hugh Edwards, for and in consideration of the sum of £700 sterling, to be paid unto the said James and George Murray or order, at or upon the 5th day of December next ensuing the date hereof, all rent and arrears of rent, and also all debts and demands, and all duties justly due to the said Hugh Edwards, to be allowed as part of the said £700; and that peaceable possession of said lands, edifices, etc. are to be delivered up unto the said Hugh Edwards at or on the 1st day of November next, without waste or molestation, and free from all incumbrances, titles, [24] debts and demands, or mortgages whatever: Pursuant to which agreement deeds are to be drawn and perfected, as counsel learned in the law shall advise, still reserving a power to the said James and George Murray to distrain for all rent, and arrears of rent, due on the said lands at or upon the 1st day of November next. In witness whereof both parties have interchangeably set their hands and seals, this 21st day of October 1730, and do hereby bind and oblige each other, for the performance of the within expressed articles, in the penal sum of £500 sterling, by these presents jointly and severally."

Upon the signing of this agreement, Mr. Hugh Edwards paid part of the £700 purchase money; but some claim being set up to the lease by the family of M'Causland, the rest of the purchase-money was not then paid, and therefore the agreement was deposited with the Rev. William Babington, to be kept for all the parties until the title should be cleared; and James Murray was in the mean time permitted to continue in possession without paying rent, it being agreed that the rent should accumulate towards discharge of the residue of the purchase-money, which, after deducting for arrears of rent and duties, and for other debts and demands due from James Murray to Mr. Hugh Edwards, at the time of signing the agreement, was but a small sum; but in 1731 the title was cleared, and the payment of the remainder of the purchase-money was settled. However, Mr. Hugh Edwards having a great regard for James Murray, his wife and family, whose circumstances were very indigent, and compassionating their distress, permitted them to occupy their dwelling-house and a small parcel of land for their support, and took their son George into his own house in the capacity of house-steward: but in consequence of a bad state of health, and of being engaged in a great variety of affairs, Mr. Hugh Edwards neglected obtaining a conveyance or surrender of James Murray's lease, or taking the article of agreement for that purpose out of the hands of Mr. Babington.

Mr. Hugh Edwards, as to the remainder of the premises, gave the possession to his brother Edward Edwards, then a minor, as tenant at will, with an intention, as it was apprehended, to convey the inheritance to him when he should attain

twenty-one; and to him the immediate occupiers attorned in trust for Mr. Hugh Edwards. Mr. Edward Edwards continued in possession, as tenant at will to his brother, for some time; but in 1735 his conduct disoblged Mr. Hugh Edwards, who therefore dispossessed him of these parts of the lands of Claraghmore and Sheagully which he had before been permitted to occupy. And on this occasion Mr. Edward Edwards wrote to his brother a letter, dated 3d October 1726, in which were the following words: "I make now my dernier application to you, to know if you will give me possession of Claraghmore, etc. at the ensuing *All-Saints*, upon the terms agreed upon between you and the Murrays, for my use during my minority. I demand no other title from them than the [25] right of possession and purchase from M'Causland, with your other assurances relating thereto." But this application proved fruitless, Mr. Hugh Edwards absolutely refusing to restore the possession to his brother.

On the 12th of October 1737, Mr. Hugh Edwards made his will, and thereby devised his real estates to trustees, to the use of the appellant Olivia, now Countess of Rosse, his eldest daughter, for her life; with remainder to her first and other sons in tail male, with divers remainders over; and soon after died, leaving the appellant Olivia a minor of the age of eight years.

The trustees in the will of Mr. Hugh Edwards, father of the appellant Lady Rosse, appointed her mother, who after his death married Mr. Mervyn, to receive the rents of Lady Rosse's estates; and Mrs. Mervyn employed George Murray to act under her in the management of them, and particularly to be the agent and seneschal of the manor of Hastings, and to assist her in all domestic concerns which required the aid of a clerk and accomptant. In this confidential situation he had access to the deeds, writings and papers of Lady Rosse's father, relative to Claraghmore and Sheagully; but he abused this confidence, by taking away the renewal of 1708, which had been delivered to him, and got from the widow of Babington the article of 1730, both which he concealed. He also permitted his father, James Murray, to repossess the whole of the lands of Claraghmore and Sheagully, and accounted to Mrs. Mervyn for the reserved rent of £15 a year, as if the lease was subsisting; but he did not account for the other payments and duties reserved, nor was the clause requiring proof whether the lives in the lease were existing or not, to be made yearly at the Easter Court for the manor of Hastings, in any instance complied with.

Thomas M'Causland, the survivor of the *cestuique vies* in the original lease of 1685, died before the year 1741; and James Murray, one of the *cestuique vies* in the renewal of 1708, died in 1746; the possession of Claraghmore and Sheagully, which his son George, the agent of the estate, suffered him to take, having continued in him till his death, and being then taken by George Murray himself.

In 1751 the appellant Lady Rosse, then Olivia Edwards, attained her age of 21, and at the recommendation of her mother, appointed George Murray her agent and receiver of her rents; and he acted in that office accordingly. But at this time Lady Rosse was entirely ignorant that her father had purchased the lease of Claraghmore and Sheagully, the transaction being concealed from her by the contrivance of George Murray, and her uncle Edward Edwards, who could have given ample information of it, dying soon after his brother Mr. Hugh Edwards.

The 16th February 1754, the appellant Olivia intermarried with Richard late Earl of Rosse; and soon after, the accounts of Mrs. Mervyn and George Murray, touching the receipt of the rents of Lady Rosse, were prepared by George Murray, and afterwards settled, and general releases to Mrs. Mervyn, and the trustees in the will of Mr. Hugh Edwards, were proposed to be exe-[26]-cuted; but the appellant Lady Rosse having received some slight information of the sale of the said lease to her father, a clause was agreed to, and inserted in the releases, that nothing comprised in the accounts, so stated and settled, should extend to prejudice the Earl and the Countess in any such right as they should afterwards appear to have to the lands of Claraghmore and Sheagully. On settling this account, the Earl and Countess of Rosse were prevailed upon by Mrs. Mervyn to continue George Murray in the agency of the manor of Hastings; and he accounted to them for the rent of £15 a year reserved out of Claraghmore and Sheagully, but not for the rents and duties. to November 1756.

In 1756 the Earl and Countess of Rosse separated; on which occasion the Earl

conveyed the manor of Hastings to trustees, during the joint lives of himself and the Countess, in trust for her separate use.

In February 1763, George Murray, the surviving *cestuique vie*, died, leaving the respondent Sophia his widow, and the respondent William a minor, his eldest son and heir at law.

Richard Earl of Rosse died in 1764, and in March 1764, application was made to the appellant, the Countess of Rosse, for the first time, to renew the lease of Claraghmore and Sheagully; but she had then found among some of her papers which George Murray had secreted from her during his lifetime, and of which she did not get the possession till after his death in 1763, a copy of the agreement of 1730, in the hand-writing of George Murray, and was become fully informed of the other transactions before mentioned; therefore, as well on account of the gross neglect in not applying for a renewal till all the lives in the lease were dropped, and the lease was absolutely extinct, as also from a conviction that the lease had been purchased in manner before stated, she refused to renew, and brought an ejectment to recover the possession of Claraghmore and Sheagully from the respondents; but on the 10th of June 1765, and before any judgment was obtained in such ejectment, the respondents exhibited their bill in the Court of Chancery in Ireland against the appellant the Countess of Rosse. This bill stated (amongst other things) the lease of the 21st of October 1685, and the renewal of the 16th October 1708; and that on executing the renewal, the lease of 1685 was delivered up to Thomas Edwards, Lady Rosse's grandfather; and that in consequence of this she had both parts of it:—That James Murray had, in 1724, conveyed the demised premises to the use of the said George Murray, and he, by articles dated 26th of July 1748, and previous to his marriage with the respondent Sophia Murray, covenanted to convey the premises to trustees to the use of himself for life, with remainder, to the intent that she should have an annuity of £60 or £40 for life on the contingencies therein mentioned, if she should survive her husband; remainder to their first and other sons in tail, with diverse remainders:—That Thomas M'Causland, one of the lives in the deed of the 16th November 1708, died in 1746, and George Murray, another [27] of the lives, died the 7th February 1763; and upon the latter's death, the right of renewal of the lease of Claraghmore and Sheagully, subject to the respondent Sophia Murray's annuity, became vested in the respondent William Murray her son, then a minor:—That Lady Rosse, at George Murray's death, resided in England, and continued there till February 1764:—That soon after her return to Ireland, the respondents caused the draft of a renewal of the lease, with the lives of his Royal Highness George Prince of Wales, of the respondent William Murray, and Mervyn Murray, to be prepared and laid before Council; and that when settled by them, it was left at Lady Rosse's house the 24th March 1764, with a note in writing from Mr. Richard Cowan, the attorney for the respondent William Murray, requiring her, on his behalf, to execute; and expressing, that he was ready, on her execution, to pay the rent and duties due for the lands, and all renewal fines, with interest; and that the said Cowan had called at her house, to tender and pay the same:—That Cowan carried £300 with him for this purpose; but that Lady Rosse declining to see him, he left the copy of the deed, and shewed the money to her maid:—That the respondents had also caused an account, by way of debtor and creditor, to be stated between them and Lady Rosse, which was annexed to the bill, and therein gave credit to her for all demands against George Murray or his representatives, on account of the rents and fines of the said lands or otherwise, and charged her with several sums paid to her, or for her use:—That Lady Rosse giving no answer to the note from Cowan, or to the account, the respondents caused deeds to be ingrossed according to the draft, with like covenants as in the lease of October 1685; and also caused these deeds, and 290 guineas, to be carried and tendered to Lady Rosse, the 1st of June 1764; but that she refused to renew, and threatened to bring an ejectment. Therefore the bill prayed, that Lady Rosse might be compelled to execute a new lease to the respondents, according to the covenant for renewal in the lease of 1685; and that in the mean time she might be restrained by injunction from proceeding at law to evict them of the possession of the lands.

To this bill the appellant the Countess of Rosse put in two answers, by which she admitted the deeds of 1685 and 1708, but denied they were in her custody, and

insisted upon the purchase made by her father from James and George Murray in 1730; and that if there had been no such purchase, yet, after such gross neglect on the part of the tenant, she was not bound to renew the time limited for renewal, by the lease being three months from the death of every *cestuique vie*; and no application being made to her trustees during her infancy, nor to her in proper time, according to the terms of the covenant for renewal.

The cause was heard the 20th, 21st, and 24th of July 1772, before the Lord Chancellor of Ireland; and it appears by the register's minutes, that a copy of the agreement by James and George Murray with Lady Rosse's father, Mr. Hugh Edwards, of [28] the 21st of October 1730, for surrender of the lease renewed, (which copy is before mentioned to have been in the handwriting of George Murray,) was read by order of the Lord Chancellor, though objected to by the counsel for the respondents. His Lordship was pleased to direct two issues to be tried upon a feigned action by a special jury in the county of Tyrone, namely, Whether any and what agreement was entered into by James or George Murray deceased, or either of them, with Hugh Edwards, father of the appellant, for a sale of their interest in the lands in question, and of the lease in the pleadings mentioned, or not?—And in case there was any agreement, Whether the same was carried into execution, or whether the same was waved or departed from by the parties thereto, or either of them?

The issues were tried at the summer assizes for the county of Tyrone 1775, when a verdict was found, that there was no agreement entered into by James or George Murray with Hugh Edwards, for a sale of the said lease.

The cause was further heard upon the 26th of November, 3d, 4th, and 6th December 1776, before the Lord Chancellor, on the right of renewal, on account of the laches of the lessee, and the frauds practised by George Murray; and on the 22d April 1777, his Lordship was pleased to decree, that the plaintiffs were intitled to relief, and that the plaintiff William Murray was intitled to a new grant from the appellants of the lands in question, according to the true purport and intent of the grants or deeds of the 28th October 1685, and the 16th November 1708, upon payment of the several fines, with interest for the same, and of the rents and arrears of rents and duties, which had become due; and his Lordship decreed the same accordingly, and referred it to a master to ascertain the times when the life in being at the time of the said grant or deed of the 16th November 1708, and the two additional lives therein inserted, respectively determined; and to take an account of what was become payable for the fines and the interest thereof; in doing of which, he was to charge a fine of £7 10s. as due on the fall of each of the said three lives, which had fallen, and was to compute and allow interest for the same, from the expiration of three months from the fall of each life; and was also to charge a fine of £7 10s. at the end of every seven years from the fall of each life respectively, reckoning seven years for a life, as had been usual in such cases, and was to allow interest for each of such fines, to be computed from the expiration of three months after such supposed fall of a life; and also to take an account of what was become due from the rents and duties reserved and payable by the said deed of 16th November 1708; and the master was to put a value upon the two bullocks and one fat mutton, annually payable, and to charge such value in the account; and in computing interest on the several fines, as aforesaid, the master was to compute the same up to the 10th June 1764 only, the time when a tender is said to have been made to the defendant Olivia, in case it should appear to the master, that a sufficient [29] sum of money to answer the rents, duties, and fines, with the interest of such fines, was made to the defendant Olivia on that day, which the master was to enquire into: and in taking the accounts, the master was to make to the parties all just allowances. And it was decreed, that on payment of what should appear to be the amount of such fines and interest, and of such rents and duties as aforesaid, the defendant Olivia should execute proper conveyances in law, containing a new grant and confirmation of the lands in the pleadings mentioned, according to the purport and true meaning of the deeds of the 28th October 1685, and 16th November 1708; in which the lives of his Royal Highness the Prince of Wales, and of the plaintiff William Murray, and also Mervyn Murray his brother, were to be inserted, as the three lives to stand in the place of the lives which had fallen: and all proper parties

were to join in such new grant or conveyances, as the master should judge necessary, according to and so far as their respective estates and interest extended, and as they had power to grant; and in case the parties disagreed, as to the mode or form of such grant and conveyances, the master was to settle the same. And his Lordship was pleased to declare, that such new grant was to be subject to the claim and demand of the plaintiff Sophia, in respect of the £50 per annum, under the settlement in the pleadings mentioned. And it being admitted, that the defendant Olivia had the possession of the lands for some time, she was to account for the rents and profits thereof during such her possession. And it was referred to the master to take such account; and the master was to make the plaintiff William Murray an allowance in respect thereof, in the accounts to be taken as between him and the plaintiff Sophia. And it was decreed, that the plaintiffs should have their costs at law, respecting the issue, to be taxed by the proper officer, but not the costs in equity.

From the order of the 24th of July 1772, and the subsequent decree, the present appeal was brought; and, on behalf of the appellants, it was insisted (A. Wedderburn, J. Mansfield), that the evidence of the agreement of the 21st of October 1730, for surrender of the lease by James Murray and his son George, to the father of Lady Rosse, being clear and uncontradicted, the Lord Chancellor of Ireland ought to have dismissed the respondents bill on the first hearing, without directing an issue for the trial of that fact by a jury. But if such issue was proper, the final decree directing a renewal on the terms therein mentioned, was submitted to be improper, because the covenant on which the respondents found their pretensions to a renewal, is only to add a new life on the falling of every old one, if the lessee should pay a fine of £7 10s. within three months after: but instead of attending to this restriction of time, George Murray, through whom the respondents derive their claim, suffered two lives to drop, and above twenty years to elapse, without ever tendering a fine; and in consequence of his death in 1763, his life being the last, the lease expired before any kind of appli-[30]-cation was ever made for a renewal; clearly therefore, in point of law, the right of renewal was no longer subsisting. That whenever a Court of Equity is resorted to for relief against the lapse of time, it is incumbent on the party applying, to allege and prove some favourable circumstances in excuse for the omission: the only facts for this purpose, in the present case, were the coverture of the respondent, Mrs. Murray, and the infancy of her son; but however available coverture and infancy may be in other instances, and even though such pleas should in general be deemed sufficient, still they occurred too late to operate in favour of the respondents, two of the lives having dropped, and more than seven years from the time prescribed by the covenant to renew, having elapsed, and consequently the right of renewal having been long lost, before the title of the respondents, which was under a marriage settlement, dated, and pretended to have been made in 1748, but proved not to have been executed till 1758, commenced. That the grounds of the decree in Ireland seemed principally to have been, that the original lease in question was without any negative words to make the covenant of renewal void, if the lessee should not pay the fine within the three months limited, and that a power of distraining for the fine of renewal was given; but both of these arguments were open to a plain answer. In respect to the first, the words of the covenant expressed clearly, that the intention of the parties to the lease was only to allow the lessee three months for electing whether he should renew or not, and therefore it was unnecessary to add negative words. As to the second argument, it proceeded on a mistake, for the power to distrain was not for the fine of renewal, but for a fine of the like sum, in case of the lessee's neglecting to prove, at any Easter court-leet, the existence of the lives in being; which latter meant nothing more than to force the tenant to shew, from time to time, how near the lease existing was to its determination, or whether it was not actually determined, and to remove the *onus probandi* from the owner of the inheritance.

On the other side it was said (J. Dunning, W. Selwyn), that the appellants, by way of defence to the bill brought by the respondents, relied on the purchase made by Hugh Edwards, under the articles of the 21st October 1730. But an issue having been directed, a verdict had been found, to the satisfaction of the Court, that no such articles were ever executed. And as to the neglect in tendering the fines for

renewal, it was admitted by the appellant Lady Rosse, in her answer, that she resided in England for some time before the death of George Murray, who was the survivor of the three *cestuique vies* named in the deed of 1708, and who died in February 1763; and that she continued in England till November 1763. While Lady Rosse remained abroad, or out of Ireland, the respondents had no opportunity of tendering the money due for fines. It was also admitted, that soon after her return, application was made to her for a renewal. A proper tender was then made on behalf of the respondents, of a sufficient sum of money for the [31] fines due for renewal of the lease, with interest for the same, which was refused. And it was hoped that these circumstances afforded a sufficient apology for any neglect that might be imputed to the respondents, in not making the tender at the time required, in a case where a compensation might be made, and had been offered. It was submitted, therefore, that the decree of the Court of Chancery in Ireland was perfectly right.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order and decree therein complained of should be reversed, and that the respondents bill should be dismissed. (MS. *sub anno* 1779, p. 259.)

CASE 5.—RICHARD VICARS and another,—*Appellants*; TIMOTHY COLCLOUGH and others,—*Respondents* [30th April 1779].

A Lease of lands in Ireland, made after the lessor's estate had been put under sequestration for a contempt of the Court of Exchequer in that kingdom, was held to be good, the lessee having no notice of such sequestration. Where there is no evidence of a trust, a Court of Equity will not presume any.

DECREES of the Irish Court of Exchequer AFFIRMED.

[Mew's Dig. vi. 1178: xiv. 1356.]

Barnaby Carroll, Esq. deceased, who had become a convert to the Protestant religion, and performed all the requisites essentially necessary to conformity, as prescribed by the Popery laws in that kingdom, (except that his certificate was irregularly filed,) professed himself a Protestant, studied in the Temple, and was called to the bar, in the year 1718, purchased an estate in the Queen's County, on which he laid out a considerable sum of money, and continued in possession of this estate about five years, when Richard Vicars deceased, father of the appellant Vicars, having found out the irregularity above alluded to, on the 13th of February 1723, exhibited his bill in the Court of Exchequer (grounded on the several acts of Parliament in Ireland, to prevent the growth of Popery) against the said Barnaby Carroll, stating himself a Protestant, and that Barnaby Carroll was a Papist, and disabled by those acts from purchasing, and therefore praying, that he, as the first Protestant discoverer, might be decreed to the estates purchased by the said Barnaby Carroll. And, on the single ground above-mentioned, Vicars obtained a decree for the estate, with an account of the mesne rents and profits thereof from the time of filing his bill; in consequence of which he was put into possession of the estate, (now worth £500 a year,) which he, during his life, and Vicars the appellant, since his death, have peaceably enjoyed.

Vicars the discoverer, not content with having thus got Barnaby Carroll's estate, without any consideration, prosecuted with [32] unremitting diligence the account for the mesne profits; and, in the year 1738, obtained a final decree against Barnaby Carroll for payment of £1067 12s. 2d. the sum reported to be due to him on that account.

Pending these proceedings, Barnaby Carroll, exhausted by the expence, and stripped of his acquired estate in the manner above-mentioned, in order to avoid the distressing consequences, which he had reason to apprehend from his inability to pay what should be reported due, was obliged to quit Ireland, and seek an asylum in London, committing to one Thady Keenan, who had served him in the capacity of bailiff or steward, the care and management of his paternal estate at Kilmain, con-

taining 400 acres, well stocked with cattle, besides a large quantity of timber, which had been provided for building, and other effects.

In the absence of Barnaby Carroll, Vicars the discoverer obtained a sequestration against all his estate and effects, by virtue of which, the appellant Vicars, who was the principal acting sequestrator, seized all the personal property of Barnaby Carroll that he could, and caused the tenants of his paternal estate of Kilmain, and of a leasehold interest in the Queen's County, the profit rent of which was £44 a year, to be served with orders to pay their respective rents to the sequestrators, and applied to the Court to compel the tenants of Kilmain (who were only tenants at will) to discover their respective tenures and rents, and to have the lands set for their full value, (alleging that they were then under-let) and the rents paid to the sequestrators. He accordingly obtained several orders for that purpose: but Keenan, who occupied the best part of the lands, refusing to comply with the terms of those orders, was attached for disobedience, and obliged to answer personal interrogatories, to clear himself from the contempt; and thinking that he had as good a right, at least, as Vicars the discoverer, to a share of the plunder of Barnaby Carroll's fortune, Keenan embraced this opportunity of setting up for himself; and, in his answer to the personal interrogatories, stated, (among other things,) that by parol agreement, confirmed by a letter from London, Barnaby Carroll had demised, or agreed to let him the estate at Kilmain, for the term of 31 years, to commence from the 1st of May 1734, at the rent of £98 5s. per annum, and he insisted on his title under the said agreement, as being prior to the decree and sequestration: on hearing the matter of contempt on the 27th July 1745, Keenan was discharged from the attachment. But these proceedings were had in the absence and without the knowledge of Barnaby Carroll, whose interest it was to have opposed the iniquitous pretensions of Keenan, if he had been informed thereof.

In March 1746 Richard Vicars the discoverer died, leaving the appellant Vicars, his only son and heir, and sole executor of his will, which the appellant proved, but did not revive the decree and sequestration, which by that event had become abated, until [33] July 1750, although he all along continued in receipt of the rents.

From the time of Barnaby Carroll's coming to England in the year 1734, until the year 1739, he received only some very trifling remittances from Keenan; but from 1739 to 1749 he did not receive a shilling; and reasonably imagining that his estates and stock, if faithfully managed, would have produced sufficient in the space of fifteen years to have discharged the sequestration, he turned his thoughts to a new arrangement of his affairs; and having contracted an intimacy, which by degrees grew into friendship, with Mr. Thady Carroll, a man of good family and connections, of the same country, he applied to him for his assistance to get in some money that was due to him in Ireland, and to discharge Keenan, his bailiff, from his employ, and to call him to account for the various embezzlements of which he had been guilty; and as an inducement to Thady Carroll to undertake this business, and to excite his attention to his interest, he proposed to let him a part of the lands of Kilmain at a moderate rent, reserving to himself a favourite spot of about 37 acres, which he intended to make the seat of his future residence: on this application a treaty ensued, which ended in an agreement, that Thady Carroll should accept the necessary powers for the above purposes, and that Barnaby Carroll should grant him the proposed lease. Accordingly, by indenture of lease, bearing date the 1st of May 1749, Barnaby Carroll, in consideration of the rents and covenants on the part of Thady Carroll to be paid and performed, and for other causes and considerations, did demise and to farm let unto the said Thady Carroll all that the town and lands of Kilmain, situate in the parish of Saint Kerran near Birr, in the King's County, containing by estimation 400 acres, to hold the said town and lands with the appurtenances, (except as after excepted, that is to say, the said Barnaby Carroll did except and reserve to his own use, and of his executors and assigns, the mill new erected on the said premises, together with the miller's garden, being one acre, thereunto annexed; as also thirty-six acres in and about the old and new intended mansion-house of Kilmain, Sion hill, new garden, orchard, wood, and grove,) to the said Thady Carroll, his executors, etc. from the day of the date, for the term of thirty-one years, at the yearly rent of £90 15s. of lawful money of Great Britain, clear of all taxes (quit-rent only excepted), payable half yearly, on the 1st of May and 1st of November, the first payment to be

made on the 1st of November then next. Covenant from Thady Carroll for the due payment of the rent, and that he should not, without the consent in writing of the said Barnaby Carroll, his executors, etc. cut down or take away from off the said premises any of the timber or other trees then growing thereon. Covenant from Barnaby Carroll for quiet enjoyment; with a clause that it should be lawful for the said Thady Carroll, his executors, etc. to surrender the said demised premises at any time within three years, giving a year's notice. And it was covenanted, that if the said lands should exceed or not amount to 400 acres, in either case the ex-[34]-cess or deficiency should be paid for or abated at the rate of 5s. per acre. Barnaby Carroll at the same time gave Thady Carroll an authority under his hand to enter on and take possession of the said lands of Kilmain.

On the same day also, Barnaby Carroll executed two letters of attorney to Thady Carroll, one empowering him to demand and receive of Thady Keenan, and all other persons then or then lately occupying the lands of Kilmain, all rent and arrears of rent due to him for the same, and all money due to him for timber, horses, cows, sheep, corn, hay, or other stock, goods, or things, belonging to him on the said lands. And by the other letter of attorney, Thady Carroll was empowered to receive of John Short, Esq. £200, part of the money due by his bonds and judgments to Barnaby Carroll, and in case of non-payment, to sue for the same, etc.

The lease and letters of attorney were all executed on the same day, in the presence of Mark Newdigate, Esq. a major in the army, Robert Roberts, Esq. deputy remembrancer of the Court of Exchequer, and a member of the Irish Parliament, and John Bailey, a gentleman of character and reputable family.

In a few days afterwards, Thady Carroll set out for Ireland, and having registered his lease in the registry office in Dublin, went to Kilmain the latter end of June 1749, where he produced his lease and powers, demanded possession of Keenan and the several other occupiers of the lands, and required an account from Keenan of the rents and arrears due from and received by him as bailiff, for Barnaby Carroll, and that he would pay him the balance. The several tenants attorned to Thady Carroll, except Keenan and his son, who insisted on the parol agreement for a lease and not only refused to give possession, or attorn, but also to pay the money due from them respectively, or to render any account; whereupon Thady Carroll, through ignorance of law, and imagining that his lease, and the powers with which he was invested, gave him a legal authority for the purpose, entered on the lands in the possession of Keenan and his son, and drove several of their cattle to pound.

This irregular step gave rise to a variety of prosecutions against Thady Carroll by the Keenans, which were productive of great expence, vexation, and distress; the result of which was, that Thady Carroll was attached for the irregularity, and afterwards thrown into prison, where he lay several years before he could get released.

On Thady Carroll's hearing of the sequestration, and the pretended parol agreement for a lease set up by Keenan, which he never had any intimation of before, when he went to Kilmain, he wrote to Barnaby Carroll, expressing his surprise thereat; and in answer, informed him, that Keenan's pretence was a sham, and that with respect to the sequestration, he was convinced it must have been paid off; and he desired Thady Carroll would call the sequestrators to an account. Thady Carroll accordingly made several applications to the appellant Vicars, by letter and otherwise, for an account of the money received by him out of the estate, but he never obtained one.

Thady Carroll finding that Keenans resolved to withhold the possession from him, declared his intention to bring an ejectment against them for the recovery of the lands in their possession; whereupon John Keenan (the son) in December 1749, filed a bill in the Court of Chancery in Ireland, against Thady Carroll and others, stating the pretended agreement from Barnaby Carroll to Thady Keenan his father, for a lease of Kilmain, and that Thady Keenan had demised to him part of the said lands, and praying an injunction. Thady Carroll put in his answer, and the bill was afterwards dismissed with costs.

Two days after Thady Carroll had put in his answer to John Keenan's bill in Chancery, viz. 22d January 1749, Thady Keenan filed a bill in the Exchequer against Thady Carroll, Barnaby Carroll, and others, insisting on the said pretended parol agreement for a lease, and praying a specific execution thereof, and an injunction



against Barnaby or Thady Carroll's distraining or suing at law for recovery of the lands.

Thady Carroll answered this bill, which, though full to a common intent, Keenan took exceptions to, and obtained an injunction. But Thady Carroll having put in a further answer, did in Hilary Term 1752, after much expence, and every opposition and delay which could be made and given, obtain an order for dissolving the injunction, and then brought his ejectment in the plea side of the Exchequer, against Keenan, for recovery of the said lands.

Thady Keenan amended his bill, and thereby charged, that Thady Carroll's lease was a scheme to defeat Keenan's lease, and to disturb the sequestrators, and was in trust for Barnaby Carroll; that he had notice of the sequestration, and that he and Barnaby Carroll both knew that Keenan had established his agreement against the sequestrators; and Keenan by his amended bill prayed a specific execution of his pretended agreement, and another injunction to restrain Thady Carroll from proceeding at law.

Thady Carroll answered this bill, and fully denied the suggested equity, and the several charges therein of fraud and trust; insisted on the fairness and validity of his lease, and for the truth thereof, and the pretence of the parol agreement for a lease set up by Keenan, he referred to the answer of Barnaby Carroll; for want of which, as Thady Carroll had referred thereto, the Court granted Keenan a temporary injunction.

In February 1753, Thady Carroll obtained an order on debate that Keenan should give, and he accordingly did give him judgment at law on the ejectment, with stay of execution, in which case the injunction was to be continued to the hearing, Keenan undertaking to speed his cause.

In October 1754, Barnaby Carroll died intestate, leaving the appellant Grace his nephew and heir at law, who obtained administration of his effects in 1755, and possessed himself of all his [36] deeds and writings, of the letters of Thady Keenan and Thady Carroll to Barnaby Carroll, and all other papers relative to the lands of Kilmain, from which must appear the fraud or trust, if any such had been, or the reality of the lease granted to Thady Carroll, and the truth or falsehood of Keenan's pretensions.

Although the death of Barnaby Carroll had put an end to the sequestration, yet the appellant Vicars continued to receive the rents of Kilmain; and although his demand for mesne profits under the decree in the discovery suit, must have been more than discharged by perception of the rents during a period of eighteen years, and was originally but a personal demand, yet he contended that the sequestration was still subsisting, or could at any time be revived; that the rents, etc. which he received, after deducting his costs in recovering them, had not been sufficient to keep down the interest of the principal money; and that, upon balance of accounts, there still remained due to him the sum of £1400, which he insisted was a lien upon his real estate. And having, by his address and management, persuaded, or intimidated, the appellant Grace into an acquiescence in these positions, he, on the 5th of July 1757, filed a bill in the Court of Chancery against the appellant Grace, as heir and administrator of Barnaby Carroll, to revive the original discovery, suit, decree, and sequestration; and Grace on the same day appeared, and put in an answer to the said bill, by which he admitted the sum of £1400 to be due to Vicars, and making no objection, by his answer, to the revival of the decree and sequestration, the same were revived as matters of course. And Grace having been thus drawn in, to allow Vicars's demand, and to consider it as a subsisting charge upon his real estate, permitted Vicars to continue in receipt of the rents of Kilmain, and to apply them to the discharge of a debt already annihilated by payment, and to which, if it had really existed, Grace, or his real estate, were not liable either in law or equity, it being only a simple contract debt.

In this situation matters rested till August 1759, when Vicars, with views which may be collected from his subsequent conduct, suggested to Grace, as a measure for their mutual advantage, that he should get possession of Kilmain by purchasing Keenan's pretended title, and that, uniting it with his own under the sequestration, he could not fail, on one or other of these grounds, to make an effectual opposition to Thady Carroll's lease; and Grace, adopting this idea, it was agreed between them

to treat with Keenan for an assignment of his pretended interest, the reality of which they had both uniformly contested for twenty years; and although, in an affidavit sworn by Vicars, on the 20th of January 1759, and read on the hearing of this cause, he positively denied that Thady Keenan "held or let the lands of Kilmain to under tenants, by virtue of the parol agreement pretended to have been made to him by Barnaby Carroll, but said he held and occupied the said lands, and demised the same, by virtue of some orders given him by Barnaby Carroll for that purpose, as [37] his agent or steward, and not otherwise, as Keenan himself had informed him, when he first served him with the sequestration;" and, in the conclusion of this affidavit, swore, "that Grace had many letters of the said Keenan's hand-writing to Barnaby Carroll, that plainly shewed he was *only his agent or servant*;"—yet, about seven months after making this affidavit, Vicars came to an agreement with Keenan for the purchase of his pretended term and interest; and Keenan, by deed, dated 30th August 1759, in consideration, as therein stated, of £100, assigned the same, and the benefit of his suit against Thady Carroll, to Vicars and Grace, but for the sole use of Vicars, by whom the consideration was paid, and to whom Keenan gave up his possession.

Thady Carroll disabled, by his long confinement and great expences at law, from prosecuting his claim with that vigour which he otherwise would have done, did not get rid of the injunction obtained by Keenan until 1761, when (after several conditional orders for dissolving it, unless Keenan set down his cause, and a variety of artifices to give delay) the Court dissolved the injunction without further motion, Keenan, or rather Vicars, who had purchased his suit, not daring to bring his cause to a hearing.

Upon the injunction's being dissolved, it was necessary to have a rule in the plea side of the Exchequer, for liberty to proceed on the judgment in ejectment; Thady Carroll's attorney entered a rule as of course for that purpose, and a writ of *habere facias possessionem* was thereupon issued, under which Thady Carroll got possession of Kilmain, and dispossessed Vicars.

It was Thady Carroll's fate to be still unfortunate; the rule under which the *habere* issued, bore date as of the law term, and by fiction of law was prior in time, though subsequent in fact, to the order for dissolving the injunction, which was made in the eight days after Trinity Term 1761.

Vicars, therefore, in Michaelmas Term 1761, applied to the Court, and, on the mistake of the attorney, the *habere* was declared to have issued irregularly, and it was ordered that Thady Carroll should restore the possession to Vicars, and pay cost together with £25 which he had received from the under tenants; and that an attachment should issue against him. The possession was accordingly restored.

Vicars was sensible that this could be but a temporary advantage, and that Thady Carroll's lease must eventually be established. Grace could have no doubt of Carroll's success; for he had often acknowledged the validity of the lease, notwithstanding his opposition to it. In this unity of sentiment with respect to Carroll's lease, Vicars treated with Grace for the purchase of the inheritance of all the lands of Kilmain, as well those comprized in the lease to Thady Carroll, at the yearly rent of £90 l. as those excepted out of the lease, which were of the yearly value of £50, and it was agreed between them, that Vicars should pay to Grace, upon the whole estate being conveyed to him, the sum of £1137 10s.; and that he should also grant to Grace 100 acres [38] of the demesne, for his life, at the yearly rent of 1s. In pursuance of this agreement, the appellant Grace, by deeds of lease and release, dated the 23d and 24th of December 1761, and by fine, for the above considerations, conveyed to Theobald Medlicott, in trust for Vicars and his heirs, the whole estate of Kilmain containing 400 acres; an estate which, subject to Thady Carroll's lease, was at the time worth £6000 at least, and is let at £1 2s. 9d. per acre.

The appellant Vicars had been in possession of the acquired estate of Barnaby Carroll, under the decree in the discovery cause, for fifteen years. He succeeded his father, who had enjoyed it for a like period. It was the reward of his merit as a discoverer, and cost nothing. With the spoil of this estate, the appellant himself had now purchased Kilmain, the old family estate of Barnaby Carroll's ancestors, and the grand object which he had long in view, for a most inadequate consideration; he had received, if not by fraud and imposition on Grace, yet through his ignorance and timidity, full satisfaction for all his trump'd-up demands and

the sequestration, which he had not a colour of right to; and he had also an allowance, as must be presumed, from Grace, on his purchase of Kilmain, for the value of Carroll's interest, on the lands demised to him. And yet he was not content; he was determined to swallow up Thady Carroll's lease, or, by vexatious, oppressive, and expensive suits, (which his acquisitions of Barnaby Carroll's estates enabled him to support,) so to harass and oppress Thady Carroll, as to prevent him from suing for, or enjoying the benefit of it.

With this view, in May 1672, Vicars filed a voluminous bill, consisting of 218 sheets, in the Exchequer against Thady Carroll, stating, amongst other things, the original bill filed by Vicars, the discoverer, against Barnaby Carroll in 1723; the decree thereon; and that Barnaby Carroll having appealed therefrom, the decree was affirmed; the sequestration in 1739; the various proceedings of Vicars against Thady Keenan; the parol agreement for a lease set up by the latter, and the result of that contest, in which Barnaby Carroll, though it was his interest to have aided the sequestrators, never interfered; that the costs attending those proceedings exceeded the rents received by the sequestrators; he stated a colourable conveyance which had been made by Barnaby Carroll in December 1738, to one George Armstrong, for a nominal consideration of £3150; stated the death of Vicars, the discoverer, in 1746; that plaintiff, his son, heir, and sole executor, had revived the decree and sequestration against Barnaby Carroll; that Keenan having established his lease, and refused to supply Barnaby Carroll with more money, the latter concerted a scheme with Thady Carroll, who was then in London, to defeat Keenan's term and the sequestration; that Thady Carroll, under the directions of Barnaby Carroll, returned to Ireland, and in June or July 1749, went down to Kilmain; and then follows a long detail of the irregular steps taken by Thady Carroll against the Keenans to [39] get possession; their various prosecutions of him; the attachment against him; his imprisonment and his discharge from confinement: the bill then states the ejectment brought by Thady Carroll; the original and amended bills of Keenan for an injunction; Thady Carroll's answers and defence; and the progress of that suit, to which Keenan had not made Vicars a party, though entitled to the benefit of the said decree and sequestration; but that Barnaby Carroll never put in any answer to Keenan's bill, though urged thereto by Thady Carroll; stated the death of Barnaby Carroll, and the revival of the original suit against Grace, his heir and administrator; the appellant's agreement with Keenan for the purchase of the benefit of his term, and Keenan's assignment thereof and delivering up to the appellants the lands of Kilmain; the order obtained by Thady Carroll, after such assignment, for dissolving the injunction, which he stated was without notice to plaintiff, and by surprise; Thady Carroll's irregularly issuing an *habere*, and, by virtue thereof, turning the appellant Vicars out of possession; the order for restoring, and the consequent relinquishment of, the possession to Vicars. The bill then charged, that the lease to Thady Carroll was a concerted scheme to defeat Keenan's lease and the sequestration; that it was not a real lease intended for the benefit of Thady Carroll, but was colourable and in trust for Barnaby Carroll; and the plaintiff, by his bill, prayed a discovery of the fraud and trust; an injunction against Thady Carroll's proceedings on his ejectment; that the plaintiff Vicars might be quieted in possession of Kilmain, *during Keenan's term, till the decree and sequestration should be discharged*; and that the lease made by Barnaby to Thady Carroll might be set aside, as calculated to defeat the sequestration.

It is observable, that in this bill Mr. Vicars did not take any notice of his purchase from Grace, reserving it as a ground for future litigation and oppression; nor did he even issue a subpoena until several months after it was filed, when he was informed of Thady Carroll's intention to bring a new ejectment.

The possession of Kilmain having been changed by the assignment from Keenan to the appellants, who were not parties to the ejectment brought against Keenan, it was thought advisable to bring a new ejectment; and accordingly in Hilary Term 1763, Thady Carroll, in the name of Thomas Heyden, his feigned lessee, brought his ejectment in the King's Bench against both the appellants, for recovery of the lands demised to him by Barnaby Carroll; to which the appellant Vicars appeared, and took defence.

Thady Carroll appeared, and put in his answer to Vicars's bill; and thereby

admitted the original bill of discovery, decree, and sequestration against Barnaby Carroll; and the several proceedings under the sequestration against the tenants of Kilmain, and against one Cook, tenant to Barnaby Carroll, of the lands in the Queen's County, at the yearly profit rent of £44, which Vicars and his father had received from Cook to the expiration of his [40] lease in 1750; said that Vicars had also received different sums by the sale of timber which he had seized on Kilmain, and rents received by one Goddard under a prior sequestration against Barnaby Carroll, for not answering a bill which was afterwards dismissed; admitted the contest between Vicars the discoverer, and Thady Keenan, steward to Barnaby Carroll; the pretensions set up by Keenan to a parol agreement for a lease from Barnaby Carroll, which defendant believed he never had, nor had ever been established by the Court; insisted that the costs of Vicars and the sequestrators, in the said contest, ought not to affect defendants title, or to be allowed out of the rents received by them; and believed that the debt decreed to Vicars had been fully satisfied; insisted that the demand was personal, and that Barnaby Carroll's estate was not liable thereto; said he knew nothing of the conveyance to Armstrong, and believed no use was made of it; he said, that having been in England from 1746 until 1749, and having for several years before lived in friendship and intimacy with Barnaby Carroll, the latter informed him he had lands to set, and that he would make him a beneficial lease, upon which defendant treated, and agreed with him for a lease of part of Kilmain for 31 years, at 5s. an acre; that accordingly Barnaby Carroll granted to defendant the lease in question, and gave him a power to take possession of Kilmain, and also executed the letters of attorney, before stated, to defendant, who was not to have any gratuity for his trouble; that defendant returned to Ireland and registered his lease on the 23d of June 1749, and then went to Kilmain and demanded the possession, and an account from Keenan, who said he had an agreement for a lease from Barnaby Carroll, (which was the first intimation defendant ever had thereof); he said that some of the other occupiers attorned to him, but that the Keenans refusing to deliver up possession, he entered on the lands demised to him by virtue of his lease, and entered on the excepted lands under the power from Barnaby Carroll; he acknowledged his irregular proceedings against Keenan, for which he had been attached by the Court of Common Pleas, and which steps he pursued through the advice of a country attorney; he said he had never heard that Kilmain was under sequestration until after his arrival in Ireland in 1749, and that then he demanded an account from the sequestrators, but that no account had been furnished; he said that he had informed Barnaby Carroll of his proceedings, who approved thereof, and by letter of 29th July 1749, assured defendant that Keenan's pretension was a sham and an artifice to defraud him; he admitted that plaintiff, as executor of his father, had obtained an order to revive the decree and sequestration against Barnaby Carroll, but he believed that Barnaby Carroll thought the sequestration was paid off or determined by the death of old Vicars; he admitted the several bills filed against him by Keenan, and his answers thereto; and that in one of his answers he referred to the answer which Barnaby Carroll should put in, and that Barnaby Carroll though [41] pressed to answer, never did; but he denied that Barnaby Carroll refused to answer for the reasons set forth by plaintiff; admitted the death of Barnaby Carroll in 1754, and the revival of Vicars's original suit and sequestration against the appellant Grace, his nephew, heir, and administrator, as also the revival of Keenan's cause; believed that for £100 the appellants bought from Keenan his pretended interest and the benefit of his suit against defendant with a fraudulent intent to oppose defendant's lease; he said that Vicars attended Keenan's cause after the assignment by Keenan of his suit and interest, and fee'd counsel to oppose the injunction being dissolved, and promised to set down the cause for hearing, which if he had done, the cause might have been determined before the filing of Vicars's bill, but that failing to set it down, the injunction was dissolved, and defendant irregularly issued an *habere* on the judgment confessed by Keenan; he said that he had brought a new ejectment in the King's Bench, and meant to proceed to trial thereon, and, if he got a verdict, to take possession of the lands demised to him, and no more; he denied any secret purpose between him and Barnaby Carroll, or any concerted scheme, to defeat Keenan's pretended agreement, or the sequestration; and said that his lease was a real *bona fide* lease; that no trust whatever was annexed to it, but that it was entirely for defendant's own benefit,

and he insisted on his lease and on the statute of frauds; he said he paid Barnaby Carroll three guineas in part of the rent on the execution of the lease, for which Barnaby Carroll gave defendant a receipt; and he set forth such of Barnaby Carroll's letters as were in his possession.

The appellant Vicars took exceptions to the answer, and obtained an injunction; Thady Carroll put in a further answer, and made several applications to dissolve the injunction, and for liberty to go to trial on his ejectment; but by the oppressive artifices made use of by Vicars, (who, on the ground of his being in contempt, and on various other pretences, opposed his going to trial) the injunction was kept up until Easter Term 1768, when Thady Carroll obtained leave to go to trial, on his undertaking to stop after verdict, until the hearing of the cause, or further order.

At length, after a most vexatious and expensive litigation of 19 years, during which period the appellant had every opportunity of preparing himself to give an answer to Thady Carroll's title, and to prove the suggested fraud or trust, the ejectment came on to be tried at the Summer assizes 1768, when Thady Carroll produced his lease, the execution of which was duly proved by Mr. Bailie, the then only surviving witness thereto, who, upon a strict cross examination with respect to the intention or design of granting such lease, or any agreement between Barnaby Carroll and Thady Carroll touching the same, and every circumstance relative thereto, that might induce a suspicion of a fraud or a trust; deposed, that the lease was granted to, and taken by Thady Carroll, for his own proper benefit, fairly and without fraud, [42] and without any trust or agreement annexed to it for the benefit of Barnaby Carroll; upon which, and the appellants not being able to produce a single witness to prove, or any written evidence to raise, a presumption of fraud or trust, although Vicars had sent an agent to England to procure evidence, and had advertised in the London papers (offering a reward) for that purpose; and although he was in possession of all the correspondence between Barnaby and Thady Carroll, relative to the lease, and the several proceedings in consequence thereof: and failing in the objections, in point of law, which he made to the plaintiff's title, the jury, without hesitation, found a verdict for the plaintiff, to the entire satisfaction of the judge who tried the cause: but the appellant, for further vexation, moved the Court of King's Bench for a new trial upon several points of law determined by the judge at the trial, all of which the Court over-ruled, and refused a new trial; and in Easter Term 1769, Thady Carroll obtained judgment.

The appellant Vicars, for the purpose of farther delay and oppression, brought a writ of error in the King's Bench in England, which Court, in Trinity Term 1770, affirmed the judgment of the King's Bench in Ireland.

Pending the writ of error, the appellant prepared a new bill, which he filed on the 13th of November 1769, against Thady Carroll, (containing 400 sheets) thereby reciting the bill of 1762, in the words of it: And further stating (among other things) his purchase of the inheritance of Kilmain, from Grace, for 1000 guineas, over and above the sum of £1400 which Vicars claimed to be due under the sequestration and a subsisting charge on the estate; and that Grace conveyed the same to Medlicott in trust for plaintiff; and the lease granted of part of the premises to Grace for his life; the ejectment brought by Thady Carroll in the King's Bench; that Keenan's lease having expired 1st May 1765, Thady Carroll applied for liberty to go to trial, but, on plaintiff's application, the Court stopt him until Easter Term 1768, when the Court permitted him to go to trial, stopping after verdict; and that, after Trinity Term 1768, he brought his ejectment to trial at the assizes, and proved the execution of the lease; and plaintiff not being able to shew the fraudulent manner in which it had been obtained, Thady Carroll obtained a verdict, and was proceeding to recover the lands under his judgment: he pretended that the motive of Vicars deceased, for filing the bill of discovery was to recover the property of a brother of Vicars which had been purchased by Barnaby Carroll, who did not pay the consideration money: he charged that Thady Carroll, at the time of making the lease, was an utter stranger to the exception contained therein, and to the value, number of acres and circumstances of the lands of Kilmain: that Barnaby Carroll, being in low circumstances and in debt, and Keenan having refused to remit him money, he formed a design of turning Keenan out of possession, and caused a power of attorney to be drawn, empowering Thady Carroll to recover his rents from Keenan; and another power of the same [43] date, to take possession of the premises

for Barnaby Carroll's use; and, lest both should fail, the lease was prepared, with directions to Thady Carroll to register the same; charged that some secret trust was annexed to the lease by way of defeasance, then executed, importing that the same was not intended to give any real interest to Thady Carroll; that no treaty had been entered into, or previous agreement made between them touching the said lease; that Thady Carroll was not a solvent tenant, even at a moderate rent, of the said lands, which would require £500 to stock them properly; that by a plan drawn many years since by Barnaby Carroll, it appeared that several parts of the lands, containing above 100 acres, were excepted out of his lease, yet under the said ejectment and judgment Carroll insisted he would take possession of the whole; that if Barnaby Carroll had answered Keenan's bills he must have confessed that the lease was a scheme to distress Keenan and obstruct the sequestration, and not to give Thady Carroll any interest in the premises; but that Barnaby Carroll had been cautioned by Thady Carroll not to admit the same, as it would establish Keenan's, and defeat Thady Carroll's lease; and the plaintiff by his new bill prayed a discovery; that Thady Carroll might be stopped from proceeding on his ejectment, and that his lease might be set aside, and that plaintiff might be quieted in his possession; and might have the benefit of Keenan's bills and the answers thereto, and of plaintiff's former bill and the answers thereto.

One bill, it seems, was not sufficient to answer Mr. Vicars's views; but on the same 13th November 1799, he caused another very long bill to be filed in the Court of Exchequer in Ireland, against Thady Carroll, in the name of the appellant Grace, stating a suit instituted in the year 1736, in that Court against Barnaby Carroll, by Michael Grace, in the names of the appellant Grace and his brother and sister, for the recovery of a legacy and other demands: the decree thereon, and the remembrancer's report in 1738, by which he certified the sum of £4500, besides interest and costs, to be due to them from Barnaby Carroll; that the said Michael Grace, finding that Vicars the discoverer, had in 1738, obtained a report that £1067 12s. 2d. remained due to him from Barnaby Carroll on the foot of the decree obtained by him, desisted from proceeding further in his suit until Vicars should be satisfied his debt out of the issues and profits of Kilmain: the bill then states in detail the several suits in law and equity, and the proceedings thereon, and the various transactions of the several contending parties relative to the lands of Kilmain; the agreement with Keenan for the purchase of his pretended interest; Grace's sale of the inheritance to Vicars, and the lease made by Vicars to Grace; and charges in a variety of shapes, that Thady Carroll's lease was fraudulent and in trust for Barnaby Carroll, and that Thady Carroll had notice of the sequestration previous to the execution of the said lease, nearly in the same manner as stated by Vicars's bill; and the plaintiff Grace by his bill prayed a discovery, and that Thady Carroll's lease might be set aside, and he restrained from further proceeding on the ejectment, until the hearing; that plaintiff might be quieted in the possession of the premises demised to him; and that he might have the benefit of Keenan's original and amended bills, and Thady Carroll's several answers thereto, and all proceedings thereon, and of Vicars's former bill and Carroll's answers thereto, and of the bill lately filed by Vicars against Thady Carroll, and also of the bill filed in the appellant Grace and his brother and sister's names against Barnaby Carroll, and the decree, report, and proceedings thereon.

The filing this bill manifests a combination between both the appellants, to bear down Thady Carroll by such an enormous load of expence, and prevent him from asserting his right; it states the same case; contains the same charges of fraud; suggests the same fictitious equity, and prays the same relief, as the bill filed by Vicars: both bills are signed by the same counsel, filed the same day, and by the same solicitor and agent; and it is admitted that Grace's suit was in trust for the appellant Vicars; so that Grace lent his name, for the purpose of oppression, to Vicars, who carried on both suits at his own expence.—Indeed it could not be conceived that Grace, who had sold his inheritance to Vicars about eight years before, should wantonly institute a suit from which he could derive no greater advantage, than from the suit instituted by Vicars, who had purchased the inheritance; as the fate of one suit must determine the other.

Thady Carroll appeared to both bills, and on the 24th November 1769, obtained an order for time to answer until the next Hilary Term, without an injunction: the appellants, however, entered process of contempt, and obtained injunctions thereon,

which, on motion, were set aside with costs; but from the great length of the bills, the much greater lengths of the answers, which it was necessary for him to put in, and his long declining state of health, it was impossible for him to answer within the time allowed; and though his answers in both causes had been prepared and engrossed, he was prevented by death from swearing them; and the appellants, of course, obtained injunctions.

On the 16th of April 1770, Thady Carroll died, worn out with a litigation of above 20 years continuance, having by his will appointed the respondents his executors; the respondents Colclough and Adams proved the will, Mr. Lyster having declined to act.

The appellants being possessed of injunctions, did not revive the suits, which became abated by the death of Thady Carroll, until his executors obtained orders for compelling them; on being served with which, bills of revivor were filed, and both causes revived.

The respondents, Colclough and Adams, the acting executors, put in their answer to Vicars's bill; and thereby, as to so much thereof as stated the bill of 1762, they answered to the same effect as Thady Carroll's answer thereto; and as to the remainder of it, said, they believed that Grace, in 1761, executed some con-[45]-veyance, and levied some fine (which was set up by the appellants on the trial in 1768, and condemned) of the lands of Kilmain in trust for Vicars; the consideration whereof was mentioned to be £1137 10s. when the reversion thereof was really worth upwards of £6000, and therefore they apprehended the said sale was calculated to answer some secret collusive scheme, to defeat Thady Carroll's lease, or that Grace was over-reached; they said that Grace was not, before the execution of such conveyance, in possession of nor resident on any part of the lands, save that he had lodged with a miller on Kilmain, and at the time of putting in their answer, resided in the miller's house, without having ever questioned Thady Carroll's right under his lease; believed if plaintiff made such lease to Grace as in bill, he took care to make it subject to Thady Carroll's; admitted Thady Carroll brought his ejectment in the King's Bench; that Keenan's pretended term expired 1st May 1765; that Thady Carroll afterwards applied for liberty to go to trial, but on the plaintiff's opposition, was stopped till Easter Term 1768, from going to trial; stated the trial and verdict; *and that on the trial the appellant set up the conveyance of December 1738, from Barnaby Carroll to Armstrong, as a bar to the plaintiff's title*; though Vicars himself had impeached that conveyance for fraud and want of consideration; stated Vicars's motion for a new trial, which was refused; and his writ of error in the King's Bench in England, where the judgment was affirmed; said they believed there was due to them, as executors of Thady Carroll, from the plaintiff, the sum of £4000 and upwards, for meane profits, exclusive of costs; they insisted that the sequestration and demand under the decree, determined on the death of Barnaby Carroll; they denied the truth of the alleged ground of plaintiff's father filing the bill of discovery, which was now stated for the first time, and believed that such bill was filed on no other principle than that of getting an estate as a Protestant discoverer; they denied that Thady Carroll, at the time of taking his lease, was ignorant of the exception contained therein, or the value, extent, or circumstances of the lands; they could not set forth what circumstances Barnaby Carroll was in at that time; believed he complained that his servant Keenan did not remit his rents as he ought to have done, and that he designed turning him out of possession, not from the motives in bill, but as a person who did not deal fairly by him, and to put the lands into the hands of a solvent tenant, believing the sequestration was paid off; admitted the letter of attorney from Barnaby Carroll to Thady Carroll to sue Keenan, and to bring him to an account for the rent and arrears of the lands, and the power to take possession of the said lands in his name and to his use; and believed that this power was given to facilitate Thady Carroll's getting possession of the lands for the purpose of his holding the part demised to him for his own use, and the parts excepted for the use of Barnaby Carroll; denied that the lease was executed, lest the letter of attorney should fail; or that Barnaby Carroll gave any directions [46] relative the registry of the lease; denied that any trust was annexed to the lease; or that any defeazance was executed importing any such trust, or that any matter was contrived other than what appeared on the face of the lease; believed Thady Carroll made a proposal to Barnaby

Carroll, and entered into a treaty with him for a lease as a fair purchaser; and that Mr. Bailie, a witness thereto, was examined on the trial in 1768, and proved the execution thereof, and on being cross-examined, proved that the lease was intended for the sole benefit of Thady Carroll, and not in trust for Barnaby Carroll; denied that Thady Carroll was not a solvent tenant; believed it would require £500 to stock the lands, and that Thady Carroll had then £500, and could raise a much larger sum on his credit; believed there was a map drawn by Barnaby Carroll, which bore date the 1st of May 1749, by which it appeared that several parts of the said lands were excepted out of the lease to Thady Carroll; but denied that the lands so excepted contain more than 37 acres; denied Thady Carroll insisted he would take possession of more than was comprized in his lease; denied that if Barnaby Carroll had answered Keenan's bill truly, he would or could have confessed, that Thady Carroll's lease was a scheme to distress Keenan, or obstruct the sequestration; or that it was not intended to give Thady Carroll any interest in the premises; and did not believe that Barnaby Carroll was ever cautioned by Thady Carroll not to admit that the said lease was a scheme to distress Keenan, or obstruct the sequestration, or not intended to give Thady Carroll any interest in the said lands; said they were advised that plaintiff was not entitled in equity to the benefit of Keenan's suit, if any could be had thereby; that the prayers of Keenan's bill, Vicars's bill of 1762, and his bill of 1769, were nearly alike; and that the several charges in the last bill were in his knowledge at the time of filing his first bill, save the subsequent proceedings, which were an idle enumeration of facts, requiring no proof, nor in any way material, but calculated to create expence and delay; and believed that if plaintiff had any intention of bringing the matters in issue to a hearing, he might have done so on his former bill, but that he never thought proper to take any step to speed his cause, but tried new experiments to give delay.

The respondents Colclough and Adams, also put in their answer to the bill filed in Grace's name; and said, they knew nothing of the suit stated to have been instituted by Michael Grace against Barnaby Carroll, or of any proceedings, decree, or report, made thereon. As to the other parts of the bill, their answer was to the same effect as that put in to Vicars's bill.

The respondent Mr. Lyster, also put in his answer to both the bills, and said, he had not proved the will, nor meddled in the execution thereof; that he knew nothing concerning any of the matters in question, otherwise than as council in the cause, and disclaimed all interest.

[47] Though the answer of the respondents Colclough and Adams to the appellant Vicars's bill, contained 1200 office sheets, and all the material charges had been fully answered, yet a great number of frivolous exceptions were taken to the answer. The respondents, to avoid the expence and delay of a reference, thought it prudent to put in a further answer. The appellant took exceptions to this answer also; but the respondents (finding that if they submitted to answer, there would be no end to exceptions) refused to answer these exceptions; whereupon they were referred to and argued before one of the barons, who reported the answers full. The appellant then took exceptions to the baron's report, which, upon argument, were all over-ruled by the Court, with costs.

The respondents obtained an order, that the lands should be let, and a receiver appointed; and that the appellant Vicars should give security for the meane rates, and should speed his cause. The lands were accordingly let to a tenant, whom Mr. Vicars procured to take them in trust for himself, at £1 2s. 9d. per acre.

The appellants having replied to the answers, and the respondents rejoined, several witnesses were examined on different commissions in England and Ireland, in both causes; and at length, after a variety of expensive motions, and every possible effort on the part of the appellants, to delay the hearing, both causes came on, by special order, to be heard together, before the barons of the Court of Exchequer in Ireland, on the 5th of December 1777, and continued at hearing the 6th and 8th days of that month, on which last day it was ordered, adjudged, and decreed, that the bill filed by the appellant Vicars should be dismissed with *full costs*. And the Court on the same day also ordered, adjudged, and decreed, that the bill filed by the appellant Grace should be dismissed with *full costs*.

On pronouncing these decrees, the Court declared "it was their duty, in order to discourage a species of litigation so *uncommon*, so *very vexatious* and *oppressive*, to dismiss both bills with full costs."



The respondents were proceeding to take the proper steps for obtaining possession under the judgment in ejectment, when it was discovered, that the feigned term of the demise laid in the declaration in ejectment (which was 15 years) had expired on the 25th November 1777; the respondents therefore moved the Court of King's Bench in Ireland, in Easter Term 1778, to enlarge the term, in order that they might issue execution on the judgment; but Vicars strongly opposing the motion, and the Court apprehending the record of the judgment remained in the Court of King's Bench in England, where it had been removed by writ of error, did not think themselves warranted by the transcript remitted to them to make the amendment; upon which the respondents, in Trinity Term 1778, were obliged to move the Court of King's Bench in England, that the term might be en-[48]-larged; which the Court was pleased to order, although the motion was warmly opposed by the appellant Vicars.

From these decrees of dismissal the appellants brought the present appeal; and on their behalf it was argued, (A. Wedderburn, J. Dunning, R. Hollist) that Barnaby Carroll's plans were all along fraudulent against the appellants, as plainly appeared from his fictitious deed to George Armstrong, and other the matters in evidence in these causes, which clearly shewed the lease to Thady Carroll was calculated for some fraudulent purpose, and ought to have been set aside. That the circumstances under which the lease to Thady Carroll was made; the indigent situation which Thady Carroll and Barnaby Carroll, and his affairs, were in at the time of his making such lease; the lowness of the reserved rent, in comparison of the real value of the estate; Thady Carroll's never having seen the lands, or even knowing their value or quantity, or the extent, or parts excepted, at the time of taking the lease; the plan of the same date with the lease, (laying out a new town, and expensive improvements on the estate, which no lessee for thirty-one years could afford to make); Thady Carroll's knowledge of Keenan's lease, and the sequestration, at the time he took his lease; and Barnaby Carroll's refusing to answer Keenan's bills to his death; all plainly shewed, that the lease in question was made either in trust for Barnaby Carroll, or for the purpose of turning Keenan out of possession, and defeating sequestrators and the appellant Grace of the benefit of his decree, and therefore ought to be set aside, as against the appellants. That it plainly appeared, from Thady Carroll's own answers, that he had two letters of attorney, the one to take possession of the estate for Barnaby Carroll, in his name, and for his use, and the other to receive his rents, and transact all his affairs; and that, therefore, he only substituted Thady Carroll as his agent or manager, and gave him a lease to register (as he had before done the deed to Armstrong) merely to dispossess Keenan, and screen the real value of the lands from appellants' decrees and sequestration debt, and to secure the surplus to himself. That if it could be supposed that Thady Carroll so far took the lease fairly, as not to have a premeditated intention of defeating the appellants of the benefit of their decrees and sequestration, and that he took it for his own benefit, yet, having taken it subsequent to the decree and sequestration obtained by Vicars, and the decree obtained by the appellant Grace, and at an under value, he ought, by a Court of Equity, to be restrained from availing himself of the lease, as against the appellants, even if he had not actual notice of those proceedings; which it appeared by positive proof he had, as well as of the lease to Keenan. That the appellant Vicars, notwithstanding his purchase of the inheritance from the appellant Grace, still remained a creditor, the sequestration continuing in him, and the inheritance being vested in his trustee Medlicott; and that if the two rights of purchaser of the inheritance, and of creditor by the sequestration, concurred in him, it would not make any difference as to the merits, and especially in regard the sale was [49] made, and the consideration paid to Grace, on presumption that the lease to Thady Carroll was void; and that if that lease was not void, Vicars had not got the consideration for which he paid his money to Grace, and therefore still remained a creditor under the sequestration, and, as a creditor, had a right to seek relief in equity as against the fraudulent lease. That the appellant Grace was a creditor for the £3700 reported due to him under his decree in 1738, which was made previous to the lease to Thady Carroll, and that he was besides a purchaser of the lease, for his own life, of 113 acres, part of Kilmain, from Vicars, and, as a creditor and purchaser, had a right to be protected against Thady Carroll's fraudulent claim. That the conveyance to Armstrong being fraudulent and void, and the inheritance of Kilmain hav-

ing, on the death of Barnaby Carroll, in 1754, descended on the appellant Grace, his heir at law, and Grace having, in Hilary Term 1762, levied a fine with proclamations to Medlicott, the trustee for Vicars, and Thady Carroll not having afterwards made any claim or actual entry, he therefore, before the trial in ejectment, in August 1768, was barred by that fine, and five years non-claim. And that supposing the lease to Thady Carroll to be good against the appellants, yet at all events the respondents should have been restrained from suing for mesne rates further back than May 1765, when the lease to Keenan determined.

On the other side it was said (J. Wallace, J. Madocks), that the objections made to the lease of 1749, by the pleadings on the part of the appellants, were, 1. That the lease was a trust for Barnaby Carroll; and, 2. That it was intended to defraud the appellant Vicars, the creditor of Barnaby Carroll. But upon the face of the lease neither trust or fraud appeared; the covenant to reduce the rent in case of a deficiency of acres; the clause of surrender at the end of three years, were unnecessary, if the lease was a *trust*; and the exception of the most valuable part of the estate was inconsistent with the idea of a *fraud* to defeat creditors, for in such case the protection would have extended to the whole. That upon the proofs in the cause, there was no ground to establish a trust; there was no evidence of any declaration of trust executed by Thady Carroll; the appellants were in possession of all Barnaby Carroll's papers, and had given in evidence the private correspondence by letter between Barnaby Carroll and Thady Carroll; and, as far as they had thought proper to produce such letters, they did not afford an insinuation of a trust; Barnaby Carroll himself never claimed any trust; Owen Grace his heir never claimed any trust; nor did Vicars ever pretend a trust, till after his purchase from Grace. But if a trust could be inferred from circumstances, yet the circumstances of the case afforded no such inference; and such a trust would be to the last degree improbable; for it was not to be supposed that Barnaby Carroll would fetter his estate with a trust lease, which could answer no good end to him, and which might be abused to his prejudice; or that Thady Carroll would encumber himself with a trust productive of [50] great trouble and expence, and from which he could not derive any possible advantage. Add to this, that Thady Carroll's ruin, occasioned by the expence he incurred in endeavouring to have the benefit of the lease, never prompted him to disclose any trust, and to seek a reimbursement from Barnaby Carroll or his estate, which must have been the consequence of an existing trust. And lastly, his positive denial in his answers of any trust, not only before but after the death of Barnaby Carroll, left this point merely upon the appellants suggestion, without either proof or probability.

As to the point of fraud against creditors;—If the lease was fraudulent against creditors, it was void at *law* as well as in *equity*. The appellant Vicars was defendant at law, and the recovery at law under the lease was, upon this point, decisive against him both at law and in equity; and against Grace, who was the heir, a voluntary conveyance would have been good; and a voluntary conveyance would be good against Vicars now, because his demand upon Barnaby Carroll for the mesne profits, in consequence of his being evicted by the discovery bill, was only a simple contract demand, and did not affect Barnaby Carroll's lands after his death; nor could the sequestration have been revived. Indeed it is difficult to conceive how this lease, which was long posterior to the sequestration, in virtue of which Vicars was in possession, and which could not take effect for the benefit of the lessee, till the land was discharged from the sequestration, could be intended to defraud Vicars of the money due to him, supposing it was not fully satisfied in 1749 by the rents he had received, or deprived him of his remedy to recover it. That upon the whole, the recovery at law was decisive that this was not a lease fraudulent as to creditors. The statute of frauds excludes the evidence of a trust, if there were any proof of circumstances which favoured the notion of a trust, of which there were none. And therefore, and for the appellants most oppressive conduct, the respondents hoped that both decrees would be affirmed with exemplary costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decrees therein complained of, affirmed, with £150 costs. (MS. Jour. *sub anno* 1779, p. 806.)

[51]

## LEGACIES.

CASE 1.—DOROTHY VACHELL and another,—*Appellants*; LUCY BRETON, Widow, and others,—*Respondents* [8th March 1706].

J. S. by his will gave to A. and B. (whom he called *his wife's children*, not owning them to be his,) 10s. a piece, *and no more*; to the children which he did own he gave considerable legacies, and appointed N. his executor, *but made no disposition of the surplus of his personal estate*. On a bill brought for a distribution of this surplus, it was decreed to be divided amongst all the children equally; but on an appeal, it was held that A. and B. were excluded, and therefore the DECREE, *as to them*, was REVERSED.

The case is thus more accurately stated under the names of *Vachell v. Jeffries*, in Pre. Ch. 169, and 2 Eq. Ab. 435. c. 17.—“J. S. devised to A. and B. (his wife's children, as he called them, not owning them to be his,) 10s. a piece, *and no more*; and gave the children which he owned considerable legacies; then he devised legacies to his executor, but did not mention them to be for their care and pains, or any thing to that purpose. Decreed that the executors should not have the surplus, but that it must be distributed: [and that the children which the testator did not own should come in for a share; for the words of exclusion are not plainly expressed, and shall be taken strictly in this case.]” The decree was reversed only in the latter particular. The report in 11 Vin. and 2 Eq. Ab. p. 437, is taken from the Mss. Table, and is manifestly incorrect. For the principle on which the distribution of the residue was decreed, see [4 Bro. P. C. pp. 7 and 21].

Preced. in Chan. 169: Viner, vol. 11. p. 195. ca. 16: 2 Eq. Ca. Ab. 435. ca. 17: 437. ca. 24.

[Mew's Dig. xv. 1621. But see *In re Holmes*, 1890, 62 L.T. 383: *Ramsay v. Shelmardine*, 1865, L.R. 1 Eq. 134.]

On the marriage of Thomas Breton with the respondent Lucy, in the year 1656, articles were entered into, whereby, in consideration of the marriage and of her portion, it was agreed that he should lay out £4000 in the purchase of lands of £200 per annum, and settle the same to the use of himself for life, remainder to the said Lucy for life, for her jointure, and in lieu of dower; remainder to the first and other sons of the marriage, in tail male; with other remainders over.

There were issue of this marriage, two sons and two daughters; namely, Francis the eldest son, the respondents William and Penelope, and the appellant Dorothy; but, Mr. Breton having lived many years separate from his lady, he did not think fit to acknowledge William and Penelope as his children.

In May 1684, a treaty of marriage was set on foot between Tanfield Vachell and the appellant Dorothy; and upon that occasion, certain articles were entered into between Mr. Breton, and Ann the mother of the said Tanfield Vachell, (who was then a minor,) whereby Breton agreed to give, as a marriage portion with [52] his said daughter, £3000 down; £1000 more at the end of six calendar months, and to secure the further sum of £1000 by bond, payable when Mr. Vachell should attain 21, and make a settlement according to the proposals agreed upon.

This marriage took effect; and Mr. Vachell being in want of money, applied to Breton for his assistance, who, on the 18th of November 1685, borrowed of one Mr. Davis £200, for which he and Mr. Vachell (though under age) joined in a bond; and, in November 1686, Mr. Breton also borrowed for Vachell's use, £500 of Mr. Loveing, and £800 of Sir Francis Winnington; but for both these sums he gave his own bond only, and constantly paid the interest of all of them, until the time of his death.

On the 28th of April 1687, Mr. Breton made his will, and thereby devised all his real estate of the value of £1500 per ann. to Francis his eldest son, and the heirs male of his body; and for want of such issue, to the appellant Dorothy, and the heirs of her body, with divers remainders over. The testator then directed the sum of £4000 to be laid out in the purchase of lands of £200 a year, and settled to the uses limited by

his marriage articles; and, after some specific and pecuniary legacies to his executors and others, the testator goes on in these words: "And I do order, will, devise, and appoint, that my said executors, or the survivor or survivors of them, shall, out of my personal estate, pay unto Penelope, *the daughter of my said wife*, the sum of ten shillings, *and no more*; and also pay unto William, *son of my said wife*, the sum of ten shillings, *and no more*; and also pay unto such other child or children, which shall or may hereafter be born of the body of my said wife, and which shall be alive, or wherewith my wife shall be *ensient* at the time of my death, the sum of ten shillings, *and no more*." The testator then charged his real estate with the payment of Sir Francis Winnington's bond, and his other creditors; and appointed the respondent Benjamin Jefferys and others, executors of his will, *but made no disposition of the surplus of his personal estate*.

In April 1689, Tanfield Vachell attained his age; and, having thereupon made a settlement, pursuant to the agreement on his marriage, Mr. Jefferys, the surviving executor of the testator Breton, paid Mr. Vachell the remainder of his wife's portion, without demanding any part of the £1500, which the testator had borrowed for Vachell's use, as aforesaid.

The £4000 was also laid out in a purchase, and settled as directed by the testator's will; and upon the death of Francis his eldest son, without male issue, which happened some time afterwards, the appellant Dorothy became possessed of all her father's real estate.

In Trinity Term 1697, Mr. Vachell and his wife exhibited their bill in the Court of Chancery against Mr. Jefferys, for an account of the testator's personal estate, and to have the appellant Dorothy's distributive share of the surplus thereof; and, in 1699, the respondents exhibited their cross bill for the same purposes, and also [53] that the above £1500 might be considered as a debt due from Mr. Vachell to the testator's personal estate, and be brought into the same accordingly.

On the 23d of July 1701, both these causes were heard at the Rolls, upon bill and answer; when his Honour decreed, that the surplus of the testator's personal estate should be divided as follows, viz. one third part thereof to the respondent Lucy, and the residue amongst the appellant Dorothy, and the respondents William, Penelope, and Ann, in equal portions; and that the sum of £1500, borrowed of Sir Francis Winnington and others, for the use of the said Tanfield Vachell, should be accounted for as part of such personal estate, and Mr. Vachell was to answer the same accordingly; but his Honour reserved the consideration of the interest of this £1500 until the Master should report who was bound, and who received the money, and whose debt it was.

The Master having, by his report, stated the circumstances of borrowing the said £1500, as above; the cause was heard upon this special matter, on the 23d of April 1706; when his Honour declared, that the £1500 ought to carry interest, and be accounted for as part of the testator's personal estate, and decreed the same accordingly.

From both these decrees the present appeal was brought; and on behalf of the appellants it was insisted (J. Jekyll, W. Norris), that the respondents William and Penelope, having 10s. a-piece given them by their father's will, *and no more*, were thereby excluded from any share of the surplus of his estate; and that therefore, the decreeing them any share of such surplus, was contrary to the express negative words of the testator's will, and was, in effect, making a new will for him, which he never intended to make. And that the testator being *singly* bound for all but £200 of the £1500, and having, by his will, taken particular care that the same should be paid out of his estate; the said £1500 ought not to be considered as a debt due from the said Tanfield Vachell, but as the said testator's own proper debt: and therefore, the decreeing Mr. Vachell to make satisfaction for this sum and interest, was doing what the testator himself could not have done, whose executor, or any claiming under him, could not be in a better situation than he himself was.

On the other side it was contended (F. Page), that although William and Penelope had 10s. a-piece given them by the will; yet the respondents Lucy and Ann had no such legacies given them; and as the respondents William and Penelope had only 10s. a-piece *and no more*, given them by the will, so the appellants had one third of the plate and other specific legacies, *and no more*, given them by the same will, and

not being executors, they could not entitle themselves to any more than what was expressly devised; but as both the appellants and respondents had legacies given them, they could only claim such legacies under the will; and must entitle themselves to the surplus of the estate undisposed of, by virtue of the statute of distributions; otherwise, the right to such surplus must be in the executors, who did not claim it, nor could be en-[54]-titled to it: and, as to the £1500, it was expressly admitted by Vachell's answer, to have been borrowed for, and received by him; and therefore, as he stood debtor for it in the testator's life-time, it was conceived, there were no words in the will which could amount to a release of this debt; and if not, then the interest would necessarily follow the principal.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of the 23d of July 1701, and the subsequent orders and proceedings grounded on that decree, should be reversed, so far as the same related to the dividends decreed to the said William and Penelope Breton; and the £1500 decreed to be paid by the said Tanfield Vachell, and to be part of the testator's personal estate; and, that what the executor had paid to the said William and Penelope Breton, by virtue of such part of the said decree, so reversed, should be restored. And, as to the residue, the said decree and proceedings thereupon were to stand: and the surplus of the said testator's personal estate was to be divided in the same manner, as was appointed by the statute for settling intestates' estates; except that the said William and Penelope were to be excluded as aforesaid; and that the Court of Chancery should proceed to give the necessary directions for carrying on the said decree, as now altered by this judgment. (Jour. vol. 18. p. 277.)

CASE 2.—MARY YOUNG, Widow, and others,—*Appellants*; WILLIAM BURDETT and others,—*Respondents* [20th March 1724].

[Mew's Dig. xv. 1696.]

A. by will, gives all his personal estate to his wife for life, and then gives to his grand-children T. and F. £100 a-piece, if they attain 21, or shall be married. Held that these legacies were not payable till after the wife's death; but that the legatees were entitled to have security for the payment of them at that time.

An attested copy of an entry in the book of the Chamberlain of London, that A. was admitted to the freedom of the city, is not sufficient after his death, to prove him to have been a freeman, without proving the identity of his person.

DECREE of Lord Chancellor Macclesfield REVERSED.

The reports in 2 Eq. Ab. 557. ca. 23; and 8 Vin. 418. ca. 9. go to the point of giving security only, in which they are accurate; but in 2 Eq. Ab. 560. ca. 5; and 8 Vin. 403. ca. 32. the effect of the Lord Chancellor's decree is stated from 9 Mod. 63; but no notice is taken of its reversal in the House of Lords. The statement in 8 Vin. 284. ca. 21. includes a point totally irrelevant, and not noticed in the case before the House of Lords.

An executor being in Equity considered as a trustee for the legatee, is the true ground of equitable jurisdiction in this case. See 1 P. Wms. 544, 575: 1 Ch. Ca. 121: 1 Ch. Rep. 136, 257. And of late the Court of Chancery will immediately on the coming in of a defendant's answer, order, so much as he admits to have in his hands of the testator's property, to be paid into the Bank. 3 Bro. C. R. 365.

9 Mod. 93: Viner, vol. 8. p. 284. ca. 21; 403. c. 32; 418. ca. 9: 2 Eq. Ca. Ab. 557. ca. 23; 560. ca. 5.

Thomas Sutton, by his will, dated the 22d of April 1714, devised to the appellant Mary, his then wife, all his real estate in the county of Suffolk, with the Chequer Inn, in the parish of [55] St. Andrew, Holborn, for her natural life; and after her death, to trustees, in trust to be applied to charitable uses; subject to the payment of two annuities of £20 and £30 per ann. to a sister and nephew of the testator's: and as

to his personal estate, he bequeathed the same in the words following, viz. "*Item*, I give and bequeath unto my said loving wife, all my personal estate, of what nature or kind the same be, to her sole use, during her natural life. *Item*, I give and bequeath unto my grandson Thomas Roberts, and to my grand-daughter Frances Roberts, children of my son-in-law Mr. George Roberts, late of Goodman's Fields, gent. the sum of £1000 a-piece, if they attain the age of 21, or shall be married; but in case they die before that age, then I give the same to my said trustees, to be applied to the like uses as the estates herein before devised to them are directed. *Item*, I give and bequeath unto my said grand-daughter Frances Roberts, after my wife's decease, all my household goods, plate, and linen whatsoever. All the residue of my estate, of what nature or kind soever, not hereby by me disposed of, I give and bequeath unto my nephew John Sutton, after the death of my wife."

On the 5th of November 1717, the testator made a codicil to his will; ratifying and confirming all the devises and bequests thereby given to his wife, and revoking all the devises and bequests therein contained relating to charities; and disposed of his lands and tenements, after the death of his wife, in another manner; and made his wife Mary sole executrix of his said will, and soon after died without issue.

The appellant Mary proved her said husband's will and codicil, and some time afterwards intermarried with Bartholomew Young.

The respondent Frances Roberts having attained her age of 21, and being married to the respondent William Burdett, they exhibited their bill in Chancery, in Michaelmas Term 1720, against the appellant Mary and her said husband Bartholomew Young, and the said John Sutton, to have an account of the personal estate of the testator, which they charged amounted to £6000 and upwards, and likewise of the household goods, plate, and linen, and to be paid the legacy of £1000 and interest from the time of their intermarriage, or of the respondent Frances attaining her said age of 21; or in case the respondents were not entitled to the said £1000 till after the death of the appellant Mary, then that the appellant Mary and her said husband might be obliged to give security for payment thereof, and for the delivery of the said household goods, plate, and linen, after the appellant Mary's death.

The appellant Mary and her said husband, by their answer to this bill, and a schedule thereto, set out the testator's personal estate, whereby it appeared not to exceed £1700 over and above debts, legacies, and funeral expences; and they insisted, that the respondents were not entitled to the £1000 till after the death [56] of the appellant Mary; and how far they might be entitled to the same, even then, they submitted to the Court; in regard they had then lately discovered, that the said Thomas Sutton was a freeman of the city of London, and as such, had no more to dispose of than a moiety of his personal estate; and that the appellant Mary his widow was entitled, by the custom of London, to the other moiety thereof, as also to her paraphernalia and widow's chamber. And the said Bartholomew Young also set forth, that said Thomas Roberts, the respondent Frances's brother, on his attaining his age of 21, being satisfied he had no title to his £1000 legacy, at least till after the appellant Mary's decease, had made him, the said Bartholomew Young, an allowance for the immediate payment thereof; and that before he had notice of the said Thomas Sutton's being a freeman of London, and on a presumption that he had power to dispose of his personal estate by will, the said Bartholomew Young, about the 10th of June 1719, had given security to pay the respondent her £1000 legacy, when the same should become payable by the will.

Issue being joined in the cause, the appellant Mary and her said husband Bartholomew procured an attested copy out of the chamberlain of London's book, for entering the names of persons made free of the said city, of an entry bearing date the 10th of January 1677, to prove the freedom of the said Thomas Sutton of the city of London.

On the 3d of November 1722, the cause came on to be heard at Westminster, before Mr. Baron Price, in the absence of the Lord Chancellor; at which time, the appellant Mary produced and read the attested copy of the said entry, to prove the freedom of the said Thomas Sutton: but Mr. Baron Price was of opinion, that the said entry was not a sufficient evidence to prove the said Thomas Sutton to have been a freeman of the city of London, without proving, at the same time, the identity of the person, and that the said Thomas Sutton the testator was the same Thomas Sutton who was

meant and intended by the said entry; and therefore made no decree in relation thereto: but as to the other matters, declared, that the respondents were not entitled to have the respondent Frances's legacy paid, till after the death of the appellant Mary; but that the respondents were, in the mean time, entitled to have security for the payment thereof upon her death, and were also immediately entitled to have an appraisement and account of the plate, linen, and household goods, and to have security that the same should be forthcoming after the death of the appellant Mary; and therefore decreed, that it should be referred to the master, to see if the said legacy of £1000 was well secured, or not; and if he should find that the same was sufficiently secured, then the said Bartholomew Young and the appellant Mary were to give such further or other security as the master should approve of, for payment of the said £1000 after the death of the appellant Mary; and that the said Bartholomew and the appellant Mary were to give security, to be allowed of by the master, for delivery of the plate, linen, and household goods to the respondents, after the death of the appellant Mary; and it was further ordered, that the respondents should have their costs of suit out of the testator's estate, to be taxed by the master.

The said Bartholomew Young and the appellant Mary, conceiving themselves aggrieved by this decree, in regard, as they were advised, the said entry in the Chamberlain of London's book was sufficient evidence to prove the freedom of the said Thomas Sutton, and that the respondents ought not to have had their costs out of the estate; they preferred their petition of appeal from the decree to the Lord Chancellor, in these particulars.

The respondents also preferred their petition of appeal from the decree, alleging, that they conceived themselves aggrieved thereby, in regard the £1000 legacy became payable to the respondent Frances on her attaining her age of 21, and ought to have been decreed to her, with interest for the same from that time; and not to wait for the same till the death of the appellant Mary.

The cause was heard before the Lord Chancellor Macclesfield, on these two petitions of appeal, upon the 25th of April 1724; when his Lordship was pleased to declare, that the respondents ought to be paid the said legacy of £1000 with interest for the same from the time the respondent Frances attained her age of 21 years: and did therefore order, that the said decree should be varied accordingly; and that it should be referred to the Master to compute interest for the said £1000 legacy, from the time the respondent Frances attained her age of 21; and, with that variation, the former decree was to stand.

Before any report was made by the Master, Bartholomew Young died; having first made his will, and appointed the appellant Arthur Young executor thereof; by whom the suit was duly revived.

Soon afterwards the present appeal was brought; and on behalf of the appellants it was contended (C. Wearg, T. Lutwyche), that the entry in the Chamberlain of London's book was a sufficient evidence to prove the freedom of the testator Thomas Sutton; and as there was no dispute concerning the identity of the person meant and intended by that entry, the same ought not to have been made a question by the Court; or at least, it was a sufficient foundation for the Court to have directed an issue, to try whether the said Thomas Sutton was a freeman of London, or not; in which case, any defect in point of proof might have been supplied as to the circumstances of the identity, or the same might have been directed to be inquired into by the Master. That the legacy of £1000 given by the testator's will to the respondent Frances, was not payable till after the death of the appellant Mary; not only because all the personal estate was given to Mary for her life, by the express words of the will, and which could not be answered if this legacy was to be paid in her life-time; but also because the legacy was not directed to be paid when Frances married, or came [58] of age, but, upon that contingency, was to be paid on Mary's death. It might be objected, that the testator had, by a separate bequest, given the respondent Frances, after the appellant Mary's decease, all his household goods, plate and linen whatsoever: but to this it was answered, that these specific legacies were given absolutely, not upon the contingency of Frances's marrying, or coming of age; and in that, the difference between those legacies, and the legacy of £1000 consisted; not that the one was to be satisfied after the death of the widow, and the other in her life-time; but that the one was certainly to be satisfied after her death, the other upon a contingency

only. It might also be objected, that by the will there were legacies of £10 for mourning, two guineas for preaching the testator's funeral sermon, and £100 to be laid out in his funeral, and for a grave-stone; and that though no time was limited by the will for the payment of these sums, yet it could never be supposed the testator intended them to wait till his wife's death; and the legacy of £1000 to the respondent Frances stood upon the same reason. But to this it was said, that these legacies for mourning, etc. fell all under the consideration of funeral expences, which in their own nature are to be paid immediately, and are a debt upon the personal estate; and the declaring the uses to which they were to be applied, was to be construed as the appointing them to be directly paid; but that the case of these was greatly different from the £1000 legacy, which being a considerable part of the estate, took off, in a great measure, from the benefit of that provision which was made for the wife, without any apparent intention of the testator so to do; no conclusion could therefore be drawn from these funeral legacies to assist the forced construction which the respondents would put upon the testator's intention in relation to the £1000 legacy. Besides, the real estate, devised to the appellant Mary for her life, was recovered from her, for want of a power in the testator to devise it; so that her only provision from him was out of his personal estate.

To this it was answered (P. Yorke, C. Talbot) on the other side, that the appellant Mary and her late husband, by their answer, insisted, that the testator Thomas Sutton was a freeman of London, and that the appellant Mary was entitled, as his widow, to a moiety of his personal estate, together with her *paraphernalia* and widow's chamber; wherefore as that matter was put in issue, and examined into before the hearing, it was incumbent on the appellant Mary to have proved it before the hearing; and she had no reason to expect to be indulged by the Court with a liberty of making further proof of it after the hearing; and especially in support of a claim set up in opposition to the will of her husband, by which she was liberally provided for. That it plainly appeared to be the true intent and meaning of the testator, from the whole frame of his will, that the legacy of £1000 should be paid to the respondent Frances, upon her attaining 21, or marriage, no other time of payment being mentioned; for in every case, where he in-[59]-tended that the payment of legacies should be postponed till after the death of his wife, as in the bequest to the respondent Frances of his household goods, plate, and linen, he gave the same in express terms after the appellant Mary's death. And therefore it was hoped that the Lord Chancellor's decree, and so much of the former decree as remained thereby unaltered, would be affirmed, and the appeal dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that such part of the decree of Mr. Baron Price, as ordered the respondents their costs of suit out of the testator's estate, should be reversed; but that the said decree, as to all other parts thereof, should be affirmed: and it was further ORDERED and ADJUDGED, that so much of the decree of the Lord Chancellor, as varied from the said decree of Mr. Baron Price, or the direction of the House, should be reversed. (Jour. vol. 22. p. 459.)

CASE 3.—DOROTHY LOVE, Widow, and another,—*Appellants*; HENRY L'ESTRANGE and others,—*Respondents* [19th February 1727].

[Mew's Dig. xiv. 1640. Followed in *Saunders v. Vautier*, 1840, Cr. and Ph. 248; and see *Pearson v. Dolman*, 1866, L.R. 3 Eq. 321.]

- A. gave all his personal estate to trustees until W. should attain 24, and from thenceforth, in trust for him, his executors, administrators, and assigns. The legatee lived to attain 21, but died intestate before 24. Held, that the representative of W. was entitled, as the right vested in him immediately upon the testator's death; and that the age of 24 was mentioned not to prevent the right from vesting in W. before that age, but to direct the trustees as to the time of payment.

DECREE of Lord Chancellor King AFFIRMED.

Walter Walteson, by his will dated the 22d of December 1720, after giving several legacies, bequeathed the residue of his personal estate in these words, viz



"And I hereby give and bequeath unto my said loving friend Sir Nicholas L'Estrange, and unto Henry L'Estrange his youngest son, whom I make the executors of this my will, all the rest and residue of my goods, chattels, and personal estate whatsoever, as shall remain after all my debts, legacies, funeral and other charges of the said executorship and trust of this my will fully paid and satisfied, and this my will fully performed, according to the true intent thereof; in trust to sell, dispose, and improve the same to the best advantage, as in their judgments and discretion of them and the survivor of them, and the executors and administrators of such survivor, whereunto, for gain or loss, the same is hereby wholly referred; until Walter Nash of Docking in the said county shall attain his age of twenty-four years: it being my desire, that he shall be employed wholly in his trade, either as an apprentice according to his present indentures, or as a journeyman, until his said age, upon trust in my said loving friends [60] reposed; and from the age of twenty-one years of the said Walter Nash, out of the said residue to pay him an annuity of £10 yearly, until his age of twenty-four years: and from thenceforth, in trust for him the said Walter Nash, his executors, administrators, and assigns; and the accounts of the said residue to be given by my said trustees, to be binding and conclusive to him, without exception, or any question at all to be made by him or them therefore." And the testator, by his said will, gave to the said Sir Nicholas L'Estrange and Henry L'Estrange his executors fifty guineas, provided they would undertake the executorship and act therein.

In March 1721, the testator died without issue; and the executors proved the will and possessed his personal estate, the surplus whereof amounted to about £5000; and afterwards Sir Nicholas L'Estrange died.

Walter Nash attained his age of 21, but died before his age of 24, intestate and a bachelor; whereupon the respondents Henry Nash and Susan Nash obtained letters of administration of his personal estate.

In Michaelmas Term 1725, the respondents, Gawen Nash, Francis Hill and Frances his wife, William Smith and Mary his wife, and Jane Nash, exhibited their bill in the Court of Chancery, against the said Henry Nash and Susan Nash, as administrators of the intestate, and against the said Henry L'Estrange, the surviving executor of the testator, to have an account of the said intestate's estate, and that they might have their shares thereof, as being his next of kin; and also to have an account of the personal estate of the testator Walter Walteson, and that the residue thereof might be paid to them, and the said intestate's administrators; insisting, that such residue vested in Walter Nash, although he died before his age of 24, and so belonged to his administrators and next of kin.

The respondent Henry L'Estrange, by his answer, set forth what the residue of the testator's personal estate amounted to, and said he was ready to pay the same as the Court should direct. And the respondents, Henry Nash and Susan Nash, by their answer, insisted, that such residue belonged to the next of kin of the intestate, and ought to be paid to them as his administrators.

But in Hilary Term following, the appellants exhibited their cross bill against the respondents for an account of the testator's personal estate, and to have the residue thereof paid to them, as they were the next of kin of the testator; insisting, that Walter Nash dying before his age of 24, such residue did not vest in him, but belonged to the next of kin of the testator.

The respondent Henry L'Estrange submitted to the judgment of the Court to whom such residue belonged, whether to the appellants, as next of kin of the testator, or to the other respondents, as next of kin of Walter Nash; and was ready to pay the same as the Court should direct. And the other respondents insisted that such residue belonged to them, as next of kin of Walter Nash the intestate.

On the 3d of August 1726, both causes came on to be heard before the Lord Chancellor King, when his lordship was pleased to decree, that the respondent Henry L'Estrange should account before the Master for the testator's personal estate, and for the profits and increase thereof; and that he should pay and deliver over to the respondents, Henry Nash and Susan Nash, the surplus of such estate, and the securities belonging to the same, after payment of his debts, legacies, and funeral expences; and all parties to the said suits, except the appellants, were to have their costs, which the Master was to tax. And the respondents, Henry Nash and Susan Nash, the ad-

ministrators of the intestate, were to divide the remainder of the monies in their hands, or which should come to their hands, of the testator's personal estate, after payment of the costs, into six equal parts, to and amongst the six next of kin of the said Walter Nash the intestate; viz. To retain to each of them the said Henry and Susan Nash, one sixth part thereof; and to pay one other sixth part to the respondent Gawen Nash, another sixth part to the respondent Hill and his wife, another sixth part to the respondent Smith and his wife, and the other sixth part to the respondent Jane Nash; and that the bill brought by the appellants should be dismissed, but without paying any costs in respect thereof.

From this decree the appellants appealed; insisting (P. Yorke, W. Peere Williams), that by the testator's will it appeared he never intended that Walter Nash should be entitled to any advantage by the bequest of the residue of his personal estate, save only to the provision of £10 a year, until his age of 24; and that the right or property of such residue was not to vest in him till that time. And as Walter died before he attained that age, and before any title to the residuary estate vested in him, the benefit of the devise could not belong to his representatives, but ought to be considered as a lapsed legacy, and undisposed of by the testator's will, and consequently belonged to the appellants, as his next of kin, and as not being given from them by the will.

On the other side it was contended (C. Talbot, T. Lutwyche), that the bequest of the residue of the testator's personal estate, after debts and legacies paid, was absolute and unconditional; and the trust being declared for Walter Nash, in the manner mentioned in the will, the equitable right to such residue vested in him immediately upon the testator's death. And though he died before he attained 24, such right was transmissible to his proper representatives, the age of 24 being mentioned, not to prevent the right from vesting in Walter before that age, but to direct the trustees as to the time of paying it to him. That there was no material difference between a money legacy given to one absolutely out of a personal estate, to be paid at a future day, (where it has always been held, that such a legacy became vested, and would belong to the proper representative of the legatee, although such legatee should die [62] before the day of payment,) and the present bequest of the residue to the executors upon the trust before mentioned. And therefore it was hoped, that as the decree was just, and according to the rules of equity, it would be affirmed, and the appeal dismissed with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed. (Jour. vol. 23. p. 188.)

CASE 4.—RICHARD BAYNES and another,—*Appellants*; PEREGRINE BERTIE and another,—*Respondents* [28th February 1727].

[Mew's Dig. xiv. 1661.]

J. S. devised his real estate to his son J. for life, and after his death, if he *leaves any issue male*, to other persons; and to one of those other persons he gave a legacy of £500 when he should attain 21. J. the son died *without issue*. The legatee also died; and on a bill filed by his administrator for this legacy, the question was, whether it did not depend, with his share of the real estate, upon the contingency of the son's leaving issue male. The Court of Chancery held that it did, and therefore dismissed the bill. But on an appeal, this decree was reversed, and the legacy ordered to be paid, with interest from the testator's death.

DECREE of Lord Chancellor King REVERSED.

Robert Fisher, grandfather of the appellant Ann Langton, having issue three sons, Robert his eldest, John his second, and Thomas his youngest son, and two daughters: settled his estate in the county of Cumberland on John his second son and his heirs, setting aside Robert the eldest son, and afterwards died.

Robert the son had issue two sons, Robert his eldest, who died without issue, and John his youngest son, and the appellant Ann his only daughter.

John, the second son of old Robert, settled at London, and applying himself to

merchandize, acquired a considerable real and personal estate, to the value of £50,000 and upwards; and having one son and no other child, frequently declared he would settle his estates in Cumberland on the children of his eldest brother Robert.

This John had likewise estates at Low Layton in the county of Essex, and at Barnes in the county of Hertford, and some leasehold houses in Wapping; and about the 4th of March 1700, died, leaving issue John, his only child; who, after his father's death, produced a paper writing, purporting to be his last will, all written with his own hand, but neither signed or sealed by him, and this paper he proved in the Prerogative Court of Canterbury, as a testamentary schedule; but there being no executor named therein, John the son, on the 19th of March 1706, took out letters of administration with the said paper writing or schedule [63] annexed, and possessed himself of his father's personal estate, to the amount of £40,000 and upwards.

By this paper writing or will it was recited, that the testator had several estates in the county of Cumberland, which he particularly enumerated, and also the several estates in Essex and Hertford, and at Wapping, as before mentioned, and then followed these words, viz. "The yearly income of all the above-said, I give and bequeath two thirds thereof to my son John Fisher, during his natural life, and the other third to my loving cousins Robert Fisher and John Fisher, sons of my brother Robert Fisher; my said cousins or their agents taking care to manage the estate in Cumberland, and my son John Fisher taking care of the management of my estate at Barnes, Low Layton, and Wapping; and after my son's decease, if he leaves any issue male, I give and bequeath to them my estate at Barnes in Hertfordshire, and at Low Layton in Essex, and to my loving cousin Robert Fisher jun. all my estate, with the sheep, and their heirs, at Brakenthwaite, Longthwaite, Fletcher's, and Scale-Hill, with Low Homes and the Lake Crommock. And to my loving cousin John Fisher, the son of my brother Robert Fisher, I give and bequeath my estate at Bridechurch, near Cockermouth in Cumberland, and £500 in money, when he shall attain the years of 21; and, in the mean time, the interest thereof at £5 per cent. for his maintenance, till he shall attain the said years: if he departs this life before he attains the said years, then what is left him, viz. in land, I will and devise to his brother Robert Fisher; and what is left him in money, to his sister Ann Fisher. I also give and bequeath to cousin Ann Fisher, daughter to brother Robert Fisher, £1000 to be paid her at the age of 21 years, and not before, unless she marry before that age, with the consent of her father and mother."

Soon after the testator's death, Ann Fisher, with the consent of her father, intermarried with John Langton, to whom John Fisher the son paid the legacy of £1000 without any objection whatsoever.

Frequent demands were likewise made on John the son, for the interest of the £500 towards the maintenance of John Fisher the legatee, during his minority; but, on account of the expectations they had from John Fisher the son, in case he should die without issue, those demands were made in the most easy terms, and without seeming to press for the satisfaction of them.

In 1719 John Fisher the son died without issue; having made his will, and thereby devised his whole real and personal estate to the respondent Elizabeth, then his wife; who, after his death, proved his will, and took administration of the goods and chattels of John Fisher the merchant, unadministered by the said John his son; and by virtue thereof, possessed herself of the whole real and personal estate of her husband, and also what remained of the personal estate of John Fisher the merchant; and afterwards intermarried with the other respondent Peregrine Bertie.

[64] John Fisher the legatee, attained his age of 21 in the year 1722, and afterwards died intestate, without issue and unmarried; after whose death, the appellant Richard Baynes obtained letters of administration, in trust for the appellant Ann Langton, his only sister and next of kin; and thereby became entitled to the legacy of £500 with the interest thereof.

This legacy and interest being frequently demanded from the respondents without effect, the appellants, on the 23d of May 1724, exhibited their bill in Chancery, praying a discovery of assets, and to be paid the said £500 legacy and interest.

To this bill the respondents put in their answers, and thereby admitted assets of John Fisher the merchant, come to their hands; and issue being joined and witnesses examined on the part of the appellants, the cause was heard before the Lord Chan-

cellor King, on the 18th of November 1726; when his Lordship was pleased to dismiss the appellant's bill, but without costs.

From this decree the appellants appealed, and on their behalf it was argued (P. Yorke, N. Fazakerley), that the paper writing having been proved to be good as a will of personal estate, the personal legacies must be paid. That the words of the will were very strong in favour of the present demand; but if there was any thing doubtful in them, they ought to receive a favourable construction; as the testator had out of his great wealth given this legacy to one of his nearest relations, for whose family he had made frequent declarations of providing, in case his own son died without issue, as had happened. That this legacy of £500 was in no sort contingent, or to arise upon the death of the testator's son having issue male, in the nature of a condition precedent; but was an absolute and substantive bequest of that sum to his cousin John, on his attaining the age of 21; and therefore he gave interest for it, at the rate of £5 per cent. A man may certainly give away his estate, upon a contingency that his son shall have children to enjoy it; and where the words of a will are plain and clear to that purpose, such a bequest must take place; but, as it is a very uncommon contingency, to disinherit because there are children to take, such a construction requires much plainer expressions than are to be found in the present will. And if, in this case, the legacy was to wait in point of vesting, till it should be seen whether the testator's son John would or would not have issue male at his death; it would have been absurd either to have made the legacy payable at the legatee's age of 21, or to have given interest in the mean time; because the giving of interest supposes the principal to be vested, though payable at a future day. It was therefore hoped that the decree of dismissal would be reversed; and that the legacy would be decreed to be paid, with interest.

On the other side it was said (C. Talbot, T. Lutwyche), that the single question was whether this gift of £500 should be considered as a distinct and independent legacy; or whether, with the devise of the estate at Bridechurch, it depended upon the contingency of the son's leaving issue male, which had not happened. The paper writing [65] question consisted of two parts, each of which was an entire paragraph, and made an entire distribution. In the first, the testator disposed of the income of his estates Low Layton, Brackenthwaite, Bridechurch, &c. during the life of his son. In the second part, he gave, not the income, but the lands themselves, after his son's decease. The land at Bridechurch, and the £500 in money, was one entire legacy; they were both given to John the cousin together, and were both given over at the same time: besides the testator had valued his estates; and that valuation shewed, that this £500 was added to the estate at Bridechurch, to make a nearer proportion between the gifts to the two brothers, than if he had left only the land at Bridechurch to John. As to the objection, that the £500 was a distinct and independent legacy, because the words *I give and bequeath*, were repeated; it was answered, that those words were only repeated by way of conjunction and continuation of the whole bequest; they could not put the legacy to John upon different terms from that to Robert; they came both under the gift of the land at Bridechurch, and could not separate the money from the land, nor could the gift of the land be distinct and independent, but must come under the whole contingent distribution; because John the son was to have the income of it during his life. And as to the interest being given to John the legatee in the mean time for his maintenance, it shewed that the testator could not intend it to be a distinct and immediate legacy; because it was apparent from the whole, that the testator did mean to leave John the younger brother in a better condition than Robert the elder. For during the life of the testator's son, both were to have an equal maintenance, viz. one third of the income of the lands between them; and there was no colour to imagine, that the testator intended to give John £500 more during the life of his son, after whose death, John's maintenance came under the same distribution, and depended upon the same contingency with his brother Robert's. That the words *in the mean time*, could only design the time between the vesting of the legacy and John's coming of age; and this construction made the whole writing consistent, the brothers having an equal share during the son's life, and both an equal share after his death. That the testator's whole attention was not now discoverable, as he had broke off and left his writing unfinished; what he had left was suddenly imperfect, and it seemed very probable that if he ever reviewed it, he threw it at

and never thought it could have any effect. What he had given to his cousins, was given in an event which had never happened; and whether he would have left them to the bounty of his son, in case of his having no issue male, or what provision he would have made for them in that event, if he had finished his will, did not appear. And therefore it was apprehended, that such a writing as this, so imperfect and unfinished, was capable of no other construction; and that the appellant Ann, who had already received £1000 under it, was not entitled to any more.

[66] But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed; and that the Court of Chancery should direct an account to be taken of what was due for the £500 legacy given by John Fisher, and for the interest of the same from the death of the testator, after the rate of £5 per cent. per ann. and that what should be found due on such account for the said principal and interest, should be paid by the respondents to the appellants. (Jour. vol. 23. p. 198.)

CASE 5.—ALEXANDER SMALL,—*Appellant*; RICHARD WING and others,—*Respondents* [16th April 1730].

[Mew's Dig. vi. 1296.]

A. gives his daughter B. a legacy of £1000, to be raised out of the rents and profits of his estate, after payment of his debts, but without mentioning any particular time of payment. This legacy will not carry interest while any of the testator's debts remain unsatisfied, nor will the Court direct it to be raised by a sale of any part of the estate.

An executor borrows money, or advances it out of his own pocket, to pay some of his testator's creditors who were importunate, and threatened to bring actions, etc. Held that he is entitled to an allowance of interest for the money so advanced or borrowed.

Decree of Lord Chancellor Macclesfield varied.

This case appears to have been a matter of intricate private accounts, and can scarcely be quoted as a precedent.

Peter Wing the elder, on the 23d of August 1695, made his will, and thereby gave to his eldest son Peter Wing the younger, all his interest in the brewhouse, utensils, and stock in trade therein mentioned, and also the rectory of North Stooke; and directed, that Peter the son, during the term he should hold the said brewhouse, being then about four years to come, should pay to the executors of the testator £250 per ann. The testator then devised to his executors all the rents, issues, and profits of all his other messuages or tenements, rectories, lands, and hereditaments, therein after mentioned and devised; in trust that they should therewith, and with the said £250 per ann. raise and pay all the testator's debt: but if his executors should neglect or refuse to receive and pay the said £250 per ann. or the profits of the said premises, or should receive and not duly apply the same towards payment of his debts; then the power thereby given them to receive and pay the same should cease: and then he appointed Robert and Peter Sayer, Robert Dorrell, and Richard Spooner, to be his trustees to receive the said £250 per ann. and the profits of the said messuages and premises, for the payment of his debts, until the same, and the legacies thereby bequeathed to his daughter Mary, the appellant's late wife, should be fully raised and satisfied.

The testator then gave to the respondent Richard Wing, his heirs, executors, and assigns, the rectory of North Morton, and all [67] his other messuages, lands, and hereditaments, in North Morton and South Morton, subject to the payment of £25 per ann. to Mary the testator's wife, during her life, to commence after the payment of the testator's debts.—And he gave to the respondent John Wing, his heirs, executors, and assigns, the messuage and malt-houses then in the testator's possession, and all other his messuages, lands, and hereditaments, in Brightwell, Mackney, and Wallingford; and declared it to be his will and meaning, that neither of his said sons, Peter, Richard, or John, should enter on or receive to their own use, the rents and profits of the premises to them respectively devised, or any part thereof, until all the testator's debts should be paid; save that his said son Peter should enjoy the brewhouse to his

own use, paying the said £250 per ann. as aforesaid; but that when and so soon as all his debts should be paid, and £1000 to the appellant's late wife which he thereby gave to her, to be also raised and paid out of the rents and profits of the estates devised to his said three sons as aforesaid, should be fully paid and satisfied; (which said £1000 over and above £1000 therein after mentioned, the testator thereby charged to be raised and paid to his said daughter for and towards her portion, out of the rents, issues, and profits of the estates before given to his said three sons,) his said three sons might enter upon and enjoy the estates so to them devised as aforesaid, *and not before*. And to the end, that the £1000 thereby given to his said daughter, should be raised and paid to her according to his will; he appointed his said trustees to receive the rents, issues, and profits of the premises so devised to his said three sons severally as aforesaid, and to pay over the same to his said daughter; and that until his debts and the said £1000 should be paid, his trustees should let and set the premises for the best rents, for raising and paying his debts and the said legacy of £1000. Provided, that if either or any of his said sons should raise and pay such sums as the trustees, or the survivor, should adjudge to be his or their proportion of the debts and legacies, then the premises to him or them devised should be exempted, and such son or sons should enter and receive the profits. And the testator appointed his said wife and the respondent Richard to be his executors, and bequeathed to them all his personal estate, and directed that they should thereout raise and pay to his said daughter, the further sum of £1000, over and above the said other sum of £1000 to be paid to her by his said executors, after his debts should be paid, *but not before*; it being his will, that his said executors and his said son John and daughter Mary should live together in the house and malthouse wherein the testator then lived: and he directed, that his executors should provide all necessaries for his said son and daughter, until his debts should be paid.

On the 30th of April 1696, the testator died; whereupon his executors proved his will, and the respondent Richard possessed his personal estate, and received the said £250 per ann. from his brother Peter for four years; and the said Peter the son entered [68] on the estates to him devised, and Richard entered on the residue of the real estates and received the profits thereof.

In July 1706, the appellant intermarried with the said Mary his late wife, whereby he became entitled to the said two legacies of £1000 each, with interest; but the testator's widow and sons refusing to pay the same, the appellant and his said wife, in Hilary Term 1706, exhibited their bill in the Court of Chancery against the said Mary Wing, Peter Wing the son, and the respondents, to have an account of the testator's real and personal estates, and that the said legacies of £1000 and £1000 with interest, might be raised and paid. The several defendants put in their answers to this bill; and Peter the son afterwards dying, the suit was revived against the respondent Richard, as his executor; but before the cause was heard, the appellant's wife died, leaving two daughters, and he having taken out administration to his said wife, became entitled to the said legacies of £1000 and £1000 and interest, and afterwards revived the suit.

On the 1st of June 1715, the cause was heard before the then Master of the Rolls; who declared the will of Peter the father to be well proved, and that Peter the son came in as a purchaser of the brewhouse, upon his paying the £250 for four years. And it was decreed, that the Master should take an account of the personal estate of the said Peter Wing the father, and of the said £250 per ann. for four years, and of the profits of the estates devised to the sons, subject to the payment of the testator's debts; and also an account of the testator's debts and legacies, and state what the same severally amounted to. And the Master was to tax all parties their costs of suit, which were to be paid them out of the testator's estate: but the consideration of interest for the legacies devised to the appellant's late wife, and touching her maintenance, and a sale of the estates subjected to the payment of the said debts and legacies, in case there should not be other assets sufficient to pay the same, and all other proper directions, were reserved until after the Master should have made his report.

The Master, on the 22d of July 1720, made his report, and thereby certified, that the testator's personal estate amounted to £1233 ls. and that he thought fit to charge the respondent Richard therewith, and also with £1000 by him received of his brother Peter, and which he was to pay at four yearly payments as aforesaid: that the rents of the testator's real estate received by the respondents from Lady-day 1696 to Lady-

day 1718, being above £600 per ann. amounted to £11,042 3s. of which the respondent Richard had received £9850 3s. and the respondent John £1192, which sum of £9850 3s. received by the respondent Richard, being added to the amount of the personal estate, and to the £1000 received by him of his brother Peter, amounted in the whole to £12,083 4s. That the testator's debts, at his death, amounted to £7189 9s. 5d. and that the respondents had paid in discharge of several of those debts, and the interest thereof, and for repairs, taxes, and maintaining the testator's family to Lady-day 1718, and [69] for the maintenance of the appellant's late wife, until her marriage, £12,734 16s. 4d. whereof he had allowed £11,881 19s. 11½d. to the respondent Richard, and the remainder being £852 16s. 4½d. to the respondent John; so that there remained in the respondent Richard's hands at Lady-day 1718 £201 4s. 0½d. and in the respondent John's hands £339 3s. 7½d. That the appellant intermarried with his late wife on the 12th of July 1706; that the said legacies of £1000 a-piece remained unpaid, and that there also remained unpaid to the testator's creditors £3026. That Peter the son had been let into possession of the North Stooke estate by the trustees, and had received out of the rents thereof from Lady-day 1696 to the time of his death in June 1711, £2625. That the respondent John had been in possession of the estate devised to him, being £114 per ann. ever since Lady-day 1708. That the respondent Richard had paid £377 19s. 2d. for interest of monies borrowed by him to pay off the testator's most pressing creditors, and of which he craved an allowance; but the Master did not think fit to determine whether the same ought to be allowed. He however gave the respondents credit (among other allowances) for £300, as the amount of ten years maintenance of the appellant's late wife, prior to her marriage.

The respondents having taken exceptions to this report, and particularly, for that the Master had not allowed the £377 19s. 2d. upon arguing the same before the Lord Chancellor on the 16th of January 1720, they were all over-ruled or waived; and it was ordered, that the report should stand absolutely confirmed, and that the respondent Richard should bring the £201 4s. 0½d. and the respondent John the £339 3s. 7½d. before the Master, subject to further order. And on the 8th of March following, another order was made by the Lord Chancellor, that the Master should appoint a receiver of the rents and profits of the premises, and allow him a salary.

On the 15th of May 1721, the cause was heard upon the report, before the Master of the Rolls, when the respondents made default; and it was then decreed, that the Master should compute what was due to the appellant for the two legacies of £1000 and £1000, and interest for the same, from the end of one year next after the testator's death, and tax the appellant his costs, according to the former decree; and that the defendants should bring all the deeds and writings relating to the testator's estates before the Master, upon oath; and that he should examine what part of the testator's real estate was necessary and sufficient to be sold, for raising what should be found due to the appellant for the said legacies, interest, and costs, after a deduction of what was certified in the report to have been paid for the maintenance of the appellant's wife; and that the same should be accordingly sold to the best purchaser, to be allowed of by the Master, and that all parties should join in such sale, as the Master should direct.

On the 6th of November following, the cause upon the said report was re-heard (on the respondent's application) by the Master of the Rolls, who then confirmed the last decree, with this further direction, that a sale should be made, as well of the testator's leasehold estate, as of his real estate, sufficient to pay his debts reported due, or such part thereof as then remained unpaid, together with what should be found due to the appellant for the legacies of £1000 and £1000, with interest as aforesaid at £5 per cent. and the appellant's costs of suit.

From both these decrees the defendants appealed to the Lord Chancellor Macclesfield; and the cause standing in the paper to be heard upon the said appeal, on the 9th of June 1722, his Lordship put it off, and recommended it to the parties to agree matters; and on the 30th of the same month, his Lordship again made the like recommendation, and ordered, that £200, part of the money in the Master's hands, should be paid to the appellant on account, and the same was paid accordingly.

But the parties not being able to accommodate matters, the cause was fully heard upon the said appeal, on the 9th of November 1723, when his Lordship was pleased to

declare, that it appeared to be the testator's intent, that his debts and legacies should be raised out of the yearly rents and profits of the trust estate, without a sale of any part thereof, and that his debts should be satisfied before his legacies; and that therefore the legacies bequeathed to the appellant's late wife, not becoming due until after the testator's debts were or could be all paid, out of the yearly rents and profits of the trust estate, and there being no direction in the will for the said legacies carrying interest, but a provision made for the maintenance of the family in the mean time; his Lordship was of opinion, that the appellant was not entitled to have any interest for the said legacies; and therefore ordered, that the appellant's bill, so far as it sought a sale of the trust estate, or payment of interest for the said legacies, should stand dismissed.—But, as touching maintenance, his Lordship conceived that the appellant's late wife was entitled to her share of what, by the will, was allowed for the maintenance of the family, from the time she was maintained by the defendant, until her death; and such share or proportion of the maintenance being £30 per ann. it was ordered, that the Master should see what the appellant had received, and what was due to him in respect thereof, and that the same should be paid to the appellant accordingly.—And as to the rents and profits of such part of the trust estate, as had been received by Peter Wing the son, and by him misapplied, his Lordship declared, that although such misapplication ought not to charge the trust estate devised to the respondents, with more than their share of the debts and legacies; yet, that the appellant and his late wife, who had been thereby injured by not having her said legacies raised sooner, were entitled to receive a compensation in respect thereof, out of the said Peter the son's estate, and in regard there might be a contest between the appellant and the other creditors of Peter the son, touching a priority of satisfaction, the appellant's being only in the nature of a debt by simple contract; his [71] Lordship therefore ordered, that the master should take an account of the assets of the said Peter, come to the hands of the respondent Richard, his administrator, and also an account of Peter's debts; and when the Master should have made his report thereon, his Lordship would give further directions, touching the priority of payment of the said debts out of Peter's assets, and the interest he had in the trust estate.—And as to the question, whether the respondent Richard should have an allowance of interest for what he had borrowed, or paid out of his pocket, towards satisfaction of his father's debts, his Lordship declared, that the said respondent had done well therein, he having therewith discharged debts which carried interest, and the estate profited thereby; and therefore ordered, that out of the rents of the said estate, he should be allowed interest for what he so borrowed, or paid out of his pocket, in satisfaction of his said father's debts, and that the money by him brought before the Master as aforesaid should be repaid.—And as touching the costs of the suit, his Lordship declared, he saw no cause to give the appellant any costs; but that the respondent Richard ought to be allowed his costs out of the trust estate in the first place, and that the surplus of the said trust estate should be applied in the payment of the debts, and then the legacies of the father; but in regard the allowance of the said defendant's costs, would occasion a longer continuance of the term to the appellant's and respondent's prejudice, his Lordship therefore reserved the consideration, whether the respondents should have satisfaction over against the appellant, in respect of their costs.—And as to the £1000 given to the appellant's late wife out of the personal estate, his Lordship declared, the appellant ought to have satisfaction for the same, in like manner as he was to have for the £1000 charged on the trust estate; and it was further ordered, that the receiver of the trust estate should be discharged, the appellant then declining to bear the charge of a receiver for the future; and the consideration, who should bear the charge of the said receiver for the time past, was reserved.

The appellant conceiving himself aggrieved by this last decree, appealed from it; and on his behalf it was argued (C. Talbot, D. Ryder), that a legacy given, without mentioning the time of payment, is, according to the known rule of a Court of Equity in ordinary cases, to be paid at the end of a year after the testator's death, and to carry interest from that time; and where it is directed to be raised out of the rents and profits of an estate, such direction is generally held to give a power to sell or mortgage the estate for that purpose, and especially in the case of younger children's portions, when it becomes necessary to raise them for their advancement in the world: and if it should be thought that it was not the testator's intention in the pre-



sent case, to have the legacies in question raised by sale or mortgage, yet it was apprehended, that as there was no time limited for the payment of the first £1000, nor the payment of it postponed by the will, it ought not to have waited till pay-[72]-ment of the debts, but be raised as soon as the profits would supply it, by which means equal justice would be done both to the creditors and legatees. The £1000 might be raised in a reasonable time, from whence it ought to carry interest; and the creditors would not be prejudiced, because their debts would carry interest, and must, in the end, be paid out of the estate: and this was still stronger, because of the express direction in the will, to pay the rents and profits to the appellant's late wife, towards satisfying her legacy. And as to the other £1000 legacy, which is more particularly mentioned to be payable out of the personal estate, that having been postponed by the payment of those assets to the creditors, it ought to stand in the place of the debts so paid, in order to its being satisfied out of the real estate, and to carry interest in the mean time, as they did. But if both or either of the legacies ought to have been postponed to the debts, it appeared, by the Master's report, that the debts might have been paid much sooner than the time of making the last decree, if the £2625 received by Peter the son so long ago as the year 1711, had been applied to that purpose, according to the directions of the will; and considering how much interest might have been saved of the debts, which would have been paid off with that money, the whole debts, upon the nearest computation, might have been paid before the year 1718; and therefore, if any variation of the decree made by the Master of the Rolls had been reasonable, as to the time of payment of the legacies, it ought to have been by referring it to the Master, to state when the debts might have been paid, and ordering the legacies to carry interest from that time, and to be paid by the respondents, so far as they had received any overplus of the rents and profits; and as to the residue, by sale or mortgage of the trust estate, or at least of that part of it which was devised to Peter the son; and the allowance of an annual sum, in lieu of maintenance, ought to have been continued to the time of the commencement of the interest. That the respondent Richard ought not to be allowed, as against the appellant, interest for the money he advanced towards payment of his father's debts, because there was sufficient raised out of the rents to pay the principal; and if that was misapplied, it ought not to prejudice the appellant and postpone the payment of his wife's legacy: nor could there regularly be any such allowance ordered upon hearing the appeal, the same matter having been previously determined on the exceptions to the Master's report. That there was apprehended to be no foundation for discharging the receiver, since, in all events, the appellant was entitled to have the legacies out of the profits of the trust estates; and by the express directions of the will, the respondents and Peter Wing the younger were not to enter upon those estates till those legacies, as well as the debts, were satisfied: and the rather because in this case, the last decree did not so much as order the respondents to apply the growing rents either in payment of the debts or legacies, or in what other manner, or by [73] whom such rents should be disposed of. That there was no reason why the appellant should bear the expence of a receiver, nor could his refusal to do so be a sufficient ground for discharging the receiver; neither did there appear to have been any reason for reserving the consideration of who should bear the expence of the receiver for the time past. That the appellant ought not to have been deprived of his costs, which, by the common course of a Court of Equity, he was entitled to; his suit being made necessary by the nature of the devise, and the misconduct of at least one of those entitled to part of the estate, out of which he was to receive a satisfaction for his demand; and much less could there be any reason for reserving the consideration, whether the respondents should have a satisfaction over against the appellant in respect of their costs. Besides, the question as to costs, was apprehended not to be open for the determination of the Court upon the appeal; because costs were given by the first decree at the Rolls, which was signed and inrolled long before the appeal to the Chancellor from the second decree. It was therefore hoped, that the decree of the Lord Chancellor would be reversed, and the second decree of the Master of the Rolls confirmed.

On the other side it was insisted (P. Yorke, T. Lutwyche), that, though in some cases a sale has been decreed, where money has been devised generally to be raised out of the rents and profits of lands, yet, in the present case, it plainly appeared to be the intention of the testator, that none of his lands should be sold; he directing, that after his debts and legacies were paid, his sons should enter upon and hold the

several estates devised to them; but which direction could not be complied with, in case any part of the estates should be sold. And the testator having also directed, that the £1000 should be paid out of the rents, issues, and profits *to be issuing out* of his lands so devised, he thereby declared his will, that the same should be paid out of the *annual* profits only. That the like intention appeared very clearly in that part of the will, where the testator declared in what manner his trustees who were appointed to enter in default of his executors, should execute their trust; namely, that they should receive the rents and profits, and let and set the estate, until his debts and the legacy bequeathed to his daughter Mary should be paid. That as the debts were only payable out of the rents and profits of the estates, and as the legacies were directed to be paid after the debts, *but not before*; and as there was no direction for the payment of any interest for the legacies, but only a maintenance for Mary, until the debts were paid; the testator seemed to have substituted this maintenance in the place of interest, and therefore the appellant could not be entitled to both. As to the objection, that it was inconvenient for the appellant's wife to wait so long for her legacies, and that it would not answer the intent of a portion unless it could be raised in a reasonable time; it was insisted, that the testator's intention was such, and that he was pleased to lay equal, if not greater difficulties, upon all his sons, in not permitting them to [74] enter upon the devised estates, until not only his debts but also his legacies were paid. And as to the allowance of £377 19s. 2d. for interest of what the respondent Richard had borrowed to pay his father's debts, it was said, that the money was so borrowed in order to satisfy some of the most importunate of the creditors, and who by expences in law would have subjected the estate to a greater burthen of costs; and therefore, as the estate had received the advantage, the respondent Richard was justly entitled to the allowance.

BUT after hearing counsel on this appeal it was ORDERED and ADJUDGED, that so much of the first part of the decree complained of as declared, "that the testator's intent was, that his debts and legacies should be raised out of the yearly rents and profits of the trust estate, without sale of any part thereof, and that his debts should be satisfied before his legacies;" and that dismissed the appellant's bill, so far as the same sought a sale of the trust estate, should be affirmed: but as to so much of the first part of the said decree, which dismissed the bill so far as it sought payment of interest for the two legacies of £1000 each, the same should be reversed. And it was further ORDERED, that the allowance of £30 per ann. for the maintenance of the appellant's late wife, should be carried on from her death, till the time that the appellant should be entitled to interest for the said legacies; and that the same should be paid to him out of the rents and profits of the trust estate: and with respect to such interest, it was ORDERED, that it should be referred to the Master to inquire when and at what time the debts of the testator might have been paid or satisfied by his personal estate, and the £250 per ann. payable by Peter Wing the son, in respect of the brewhouse devised to him, and by perception of the profits of the trust estate, if the same had been duly applied; in making of which inquiry, the Master was to make all just allowances and deductions: and it was further ORDERED and ADJUDGED, that so much of the said decree as contained a declaration of the Court relating to the rents and profits received by Peter Wing the son, and ordered the Master to take an account of his assets; and also the declaration and order relating to an allowance of £377 19s. 2d. to the respondent Richard, and the repayment of the money brought by him before the Master, should be affirmed; but that so much of the said decree as related to the costs of suit of the several parties, should be reversed: and it was further ORDERED and ADJUDGED, that that part of the said decree which contained a declaration, "that the appellant ought to have satisfaction for the legacy of £1000 given his late wife out of the testator's personal estate, in like manner as he was to have the £1000 charged on the trust estate," should be affirmed; but as to so much of the said decree as directed the receiver of the rents and profits of the trust estate to be discharged, the same was reversed: and it was ORDERED and ADJUDGED, that the Court of Chancery should appoint a receiver of the rents and [75] profits of the said trust estate, with a proper salary to be paid out of the produce thereof: and it was lastly ORDERED and ADJUDGED, that the said decree in all other respects not hereby varied or reversed, or inconsistent with the directions hereby given, should be affirmed. (Jour. vol. 23. p. 537.)

CASE 6.—JOHN BROWNE,—*Appellant* ; MARGARET BYRNE, Widow,—  
*Respondent* [4th April 1754].

A. by will gives a legacy of £500 to B. payable on her marriage day, and directs that any bonds or notes left by him in the hands of B.'s father, should go in discharge *pro tanto* of the legacy. The testator had in fact deposited sundry securities, but the statute of limitations had run upon them in his life-time. On a bill filed by the legatee after her marriage, she was held to be entitled to the legacy and interest, without deducting the value of the deposited securities, because they could not, at the time of the testator's death, be applied in satisfaction of the legacy, within the intent and meaning of his will.

DECREE of the Irish Chancery *AFFIRMED*.

The admissions of the appellant seem to form the most material features of this case: it therefore scarcely warrants the conclusion drawn from it.

George Browne Esq. the appellant's elder brother, being seised as tenant in tail, with remainder over to the appellant of a considerable real estate in Ireland, and possessed of some leasehold lands, held for terms of years, as well as of other personal estate, duly made his will, dated the 6th of April 1737, and thereby, amongst other legacies and bequests, gave and bequeathed to the respondent, by the name of the Honourable Mrs. Margaret Birmingham, daughter of the Right Honourable the Lord Athunry, a legacy of £500, in the words following; viz. "Item, I leave to the Honourable Mrs. Margaret Birmingham, daughter to the Right Honourable Lord Athunry, who has lived in my family since her infancy, and for whom I have a great tenderness, as I have for every one of my Lord Athunry's and my dear Lady Athunry's children; I say, I bequeath her the sum of £500 on her marriage day: And my will is, that any bond, or bonds and judgment, or cash-note, payable to me, and now subsisting, which I gave or bestowed to the said Honourable Mrs. Margaret Birmingham, left her by letter, or any other instrument in writing, in Lord Athunry's hands or otherwise, shall be deemed and taken for so much, as part of the five hundred pounds bequeathed to the said Honourable Mrs. Margaret Birmingham by this my will, and shall, for so much, go in discharge of the said five hundred pounds." And the testator appointed the appellant sole executor of his will, who after his death duly proved the same.

[76] The testator in his life-time had given or deposited several bonds, notes, and other securities, to or for the benefit of the respondent, which he designed and directed, as aforesaid, should go for so much, in discharge of the said £500 legacy, and soon afterwards died indebted to many persons to a great amount; and the appellant applied all his personal estate, so far as the same would extend, in the payment of his debts; but there being a great deficiency, the appellant, in regard to the memory of his brother, voluntarily took upon himself the payment of all his debts, and secured the same, by charging them on his own estate.

Soon after the testator's death, and before the appellant could know the state of the testator's affairs, or receive any information concerning the securities given or deposited for the benefit of the respondent; she by her next friend, in March 1737, exhibited her bill in the Court of Chancery in Ireland, against the appellant, for an account of the testator's real and personal assets, and to have her said legacy paid, though the same was then only a contingent right, and not vested.

The appellant put in his answer to this bill, and thereby said, that notwithstanding he was advised that he never would be liable or subject to the said legacy, or any part thereof, (the personal estate of the testator being no way sufficient to discharge the judgment debts owing by him at his death, and the testator's real estate being specifically devised to the appellant,) yet in regard to the memory of his brother, and the particular esteem which the appellant had for the respondent, he was willing, as he always had been, to discharge the said legacy, in the same manner as prescribed by the testator's will, and as soon as the contingency happened.

The respondent in 1741, intermarried with George Byrne, Esq. whereby the suit became abated; and soon afterwards the said George Byrne died, and the suit never was revived either by the respondent and her said husband during his life-time, nor

by the respondent since his death; but instead thereof, the respondent departed from her said suit in the Court of Chancery; and to put the appellant to greater expence, she, on the 12th of May 1744, exhibited her original bill against the appellant in the Court of Exchequer in Ireland, stating the bequest of the said legacy to her, and that the same was a charge on the testator's real as well as personal estate, and was become due and payable on her said marriage, and also stating her former bill in the Court of Chancery, and the appellant's answer thereto; and charging, that the appellant had thereby, and by several letters and otherwise, promised payment of the said legacy; and likewise, that the testator was possessed of several valuable leases, as well as other personal estate, more than sufficient to pay his debts and legacies, particularly the respondent's legacy; and therefore prayed, that the appellant might discover and come to an account for the testator's real and personal estate, and that the said legacy might be paid.

[77] The appellant, by his answer to this bill, insisted, as the truth was, that his brother had not left sufficient assets to pay his debts, much less his legacies, and that the appellant had paid, in discharge of his brother's debts, more than all his assets amounted to, by £2000 and upwards: and with respect to his answer put in to the respondent's former bill in Chancery, he confessed that he left an answer without oath, in the hands of his brother Henry Browne, to the bill filed by Peter Daly, Esq. as next friend to the respondent; but with instructions to the said Henry Browne not to file the same until Denis Daly, Esq. had first got into his hands all such bonds, notes, and securities as were deposited in the hands of Lord Athunry, or any other person by the testator, in trust for the respondent; it being at that time confessed, that there were such by the said Denis Daly, and that the appellant believed he might have submitted to pay the said legacy, in the manner, and liable to such account, as directed by the will, being then informed there were in the hands of Lord Athunry and others, securities sufficient to discharge the said legacy; and it was upon that account, and no other, that he signed such answer. And the appellant further insisted, that the value of the bonds, notes, and securities, in the hands of the respondent and Lord Athunry, which had been concealed from him, ought to be taken as part of the legacy.

The respondent replied; and the cause being at issue, many witnesses were examined for the respondent, touching the testator's real and personal estate, and publication passed, no witnesses being examined by the appellant; but, by consent of parties, several orders were made enabling the appellant to read at the hearing several deeds, articles, wills, and writings therein mentioned, as if the same had been proved; and also a cross bill filed by the appellant, and the answers thereto, having just exceptions.

The cause came on to be heard on the 7th of May 1750, when the Court decreed to the respondent the legacy of £500 given her by the testator's will, with interest for the same from the time of her marriage in November 1741; and that the Remembrancer of the Court, or his deputy, would state and settle an account between the respondent and the appellant of the interest due on the said legacy; and that an account should be taken of the personal estate of the testator, and the nature thereof, and to whose hands the same came, and how it had been applied, and of the testator's debts owing at the time of his decease; and that he should also inquire whether any bond or bonds, or cash-note payable to the testator, and subsisting at the time of the will, given or bestowed by the testator to the respondent, or left her by letter, or any other instrument or writing, were lodged in the hands of the Lord Athunry, or the respondent, or of any other person in trust for her, and what was paid in discharge of them, and to whom; upon which account all parties were to have just allowances, and, if any thing appeared difficult, to report it specially; [78] and, on return of the Remembrancer's report, such further order should be made as should be fit.

In consequence of this decree, the appellant fully proved before the Remembrancer, that he had paid in discharge of the testator's debts more than he had received by £2000 and upwards; and that the testator had in his life-time given or deposited, to and for the benefit of the respondent, several securities to a considerable amount, which ought to go in discharge of so much of the said £500 legacy.

All the accounts directed by the decree being taken, the Remembrancer made his report, dated the 7th of November 1752; and thereby certified, that the said legacy of

£500 was due to the respondent, and for interest thereof, from 30th November 1741 to 30th May 1752, after the rate of £6 per cent. per ann. the sum of £317 10s. which being added to the said principal sum of £500, amounted to £817 10s.; that the appellant had paid in discharge of the said interest £30 sterling, which being deducted from the said £817 10s. there remained due to the respondent, for principal and interest, £787 10s. That the testator's personal estate consisted of several particulars, in the schedule thereto annexed mentioned, amounting to £2217 8d. besides two bonds of £100 each, therein mentioned to be desperate; that the debts due and owing by the testator at his death amounted to £5539 12s. and that the appellant had paid on account of the testator's debts and funeral expences, several sums mentioned in another schedule, amounting to £3680 5s. 3½d. That a cash-note for £100 perfected by John Browne of Westport, Esq. dated 14th May 1729, and payable to the testator or order, on the death or marriage of the said John Browne, but not indorsed by him, was inclosed in a letter, written by the testator to the respondent, dated 18th May 1729, which was sealed up in a wrapper, also sealed and directed on the back, to be kept by the Lord Athunry, unopened, till after the death of the testator: and that the said John Browne of Westport executed to the testator another note in May 1729, for £100, payable to the testator, or order, on the day of the death or marriage of the said John Browne, which should happen soonest; on which said note was indorsed the words following: "Pay the contents to Mrs. Margaret Birmingham, dated 20th May 1729;" which notes of £100 each the appellant's agent had insisted should go in discharge, or in part satisfaction of the said legacy, under the testator's will, in case the Court should be of opinion that the said legacy ought to be accounted for by the appellant; but that the respondent's agent had insisted, that neither of the said notes ought to be charged to the respondent, the statute of limitations having incurred against the note which was sealed up in Lord Athunry's hands, and the other note never was in the respondent's custody or power; but whether the said two sums of £100 each, making £200, ought to go in discharge of the said legacy, was by the Remembrancer submitted to the judgment of the Court.

[79] On the 19th of May 1753, the cause was heard on the special matter of this report; when, upon hearing the report read, and on reading the deposition of the said John Browne of Westport, (although the reading thereof was objected to by the appellant,) the Court decreed, that the said special point should be ruled for the respondent, and that the report should be absolutely confirmed: and the respondent was thereby decreed to receive the sum of £787 10s. reported due for principal and interest of the said legacy, with interest after the rate of £6 per cent. per ann. from 30th May 1752, to which time interest was computed by the report, to be totted up by the Remembrancer to that day; and the Remembrancer having totted up the said interest to the amount of £28 5s. which, being added to the said sum of £787 10s. made together the sum of £815 13s. the same was decreed to be paid by the appellant to the respondent, with interest after the rate of £6 per cent. from that day until the same was paid; and that the respondent should have and recover her costs of the suit, and accordingly make up and inroll the said decree.

From this last decree the appellant appealed, insisting (T. Clarke, K. Evans), that the will did not give the respondent £500 to be paid absolutely, and in all events, but on her marriage day; and expressly directed the amount of any bond, judgment, or note, left in Lord Athunry's hands, or otherwise, for the respondent, should be deemed and taken as part, and go in discharge of the said £500. And even as to so much of this legacy as, agreeable to the will, should eventually become payable, the respondent could only be entitled to have the same paid in common with other legatees, in a due course of administration, and after all the testator's debts were satisfied. That the suit instituted by the respondent in 1737, was premature, improper, and vexatious, being instituted before any right was vested in her, while the bequest rested in contingency; and it was utterly uncertain whether she would ever become entitled to any part of the legacy. That the submission in the appellant's answer to that bill was a voluntary and generous offer, and such as he was not in any manner obliged to make: and the nature and effect of that offer was only to dispense with the objection which he might otherwise have made to the payment of the legacy, if ever it became due, on account of the deficiency of assets, by submitting to pay so much of the legacy as should become due, notwithstanding such deficiency: but in every other respect, the

respondent's right was left in the same condition as it stood by the testator's will, which expressly directed, that the securities therein mentioned should for so much go in discharge of the £500 legacy. That it appeared in the cause, that securities were given to, or deposited for the respondent, to a considerable amount; and if the same, or any part thereof, were never recovered, such loss it was apprehended ought to be borne by the respondent, who in all events was only to have the residue of the £500 after deducting the amount of those securities. And even [80] for such residue, the appellant was not personally liable, as he appeared by the report to have overpaid the assets by near £1500, and his offer in the former suit was only to pay it *in the same manner as prescribed by the will, and as soon as the contingency happened*. But this offer, such as it was, was in effect waived by the respondent, when she instituted a new suit in the Court of Exchequer; and it seemed to be so considered by the Court, as the first decree directed an account of assets, and an inquiry concerning the securities; and accordingly such inquiry was made, and the account taken. The final decree, however, made in consequence of the report, did not seem to be upon the whole well warranted; for it charged the appellant personally with the payment of the whole £500 and interest, without having any regard to such securities as it was apprehended ought to be deducted thereout, and without having regard to a total want of assets. It moreover charged the appellant with the whole costs of suit, without any regard to the respondent's behaviour, which, from the year 1737, had been remarkably and unnecessarily vexatious; and without regard to the great expence occasioned by the long inquiry and examination concerning the testator's assets, which all turned out in favour of the appellant.

On the other side it was said (W. Murray, C. Yorke), that it appeared by the appellant's answer to the bill in 1737, brought by the respondent during her minority for a satisfaction of this legacy, that the appellant admitted himself liable to pay it, and thereby in express words allowed the legacy: and he did accordingly, after the respondent's marriage, on which event it became due, pay one year's interest. That there was no colour to say, that the bonds or notes pretended to be given to the respondent by the testator in his life-time, could now be applied in satisfaction of the legacy; for the appellant, as executor, received the money due upon the bonds on which judgments were entered up, but if he had not, still he was the only person entitled to do it; and the respondent had offered to assign all her right, title, and interest in the bonds. And as to the notes, it appeared by the account of the testator's personal estate produced by the appellant, that nothing could be recovered upon either of them at the time of the testator's death; for John Browne was married in 1729, and the testator lived till 1737, so that the remedy was barred by the statute of limitations; consequently the notes could not be considered as subsisting securities at the time of the testator's death, to be applied in satisfaction of the legacy, within the intent and meaning of his will. But supposing the remedy had not been barred by the statute, the respondent could not avail herself of these notes; one of them, which was alleged to be indorsed to her, never having been in her custody or power; and the other being unindorsed, could only be put in suit by the executor, who had refused to receive or sue for the contents of it. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

[81] Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed: and it was further ORDERED, that the appellant should pay to the respondent £100 for her costs in respect of the said appeal. (Jour. vol. 28. p. 263.)

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CASE 7.—GEORGE Duke of MONTAGU and others,—*Appellants*; EDWARD Lord BEAULIEU and others,—*Respondents* [6th April 1775].

A. devises an Exchequer annuity of £1000 to trustees for the benefit of certain persons in his will named. Held, that this was a *specific* Legacy, and not to be taken as any part of the testator's general personal estate, or applicable to the payment of his debts.

This case is involved in such a multiplicity of private circumstances as to form no precedent whatever.

The material facts of this case have been already stated, on occasion of a former appeal (Brown P.C. Vol. III. p. 277. tit. Devise, ca. 46.); and in consequence of the order then made by the House of Lords, several proceedings were had before the Master, who, on the 16th of June 1773, made his report, in which he stated the several accounts which he had taken of the personal estate, and of the rents and profits of the real estate of Ralph Duke of Montagu; the general result of which accounts was, that the personal estate of Duke Ralph (including two sums of £2102 2s. 8d. and £20,097 16s. received in consequence of the articles of 1724) amounted to £52,199 2s. 8d. and that the payments and allowances thereout allowed to Duke John, in respect of his father's debts, legacies, and funeral expences, amounted to £48,412 8s. 1½d. which left a balance in favour of the personal estate, of £3786 14s. 6½d. but that a balance was due to Duke John, on account of the real estate, of £1695 14s. 2½d. which being deducted, the final balance due from him appeared to be £2091 0s. 3½d.

Exceptions were taken on both sides to this report, the most material of which were, the 4th, 5th, 6th, 7th, 8th, and 9th exceptions of the respondents.

These exceptions were couched in the following words, viz. IV. "For that the said Master had by his said report charged the representatives of John Duke of Montagu, with no more than the sum of £20,097 16s. part of the sum of £32,753 13s. 10d. due to Duke Ralph from Christopher Monk, or his representatives: whereas the respondents charged and proved, that on the 24th of June 1724, there was due from the said Christopher Monk, and his representatives, to the estate of Duke Ralph, the sum of £32,753 13s. 10d. over and besides the [82] sum of £2102 2s. 8d. mentioned in the 6th exception; and therefore they insist, that the Master ought to have charged the representatives of Duke John, with the said whole sum of £32,753 13s. 10d.—V. For that the said Master had disallowed the charge of the respondents, as to the produce of the said £32,753 13s. 10d. from the 24th of June 1724, and had not charged the representatives of the said John Duke of Montagu with the produce thereof from that time, to the time of filing the exceptions.—VI. Nor with the produce of the said sum of £2102 2s. 8d. the interest due on the Grindon mortgage at the death of Duke Ralph, from the said 24th of June 1724, to the time of filing the exceptions.—VII. For that the Master had totally disallowed the charges carried in before him by the respondents, as to the Exchequer annuity of £1000 a year, and had not charged the representatives of Duke John with the life estate or interest of Duke John therein, given to him by the will of Duke Ralph, on the condition therein mentioned, which was not performed: whereas the Master ought to have charged the representatives of Duke John, with all the quarterly payments of the said annuity from the 24th of June 1711, to the time of filing the exceptions.—VIII. For that the Master had by his report, applied the whole rents and profits of the devised real estates of Duke Ralph, to the discharge of the several annuities and interest of mortgages, charged on the said real estates, being part of the debts of Duke Ralph, without making the Exchequer annuity bear a proportion of such debts, which the said Master ought to have done; the said Exchequer annuity being liable, although it should be considered as a specific legacy given by the will.—IX. For that the said Master had not charged the estate of Duke John, or his representatives, with any rents or profits of fourteen houses or tenements, in the parishes of St. Martin in the Fields, and St. Clement Danes, part of the real estate of Duke Ralph, (which were sold by Duke John on the 23d of March 1727,) subsequent to Christmas 1726, to the present time; nor with the purchase money or value of the said fourteen houses and tenements, as he ought to have done, but the said Master had totally disallowed the respondents charge as to those matters."

On the 21st of January 1774, these exceptions were argued before the Lord Chancellor Bathurst, when his Lordship ordered the 4th exception to be allowed, as to a sum of £238, which was to be added to Duke Ralph's personal estate; and that the rest of that exception, and the 5th, 6th, 7th, and 8th exceptions should be overruled: and as the 9th exception, it was ordered, that the estate of Duke John should be further charged with the rents and profits of the said houses, from Christmas 1726, till Duke John's death.

From so much of this order as allowed the 9th exception, the original appeal was brought; and so much of it as over-ruled the [83] 4th, 5th, 6th, 7th, and 8th exceptions, was the subject of the cross appeal.

In support of the original appeal, it was said (E. Thurlow, J. Dunning), that in 1726, the houses in question, together with part of Southampton Buildings, of the yearly value of near £800, were sold under the authority of Parliament, and the direction of the Court of Chancery, for £20,000, which was paid to Lady Beaulieu's trustees; so that no other rents were received by, or for the use of the late Duke of Montagu, except those which had been accounted for. The act of Parliament recited, that the agreement which was to be effectuated by that law, was beneficial to the children; *prima facie* it would be presumed, that their interests were taken care of; and that the Duke their father, as well as the Duke of Manchester and his friends, and the common friends of both families, did not contrive to cheat the daughters, and prevail upon Parliament to lend its assistance to compleat the fraud. But if the respondents were right, fraud was imputable not only to all these parties, but even the Court of Chancery lent its aid. For the propriety of the agreement did not rest upon the act of Parliament only, as it appeared by the facts stated in the case, that that part of the transaction which was overturned by the order now appealed from, was carried into execution under the direction of the Court of Chancery, in the cause where Lady Beaulieu and her husband the Duke of Manchester were parties. The sale was made under the authority of that Court; and the money applied for Lady Beaulieu's benefit, pursuant to the articles and act of Parliament. The Duke of Montagu her father had not, nor could have any benefit from it, in any event whatever. The agreement entered into by the articles of 1722, confirmed by the act of Parliament and subsequent proceedings, was almost forty years before the commencement of the cause, in which the transaction was now attempted to be impeached. If it be said, that Lady Beaulieu was a minor at the time, and that she was afterwards under coverture, and therefore disabled from asserting her right; yet it must be remembered, that the Duke of Manchester died in 1739, and that then every disability ceased. She was of competent age to judge, whether it was expedient to attempt to rescind the agreement made on her marriage, and abandon what was then provided for her; and the provision which the care of her father had secured for her by that agreement, had placed her in circumstances so affluent, that she was well able to assert and defend her right.

After an agreement so made and ratified, carried into execution in all its parts, and so long acquiesced under, it seemed rather hard, that the appellant should be required to shew that Lady Beaulieu was a gainer by it; but they were not afraid of entering into that point. The portions for the ladies were not raiseable until after the death of their father, who, at the time of Lady Beaulieu's first marriage, was but thirty-two years of age. It was not improbable, that he might live to see her arrive at an advanced time of life. In fact, he survived her first marriage [84] twenty-six years. It was of importance to the future prospects in life of the daughters, that the payment of their portions should be accelerated. It must be remembered, that at the time of the agreement, the estates comprised in Duke John's marriage settlement, of which Southampton Buildings were part, and the estates of which Duke Ralph died seised in fee simple in possession, of which the houses in question were part, stood settled alike; except that Duke John's estate for life did not extend to the latter. After his death, it was perfectly indifferent to the parties interested in remainder, whether the £40,000 portions were raised from the settled estate entirely, or whether the houses, the rents whereof formed the present matter in dispute, were applied, as far as they would extend, towards discharging that burthen; because both the estates, after his death, would belong to the same person. The Duke's estate for life stood clear of the portions; he therefore would have been no gainer, if they had been wholly raised out of the other estate; nor would the daughters have been losers, for the interest of the money would have been equivalent to the rents of what had been sold for that purpose. But the Duke was willing to make a large concession in their favour: he therefore agreed, that, together with the houses in question, which were of the yearly value of £408, subject to a rent-charge of £200 per ann. for the life of the annuitant, Southampton Buildings, of the yearly value of £1792, to which he was entitled for life, should be sold for raising the portions.



So that for twenty-six years, and it was not improbable that it might have been for a much longer period, he gave up £1792 per ann. for the benefit of his daughters. The moiety which Lady Beaulieu was entitled to receive of the £408 per ann. after keeping down the rent-charge thereon, would only have amounted to a very small annual sum; instead of which, she had, in consequence of this agreement, £600 per ann. immediately secured to her separate use out of the £20,000 raised for her portion; subject to which, it was settled for the benefit of her children, and the Duke of Manchester her husband; who, in consideration of it, settled upon her a jointure of £2000 per ann. for her life, and his estates on the issue of the marriage; and upon the death of her father, she found the estate, which would then have become liable to the portions, discharged of that incumbrance. The Duke her father was in no respect affected by the mode of raising the portions, but by giving up to his daughters a life estate of £1792 a year for that purpose, which, in the time he outlived the agreement, would have amounted to near £40,000.

Yet it is said, that the Duke of Montagu procured advantages to himself by this agreement; viz. a re-settlement of the family estate, whereby his daughters were reduced from tenants in tail, to tenants for life, with limitations to their issue in tail, and an ultimate reversion in fee to himself; and that he also procured the inheritance of the advowson of the parish church of St. Andrew, Holborn.

[85] As to the re-settlement, it must be observed, that it left untouched the estate for life of Duke John, and the limitations in tail to his issue male; and only settled such parts and shares as these two daughters might respectively become entitled to, upon or after the death of the Duke their father, and failure of issue male of his body; that the Duke was then but 32 years of age, and might probably have issue male, and in fact had another son in 1725, who lived about two years. It was therefore upon an event barely probable, that the re-settlement was to take place. It is usual in great families for re-settlements to be made upon the marriage of an eldest son, or other child, entitled to an estate tail, and for such child to reduce himself, or herself, to an estate for life. It was done upon the marriage of Duke John, who was then but 14 years of age, and the reversion in fee was given to Duke Ralph, subject to no other limitations than to Duke John and his sons; out of which reversion, the interests of the daughters arose under Duke Ralph's will. By the re-settlement, the interests of the daughters were well taken care of, and their issue were placed in a safer condition; the subsequent limitations were to relations of the name and blood of this noble family, who were also remainder-men under Duke Ralph's will, and therefore necessarily considered in the re-settlement; as Parliament would not, probably, have otherwise lent its assistance to raise the £40,000. And as to the reversion in fee, which the Duke was supposed to have got by the re-settlement, it must be observed, that at the time of the treaty, he had the reversion of these estates, subject to the limitations of Duke Ralph's will; and the ultimate remainder limited by the re-settlement was placed at such a distance, as not to have been at all more valuable than the former reversion. These observations supposed, that the reversion in fee was really limited to Duke John by the articles in 1722; but that was not so. For although these articles contained a limitation *to the right heirs of the said John Duke of Montagu for ever*, yet nothing was clearer, than that he took no interest by those words; for the articles contained no prior limitation to him for life, or otherwise; no interest of his could be enlarged by these words; but the party or parties who should eventually turn out to be his heir, or coheirs, would, under that limitation, take the ultimate remainder in fee *by purchase*; and consequently, if the re-settlement should take place at all, that ultimate remainder must vest in, or come to the ladies themselves; for if the Duke should leave a son, who should live to make a disposition of these estates, the re-settlement would never take place. It did in fact vest in the ladies by purchase; Duke John therefore, *instead of acquiring a more valuable reversion, gave up that to his daughters, which before the treaty he was entitled to*. The ultimate remainder was, in truth, too remote to be of much consideration. Both the ladies had issue, who had attained 21, recoveries had been suffered, and there was an end of all the limitations.

[86] As to the advowson of St. Andrew's, the Duke was, at the time of the treaty, tenant for life of it, under his own marriage settlement, prior to which he had been tenant in tail; and the interest he acquired in it by the articles, could scarcely amount to more than one tenth part of what he gave up to his daughters by the

treaty, in lieu of it. And yet this interest in the advowson was all he got by the articles, in whatever view the transaction was considered. His life interest in the family estate was diminished no less than £1792 a year; what remained was eased of no burthen; nor, by the whole of the bargain, was any other possible advantage to accrue to him. But lastly, if the agreement was at this distance of time to be rescinded, it must, according to the rules of equity, be rescinded *in toto*; and both parties put into the situation in which they would have stood, if the agreement had not been made. If the respondents wished for that, it was not the interest of the appellants to object to it; for as the Duke's estate would, on the one hand, be charged with the value of Lady Beaulieu's moiety of the interest he acquired in the advowson; and with a moiety of the rents in question; it must, on the other, be allowed the interest of the £20,000 raised for her Ladyship in pursuance of the agreement, which would make an increase of many thousand pounds in his assets.

On the other side it was said (A. Wedderburn, A. Forrester), that the order made on this ninth exception, was founded on the judgment of the House in 1767; whereby their Lordships were pleased to declare, "that John late Duke of Montagu was entitled to the benefit of any bequest or devise by the will of his father, from three months after he had suffered the recovery; the said John Duke of Montagu now having complied with the condition annexed thereto, by settling his Warwickshire estate; and that the same ought to go in such manner, and to such persons, as limited and directed by the proviso in the will." On the 18th of April 1711, Duke John suffered the recovery; consequently, at the end of the three months after, his son, the Marquis of Monthermer, by virtue of the conditional limitation in his grandfather's will, became seised for life, without entry or claim, of Duke Ralph's fee simple estates; which on Lord Monthermer's death, upon the 6th of August in the same year, vested in Lady Beaulieu as the only child of Duke John then living, as the person entitled next in remainder under Duke Ralph's will. Duke John therefore, from three months after the 18th of April 1711, could have no right or title whatsoever to his father's fee simple estates; and consequently, though he obtained (upon such pretences as the respondents wished not to repeat) acts of Parliament for the sale of them; it was but common justice, that he, or his representatives, should not only account for the rents and profits of such of the estates as he actually sold, but also for the real value of them.

But it is objected, that the devised Middlesex estates were sold towards raising £20,000 for Lady Beaulieu, on her first marriage [87] with the Duke of Manchester; which portion being charged on estates settled upon Duke John for life, he was obliged to raise in his lifetime, and as together with the devised estates, he sold part of his settled estates, which produced a larger income than the former, to make up the £20,000 portion; therefore under the *just allowances* directed by their Lordships' order to be made by the Master, Duke John's representatives ought not to be charged with the rents and profits of the devised estates, subsequent to the time of sale, being inferior to those of the settled estates which were sold.

In answer to this, it was said, that the consideration of a supposed comparative advantage to the daughter, by raising her portion in her father's lifetime, could be entered into under the head of *just allowances*. It was plain, that Duke John himself never intended to claim any such allowance; for he kept no separate or distinct accounts of the price or value of the devised Middlesex estates. He sold them along with part of the settled estates, to one purchaser for £20,000. But if any peculiar merit could be ascribed to a father, for providing for a child in his lifetime, Duke John's bounty in this respect was fully compensated, by not reducing the estate tail which Lady Beaulieu was entitled to under her grandfather's will, to a bare estate for life; but also by depriving her of one moiety of the advowson of the church of St. Andrew, Holborn, worth above £1000 a year, which, by the same instrument, he procured to be limited to himself in fee, and which he afterwards devised to the Duchess of Montagu and her issue.

In support of the cross appeal, as to the 4th, 5th, and 6th exceptions, it was said to have been admitted before the Master, that on the 24th of June 1724, there was a release from Monk's estate, to the estate of Duke Ralph, no less a sum than £32,753 13s. besides the Grindon mortgage. And Duke John, as executor of his father, had, of his own accord, compounded and released these debts, and having kept no

of account of what he recovered out of Monk's real or personal assets, became answerable for the whole; out of which therefore the Master was not warranted to make any deduction. That as Duke John, by the articles of 1724, accepted lands in lieu of all the demands, which, as executor of his father, he had on Monk's estate, he consequently was as much accountable for the rents and profits of those lands, or for the interest of the money with which they were purchased, as he was for the rents and profits of any other of Duke Ralph's devised estates.

And, as to the 7th and 8th exceptions, it was said, that neither the specific bequest of the Exchequer annuity by Duke Ralph, nor the dismission of Lord and Lady Beaulieu's claim of a moiety of it, could warrant the Master's total omission thereof in his account of Duke Ralph's personal estate, come to the hands of Duke John. It was clearly part of Duke Ralph's personal estate, and therefore applicable, in case of a deficiency of other assets, to [88] the payment of his debts; and though it was specifically devised, so were the real estates, which yet were, by the Master, made to bear the whole burthen of the debts, without any contribution from this annuity. The former dismission of Lord and Lady Beaulieu's claim to a moiety of it, must have been grounded on Duke John's taking it, not under his father's will, but as representative of his son George, in whom it was admitted, in consequence of their Lordships' judgment, the absolute property vested. But if there was any period during which Duke John held, and could hold the annuity, or what he sold it for, *only* under his father's will, it ought, in pursuance of their Lordships' order, to go in such manner, and to such person, as was directed by the proviso in Duke Ralph's will; and that there was such a period was evident. For John Lord Montagu, the devisee thereof for life, died on the 6th of August 1711, from which time to the birth of George, on the 11th of October 1715, there being no intermediate taker but Duke John, he could only take it under the limitation of his father's will; so that here was a term of four years and a quarter, from the 24th of June 1711, the quarter day next preceding John Lord Montagu's death, to the 29th of September 1715, the quarter day next preceding George's birth, during which time, Duke John could receive the annuity merely and only as his father's devisee; and therefore he became accountable for its produce. But Lord and Lady Beaulieu did not confine their claim to this period; for there being, on the death of John Lord Montagu, no other son of Duke John's then in being, the Duke, by the express words of his father's will, became entitled to the annuity for so many years as he should live. It ought therefore, in pursuance of their Lordships' former order, to go, in three months after the recovery was suffered, in such manner during Duke John's life, as was directed by his father's will.

Against these arguments in support of the cross appeal, it was urged on behalf of the appellants in the original appeal, that as to the 4th exception, the debts due to Duke Ralph from Christopher Monk, were contracted principally before, and partly in the year 1701, and the whole principal monies did not much exceed £12,000. Monk died in that year, manifestly insolvent. All that he left to descend to his daughter, was the reversion of the Albemarle estate, under the will of the Duke of Albemarle, subject to the estate for life of the Duchess, and to several remainders in tail then vested. The will itself had been contested, and Christopher's interest had become intangled by his articles with Lord Bath, and several suits were depending between them. He left other considerable debts; one of which being a judgment for £12,000, was prior to Duke Ralph's. Duke Ralph survived him near eight years, without recovering any part of either principal or interest. Duke John, when he came of age, stood clear of the Monks; and when he afterwards became a creditor, it could be only with a view to facilitate the recovery of his father's demands. But these demands were irrecoverable, by any ordinary course of proceeding; the only resort was to attempt the procuring a performance between the surviving Monks, and the representatives of Lord Bath, of the articles of 1697, entered into between Christopher and his Lordship; and in that negotiation, to obtain some satisfaction, out of what might be derived to the Monks from thence. This measure was advised by counsel, in the year 1715, and the difficulties attending it, considering the then situation of these affairs, appeared from the cases, and need not be repeated. It would have been unreasonable and impossible to be accomplished, without a proper recompence or consideration to the surviving Monks, whose concurrence was

necessary to complete it. The different parties were not brought into the agreement, till the year 1724; and it manifestly appeared by the articles of 1724, from the marginal notes and observations of the counsel in the original draft, and indeed from the whole scope and nature of the agreement, that the Monks joining in conveying the estates, and releasing Lord Bath's representatives from all their claims, were the grounds and consideration of Lord Bath's representatives coming into the agreement. The sums and annuities paid by Duke John to the Monks, as the consideration of their doing these acts, were necessarily paid, and extremely reasonable; for by thus inducing them to come in, he obtained not only the £30,000 which had produced the present appeal, and the Grindon mortgage money, which had been settled by his father, but also a collateral security for the title of the Lancashire and Yorkshire estates, which had been likewise settled by his father. That out of this £30,000 so recovered, he should in the first place be allowed what he paid to obtain it; and that out of the residue he should receive, in respect of his own demands upon the Monks, a rateable proportion with those of his father, seemed so just and reasonable as to make all argument unnecessary; for if this agreement had not been made and carried into execution, it was impossible to say that any part of Duke Ralph's demands, brought into question by this exception, could ever have been recovered; and yet by this agreement, Lord and Lady Beaulieu had, according to the report and order from which they had appealed, obtained upwards of £20,000 towards satisfaction of those demands; which sum exceeded not only the principal monies, but the amount of the useless judgments which had been given as a security, whilst another judgment creditor, of a prior date, thought fit to accept of one twelfth part of his demand.—Should it however be said, that Duke Ralph's judgments were a higher security than Duke John was possessed of for his own demands, and that fore ought to have been preferred in the apportionment; it might be answered, that the priority of securities can have no weight in the application of a sum, which could never have been obtained by putting such securities into execution. Duke Ralph's judgments could never have been executed. Besides, the sum allowed in respect of his demands, exceeded the amount of his judgments, and it must be remembered, that part of Duke John's demands was a judgment for £3000, which bore about the same proportion to the amount of his demands, as Duke Ralph's judgments did to his.

As to the 5th and 6th exceptions, it was said, that this was the first instance of an attempt before a Master, under a general direction for taking an executor's account, to charge an executor with interest upon sums which he may have received on account of his testator, which are applicable in a course of administration. And it happened in the present case, that at the time when the two sums of £20,097, s. £2102 2s. 8d. with which Duke John was charged in respect of his father's demands upon the Monks, were got in, he was a very large creditor upon his executor's account, having paid a great many thousand pounds for his father's debts, beyond what the personal estate before that time amounted to, as appeared from the report, for, after charging him with those two sums, the final balance reported due upon the whole account, was but £2091 3½d. But had it been otherwise, it was not competent to the Master to consider any question of interest upon these sums; the Lordships, by their former judgment, having specially reserved the consideration of interest upon any sums received by Duke John, until after the Master should have made his report.

As to the 7th exception, which related to the Exchequer annuity, their Lordships had already in this cause decided, that Lord and Lady Beaulieu were not entitled to any account of that annuity. It was, by Duke Ralph's will, specifically bequeathed to trustees, in trust for Lord Montagu the grandson for life; and, after his death, for such person as should be the heir-male of his body; and if there should be no such person, in trust for such person as should be the heir-male of the body of Duke John for the residue of the term and estate therein; and if there should be no such person, in trust for Duke John for his life; and if these limitations should fail, in trust for such persons as should be entitled to the testator's real estate devised, according to the estates thereof thereby limited. Lord Montagu the grandson dying, George the second son of Duke John, became entitled to the whole interest in this annuity upon his birth, in the year 1715, either as being heir-male of the body of

testator's son John, (which words, as they stood in this will, must necessarily be applicable to a son of John in John's life-time, and not wait for their application till the technical meaning of the word *heir* should be ascertained by the death of the ancestor, as was manifest by the subsequent limitation to Duke John for life, if there should be no such person,) or as being first tenant in tail of the real estate, the uses whereof the Exchequer annuity was to follow, in failure of the preceding limitations. George dying an infant, Duke John became entitled to this annuity as his father and administrator. The plaintiffs, however, thought fit to claim a moiety of it by their bill, and an account to be taken of the profits. The defendants insisted, that it vested in George; and Lord Northington was so clearly of that opinion, that he dismissed so much of the [91] bill as sought an account of the Exchequer annuity, with costs. Their Lordships, on the former appeal, affirmed that dismission, and directed an account to be taken of the personal estate of Duke Ralph, *after payment* of his debts, legacies, and funeral expences. The object of the account so directed was presumed to be to ascertain the clear surplus of Duke Ralph's personal estate; which, according to his will, was to be laid out in lands, to be settled as thereby directed. But the Exchequer annuity was not to be laid out in land; and being specifically bequeathed and settled as before stated, it could never make any part of that surplus. Had it not vested in George, the second son, it would have vested in the daughters, under the specific limitations of it, as being the next tenants in tail of the real estate; and besides them, there were many other persons in remainder who would have taken the whole interest, had it not vested under the prior limitations. Nevertheless, Lord and Lady Beaulieu thought fit to claim before the Master upwards of £60,000 for the profits and gross value of this annuity; though the account to be taken by the Master was, in the direction of it, expressly confined to the personal estate, *after payment* of the debts, legacies, etc. and though the very judgment directing that account had affirmed the dismission of their bill, so far as it sought an account of the Exchequer annuity, with costs. The only question which could have arisen respecting this annuity, would have been as to the profits between the death of Lord Montagu the grandson in 1711, and the birth of George in 1715. But that would have been a question between George and those who were postponed to him in the specific limitations of it, whether those profits should accumulate and go to George with the capital, or whether such intermediate profits belonged to the next takers? This question was presumed to have been already decided by their Lordships, because if the profits had not been held to accumulate, Lady Beaulieu would have been entitled to a moiety of them during that period; whereas the bill, so far as it sought an account of the Exchequer annuity, was wholly dismissed. Besides, it has before been determined, that, in such a case, the profits are to accumulate until the contingency happens, and then to go with the capital. In no sort, therefore, could these profits make part of the surplus of Duke Ralph's personal estate, to be laid out in lands; under which notion alone they could be the object of the present account.

And as to the 8th exception, the effect of it was, that the Master had allowed the payment of annuities, and interest of mortgages, out of the rents and profits of the real estate, without making the Exchequer annuity bear a proportion thereof. All the testator's bond debts, as well as those by simple contract, were charged by the report upon the personal estate, of which there still remained a surplus. The only payments allowed out of the rents and profits of the real estate, were for annuities; all of which the origin appeared (except only one of £40 secured by bond) were specifically granted out of, or charged upon different [92] parts of the real estate; and for the interest of mortgages, which had been made in the usual way of part of that estate. The testator manifestly intended the Exchequer annuity as a provision for the *heir-male apparent* of Duke John, not subject to any incumbrance; and he made a specific disposition thereof accordingly. The real estate alone was liable to the annuities, as being specific incumbrances thereon; and it appeared, that the testator intended the mortgages likewise to remain a charge upon the real estate; and the direction of their Lordships judgment was, to take an account of the rents, issues and profits of the real estate, *over and above the interest of debts chargeable thereon, and all other outgoings*. But if the general devisees had any title to be eased of the mortgages, it must have been out of the general personal estate only, and that too, *after payment* of all other debts, legacies, and funeral expences; much

less could they have compelled specific legatees to give up any part of their legacies for that purpose. But further, it was submitted, that if bond creditors, whose debts are not direct charges upon any specific part of the real estate, had exhausted the personal estate, not only the specific, but the other legatees would, in equity, have had a right of resorting to the real assets, to be satisfied thereout what had been so taken from them by the bond creditors; such assets being so liable in the hands of a general devisee, as well as in the hands of an heir. It follows, therefore, that had there been no surplus of the general personal estate, which in the present case there was, yet the general devisee of the real estate would have had no right to call upon the specific legatees of the Exchequer annuity, to be eased even of bond debts paid out of the real estate; and there was still less colour to call upon those legatees for a contribution towards the annuities, and the interest of the mortgages, which were specific incumbrances upon different parts of the real estate, the whole whereof was generally devised. Lastly, if there had been any foundation for this question, it ought to have been made on the former appeal, and a direction ought to have been prayed to the Master thereon; but it did not appear to have been so much as thought of until after the Master had signed his report, when many exceptions being taken thereto, this was thrown in among the rest.

AFTER hearing counsel on these appeals, it was ORDERED and ADJUDGED, that the original appeal should be dismissed; and that so much of the order therein complained of, as allowed any part of the respondents' 9th exception to the Master's report, should be affirmed. And it was further ORDERED and ADJUDGED, that that part of the order complained of in the cross appeal, which over-ruled the 7th and 8th exceptions to the Master's report, should be affirmed. And the appellants in the cross appeal having waived upon the 4th, 5th, and 6th exceptions, any account of the produce of the two sums of £32,753 13s. 10d. and £2102 2s. 8d. arising from the lands conveyed in satisfaction, by the articles of the 24th of June 1724, and electing to have Duke John consi-[93]-dered, in respect to the personal estate of Duke Ralph, as having received so much money, part of his assets, at the date of the articles: it was DECLARED, that neither the sum of £1000 claimed upon Annesley's judgment, nor the sum of £3000 or any part thereof, claimed upon Coulthurst's judgment, ought to be allowed; and that the several sums paid by Duke John to some of the parties, for consenting to join in the said articles, and for defraying the charges attending the execution and performance of the same, ought to be considered as a charge upon the whole sum of £52,545 15s. 7½d. and to be thereout deducted in the first place: and it was therefore ORDERED and ADJUDGED, that the Master should settle the proportion thereof to be borne out of the £30,000, and that the remainder of the said sum of £30,000 should be applied in discharge of the several demands of Duke Ralph and Duke John, rateably and in equal proportions: and it was further ORDERED and ADJUDGED, that the order upon the said 4th, 5th, and 6th exceptions should be affirmed, in so far as the said exceptions were not hereby varied. (MS. Jour. *sub anno* 1774-5, p. 534.)

## LIMITATIONS.

WILLIAM BICKFORD, et Ux.,—*Appellants*; Sir WILLIAM PENDARVIS and others,—*Respondents* [24th February 1724].

- A. by deed settles his estate to himself for life, and then to trustees, to raise portions for his younger children; provided, that if his eldest son (who was otherwise provided for) should pay the portions, then the trustees were to stand seised to the use of the right *heirs-male* of A. for ever; \*\* and, after raising and paying the said portions, the trustees and their heirs to stand seised of such part of the premises as should remain unsold, to the use of the right *heirs-male* of A. for ever.\*\*—The son did not pay the portions, but died intestate, leaving D. his daughter and only child. Held, that D. being *heir-general*, was entitled to the estate, subject to the charge laid thereon by her grandfather.

DECREE of Lord Chancellor Macclesfield, reversing Decree of Sir J. Jekyll. Master of the Rolls, reversed; and Decree of the Master of the Rolls AFFIRMED.

The cases in which it has been held, that the person described as an *heir special* need not answer both parts of the description, by being actually heir, as well as that species of heir denoted by the description, seem to have materially broken in upon the doctrine of Lord Coke on the sub-[94]-ject: see 1 Inst. 24. b: and which doctrine of Lord Coke has been pursued in many cases, exclusive of that on which he relied; particularly in *Couden v. Clerke*, Hob. 29: *Southcot v. Stowell*, 1 Freem. 216: Lord Ossulston's case 3 Salk. 336: *Dawes v. Ferrers*, 2 P. Wms. 1: *Starling v. Ettrick*, Pra. Ch. 54.—Mr. Hargrave has very ably attempted to vindicate the propriety of Lord Coke's doctrine; and having examined the circumstances of the cases supposed to have weakened its authority, concludes his note with remarking, that Lord Cowper's judgment in *Newcomen v. Barkham*, (or *Brown v. Barkham*, 1 Eq. Ab. 215. c. 14: Rep. Eq. 116, 131: Pra. Ch. 442, 461: 2 Vern. 729: 1 Stra. 35) which was materially shaken in its principle by what fell from Lord Hardwicke in decreeing upon the bill of review, is the only direct authority against Lord Coke. In a following note however (1 Inst. p. 164, a.) Mr. Hargrave candidly admits that since his writing the former note, a case has been published in which the Court of King's Bench, after three arguments, decided against applying the rule to a will: *Wills v. Palmer*, 5 Burr. 2615: and that in another, which was also three times argued, the Court of Exchequer had refused to apply the rule to a marriage settlement. *Evans d. Burtenshaw v. Weston*, M. 1774, or Hil. 1775.—It is however worth the student's while to consult Mr. Hargrave's observations in support of Lord Coke's doctrine, that to take as a purchaser by description of a special heir, *every part of the description* must unite in the claimant. See also Fearn on Cont. Rem. 4th edit. p. 319: 2 Wils. p. 20: 2 P. Wms. 3. in n.

Edward Hoblyn of Nanswhidden in the county of Cornwall, Esq. in consideration of a marriage between Robert Hoblyn his son, and Grace the daughter of John Carew Esq. did, by deed, dated the 30th of December, 23 Car. I. settle certain manors and lands in the county of Cornwall, of a very great value, on the said Robert Hoblyn and the heirs male of his body, with divers remainders over.

The marriage took effect; and Robert Hoblyn having eight sons and three daughters by the said Grace, for all of whom, except the eldest son, no provision was made by the former deed; did, by lease and release, dated the 14th and 15th of June, 32 Car. II. in consideration of natural love and affection for his younger children, grant and release unto Sir John Carew and other trustees, and their heirs, the manor and barton of Trevedow, and divers other lands in Devonshire and Cornwall; all, or the greatest part whereof, he purchased himself, and none of them were comprised in the said settlement of his father; and directed, that the trustees and their heirs should stand seised of the premises, to the use of himself for life, and after his death to raise by sale, leasing, or perception of the profits, £4800 for the portions of his younger children, as therein allotted to them; and maintenance for them in the mean time, as therein appointed: provided, that if Edward Hoblyn, his eldest son, who was the appellant Damaris's father, should die in the life-time of the said Robert, without any issue, or if Edward outliving Robert, or the eldest son of Robert, which should be living at his death, should pay or secure the said portions; then the trustees and their heirs were to stand seised of the premises, to the use of the right heirs male of the said Robert for ever. And after raising and paying the said portions, the part of the premises as should remain unsold, to the use of the right heirs male of the said Robert for ever. With power for Robert [95] to revoke, alter, or make void, by deed or will, any use, estate, or provision thereby made or created.

On the 1st of June 1682, Robert the father made his will, and appointed Grace his wife, and Edward Hoblyn his eldest son, executors and residuary legatees; and thereby devised to Robert his third son, and his heirs, the said manor of Trevedow, and all his lands in Warlegan and Cardingham, he paying to his son Carew £400 at his age of 21, and £15 per ann. maintenance in the mean time; and the testator revoked the said settlement, as to the portions of his sons Robert and Carew, and his daughter Ann, which being £1450 reduced the charge on the trust estate to £3350.

And he gave to the said Edward his eldest son, all his chattel leases and estates for years in Tregoose, Tregath, Andregoth, and Nantornan, in the parishes of Higher and Lower St. Colombe, and Little Colen; provided he paid his brothers and sisters what was provided for them by the said deed, and not revoked by the will.

Afterwards, Robert the father, in consideration of the marriage of his son Edward with Damaris Avent, the appellant Damaris's mother, who was a fortune to him of about £4000, covenanted by articles, dated the 11th of December 1682, that after his death, the said Edward and his heirs should have all his lands and leases of his tenements and mills, called Tregoose, Higher Tregoose, and West Nantornan, without any condition; and that on payment to Robert the father of £1500 within two years after the marriage, Edward and his heirs should have all his lands in Trevedow, Warlegan, and Cardingham, and all his lands called Tredisack in Lower St. Colombe; and that Edward and his executors should have all his leases and terms for years in two parts of Tredisack. And the said Damaris, the appellant's mother, therein covenanted with the said Robert Hoblyn, to convey to him and his heirs, all her lands in Devon, except Combe, upon the terms therein mentioned; and which she afterwards conveyed to him accordingly.

Robert the father made no settlement pursuant to these articles, nor was the £1500 ever paid; but on the 16th of August 1683, Robert the father made a codicil to his will, and therein declared, that if his son Edward should pay to his son Robert £600 and to his son Carew £700 within one year after his death, and in the mean time, £20 yearly; then the devises of his lands in Trevedow, Warlegan, Cardingham, and Tredisack, and the leases thereof, were to be void; and Edward and his heirs were to have the said lands and leases: and he reduced the legacies in his will of £100 each to Grace his wife, and to his sons Francis and William, to £50 each.

On the 6th of October following, Robert the father died; whereupon Edward, his eldest son, entered on such part of the trust estate, the uses whereof were not revoked by his father's will, and also upon the chattel estates, by virtue of the will, and enjoyed the same respectively until his death; but he never paid the £600 to his brother Robert, or the £700 to his brother Carew. Wherefore Robert entered upon the manor of Trevedow, and the lands in [96] Warlegan, Cardingham, and Tredisack, according to his said father's will and codicil; and paid the legacies thereby given to the said Carew his brother.

In August 1684, Edward Hoblyn died intestate, leaving the appellant Damaris, his only child and heir at law, an infant about nine months old; whereupon Richard, his next brother, entered upon the trust estate, and by deeds of lease and release dated the 1st and 2d of July 1688, executed by the trustees, and reciting the trust deed, and the death of Edward, without leaving heirs male of his body; that great part of the portions of the younger children were still unpaid; that the trustees had not taken any of the rents, issues, or profits of the premises, or raised any money by leasing or sale thereof; but that such rents, issues, and profits had been received by Edward during his life, and afterwards by the said Richard, his eldest surviving brother, who was now become the heir male of Robert the father; the trustees, in order to discharge themselves of their trust, in a manner agreeable to the directions of the said Robert the father, and in consideration of £3200 paid, or secured to be paid to them, and to be applied in payment of the portions of such of the younger children as remained unpaid, did convey all the trust premises, not revoked, or otherwise settled by the will and codicil of Robert the father, to the said Richard Hoblyn and his heirs.

In 1689, Richard died without issue, but made his will, and thereof appointed his brother Robert executor; who, taking advantage of the infancy of his niece the appellant Damaris, entered and possessed himself of the freehold and chattel estates, and held the same till his death in 1704.

On the death of Robert, his son Francis entered and possessed in like manner, till his death in 1711; and after him, the respondent Robert his son entered and possessed all the said estates.

As soon as the appellant Damaris came of age, she found that what had been raised by fines for leases of the trust estates, together with the yearly profits thereof, and by profits of the mines, had satisfied all the charges laid thereon, both by the settlement and will, and that there was a great overplus due to her, and therefore she entered thereon; but for want of the deeds, which were in the custody of the re-



spondents, or those under whom they claimed, and by reason of the trust, she could not assert her right at law. For which reason, in Trinity Term 1709, the appellant Damaris brought her bill in Chancery, for a discovery of the deeds belonging to her, and for an account of what had been raised out of the trust and other estates, and to have the possession thereof, and such other relief as should, in her case, be proper. All proper persons were made parties to this bill, and all the children of old Robert, and their representatives, admitted by their answers that they had been satisfied their respective portions. But two of the defendants, Charles Holt and Martha his wife, pretended a right to an annuity of £200 per ann. out of the premises, under a settlement made by her former husband, the [97] said Richard Hoblyn. And the said Francis Hoblyn, and after his death the said Robert his son, pretended a right to the premises, as heir male of old Robert, or under his will.

On the 28th of June 1723, the cause was heard before Sir Joseph Jekyll, Master of the Rolls, who declared and decreed, that the appellant Damaris was well entitled to the lands and premises mentioned in old Robert's settlement, subject to the charge laid thereon by her said grandfather; and that she was also well entitled to two third parts of the leasehold and personal estates of Edward her father, by the statute of distribution; and that the possession of the lands comprised in the deed of old Robert, should be delivered to the appellants, together with the deeds of the same estate; his Honour declaring, that it plainly appeared to him, that the said estate had borne its burthen, and that it belonged therefore to the appellant Damaris, the heir at law of old Robert, and of Edward his eldest son; and that the appellant Damaris was entitled to the surplus profits of the said estate, beyond the charge laid thereon; and therefore gave proper directions about the same, as also for a division of the chattel estates, and about the personal estate of Edward, the appellant Damaris's father.

From this decree the respondents appealed to the Lord Chancellor Macclesfield; and on the 17th day of July 1724, his Lordship was pleased, on hearing the cause, to decree, that the appellant Damaris had no right to the lands comprised in old Robert's settlement; declaring, that the limitation to the heirs male therein, was good to the male, exclusive of the heirs general; that the conveyance of the trustees to Richard, as heir male, was good; that the annuity granted to Martha was good; and that the devise to Edward, of part of the lands in the codicil, became void by his non-payment of the £600 and £700 therein mentioned, within one year after the testator's death; and therefore his Lordship decreed, that the bill should be dismissed as to every thing but the appellant's share of the personal estate of Edward her father.

From this latter decree the appellants appealed; and on their behalf it was contended (C. Wearg, T. Lutwyche), that a limitation in a deed to the heirs male, is void in law to take effect for the benefit of any other person than the heir general; and that it always enures to the heir general, the law not allowing any limitation to an heir male, unless he be heir. But if such a limitation in a deed to the heirs male, could in law enure to the males who were not heirs, yet even in that case, Edward, the appellant Damaris's father, was entitled; he being the eldest son and heir male, as well as heir general of old Robert his father; and being also living at the death of his father, he answered the description in the settlement, for by the express words and manifest intent of that settlement, no other person was to take the estates, unless Edward should die without *any* issue; whereas he left issue, the appellant Damaris. That Richard, the second son, having therefore no title to the premises, and the assignment to him from the trustees, [98] being only to do what they themselves ought to have done, namely, to pay the small remaining charges on the trust estate, Richard could be in no other condition, than the former trustees were; viz. in trust for the appellant Damaris, after satisfaction of those remaining charges: so that his possession was merely that of a tenant at will, or at most as guardian for the appellant Damaris, during her infancy; and consequently he could make no title, either at law or in equity, either to his wife Martha, or any other person. Besides, Martha had notice of the appellant Damaris's right; there being express mention in her husband Richard's settlement on her, that the lands therein mentioned were the lands of, and purchased by Robert Hoblyn his father; and mention was likewise made of Edward, as the eldest son of Robert the father; and covenants were therein contained against the acts of both of them. But even if this were not so, yet Martha had ample security

for her annuity of £200 per ann. out of other estates of the Hoblyns, of the yearly value of £600, which came to her husband Richard by the settlement of Edward his grandfather; and to which estates the appellant Damaris made no claim. That as to the estates devised to Edward by the codicil, no laches were imputable to him for not paying the portions of Robert and Carew, his brothers, at the time thereby limited for such payment; he dying before that time came, and was therefore prevented from complying with the condition, by the act of God: and the long infancy of the appellant Damaris was a sufficient excuse for her, even if the portions had yet remained unsatisfied, but which was not the case. As to the estates of Tregoose, Higher Tregoose, and Nantornan, part of the lands in old Robert's settlement, he had a power of revoking the uses thereof; and having by articles, on the marriage of his eldest son Edward, covenanted absolutely, that the same should be to him and his heirs, the appellant Damaris, as the heir of Edward her father, had an undoubted right to those lands, and to the rents and profits thereof from his death; and therefore, whoever had received such rents and profits during the 20 years of her infancy, were accountable to her for the same in a Court of Equity, as her trustees. That though the appellant Damaris was the heir both of Robert her grandfather, and of Edward her father, who died possessed of the premises, yet she had not the least provision made for her by either of them; and therefore, as being an heir at law, she ought not, unless in a very clear and undoubted case, to be debarred of her right; more especially as there was so large a provision for the heirs male of the body of Robert her grandfather, by the estates settled on them by Edward her great-grandfather, of about £600 per ann. and which the respondent Robert was in the quiet possession of. Upon the whole, as the respondent's pretence of claim was contrary to the fixed and established rules of law, contrary to the express words and intent of the settlement, marriage articles, will and codicil of old Robert, and against an heir who would otherwise be disinherited, notwithstanding her [99] mother's fortune, it was hoped that the latter decree, as to the real estate, would be reversed, and the former decree, made by the Master of the Rolls, revived.

On the other side it was insisted (J. Willes, C. Talbot), that the manor of Trevedow, and the lands in Cardingham, Warlegan, and Trevisack, were devised by the will of old Robert, to Robert his third son and his heirs, who was the respondent Robert's grandfather; and that such devise was not revoked or altered, either by the articles or codicil. That in the case of a trust-deed, a Court of Equity will consider the intention of the parties, as well as in the case of a will, or articles; that it was plainly the intention of old Robert Hoblyn, to continue his estate in the male line of his family; and therefore he had expressly given the redemption of the lands, subject to the portions and maintenance of his younger children, not only to his eldest son Edward, but to such eldest son as should be living before the said portions became payable, who should pay or secure the same according to the said trust-deed; and which was accordingly done by Richard, under whom the respondent Robert claimed. That the construction contended for by the appellants was highly unreasonable; for if that should prevail, though the eldest son of old Robert living at the time when the portions became payable, should actually redeem the estate, by paying the portions according to the express words of the proviso, yet he must not keep it, but immediately yield it up to the appellant Damaris, as heir general of the family. That there was much less reason for making so strained a construction in her favour, because she had an ample provision besides, she having not only her mother's whole fortune, but likewise two thirds of the personal estate of her father. Besides, such a construction would tend to impeach the title of several purchasers for a valuable consideration, and who had purchased without any notice of the appellant's pretended right; for one part of the trust estate was sold by Richard, for raising money to pay the portions charged thereon; and under that title several leases had been granted, fines levied, and marriage settlements made. And lastly, if the appellants should prevail, all the parties would be involved in an account of profits for above 40 years past, which, at such a distance of time, would be attended with great hardships and insuperable difficulties; inasmuch as the persons who were in possession of the premises for the first 25 years after the death of Edward, the appellant's father, enjoyed the same without any interruption: and therefore it was hoped, that the last decree would be affirmed, and the appeal dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of the Lord Chancellor should be reversed, and the decree of the Master of the Rolls affirmed; with this additional order and direction, that the respondents, Charles Holt and Martha his wife, during their joint lives; and the said Martha, in case she survived her said husband, should have, take, and enjoy, during the natural life of the said Martha, the an-[100]-nuity or rent-charge of £200 per ann. according to the form and effect of an indenture bearing date the 23d of October 1693; and that the Court of Chancery should cause an enquiry to be made into the value of the lands subject to the said annuity; and that if the said annuitants, or either of them, should levy, receive, or take any part of the said annuity out of the lands decreed to the appellant Damaris, the said Damaris, her heirs or assigns, should be reimbursed and repaid the same, out of the other lands, subject by the said deed to the payment of the said annuity or rent-charge; and that the Court of Chancery should give such directions, in pursuance of this judgment, as should be just. (Jour. vol. 22, p. 431.)

## MARRIAGE.

LEONARD HATFIELD,—*Appellant*; JANE HATFIELD and others,—*Respondents*  
[2d April 1725].

[Mew's Dig. v. 896. As to jurisdiction in jactitation suits now, see 20 and 21 Vict. c. 85. s. 6.]

The sentence of the Ecclesiastical Court in a cause of jactitation of marriage, is conclusive; and the legality of that marriage cannot afterwards be agitated in a Court of Equity, even though the proceedings in the Ecclesiastical Court were collusive.

A. by his will made several provisions for his wife, which B. his son and heir, after his death, filed a bill against her to set aside; alledging that she was never married to his father, or if she was, that she had been previously married to P. who was still living. To all the charges in this bill, except what related to her marriage with P. the widow answered; but as to that charge, she pleaded her marriage to the testator, and cohabiting with him as his wife, and that she had by him a son who was still living; and therefore insisted, that she was not compellable to answer the matter of the marriage with P. as it tended to criminate and make her guilty of bigamy, which by law is felony. Plea allowed.

DECREE of the Court of Exchequer in Ireland, AFFIRMED.

The above statement seems in the first part of it too strong even in this case. The determination is thus stated in Viner and 2 Eq. Abr. and the Mss. Table from which the note in both those books is taken

"The legality of a marriage shall never be agitated in *Equity*, especially after sentence in the Spiritual Court in *causâ jactitationis matrimonii*; although the proceedings in the Spiritual Court were only feint and collusive."

The real effect of such a sentence in the Spiritual Court was fully agitated in the case of the Duchess of Kingston. The Judges, in that case, in answer to a question proposed by the Lords, declared their unanimous opinion, "That a sentence in the Spiritual Court against a marriage, in a suit of jactitation of marriage, is *not* conclusive evidence; so as to stop the counsel for the Crown from proving the marriage in an indictment for polygamy. But, admitting such sentence were exclusive, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion. See 11 St. Trials 198-264; and the cases there cited; of which this of *Hatfield v. Hatfield* was one.

Viner, vol. 15. p. 262. ca. 8: 2 Eq. Ca. Ab. 585. note (a).

The respondent Jane was descended from the family of Chichester, Earls of Donegal in Ireland, and had a liberal education; but being deprived of her parents in her

infancy, she married one Adams, who, by misfortunes being reduced in his circumstances, left her, at his death, in a poor condition.

[101] Leonard Hatfield, Esq. the appellant's father, happening to lodge in the same house in Dublin with the respondent Jane, professed great friendship for her, and after many intreaties, prevailed on her in August 1714, to go to his house at Killinure, forty-seven miles from Dublin, there to remain as a companion to his daughter Ann Hatfield, to instruct her in what was necessary for her education, and to manage his domestic affairs; for which he promised to give her £20 per ann. and in this station she continued till July 1718. During her stay there, Mr. Hatfield observing the great care, industry and good behaviour of the respondent Jane, thought her a fit person to be his wife, and having therefore made his addresses to her, they were, in July 1718, married by a minister of the church of Ireland, as by law established, and cohabited as man and wife until his death.

On the 14th of November 1719, Mr. Hatfield made his will, and thereby devised to the respondent, by the name of his beloved wife Jane Hatfield, £40 per ann. for her life, for her support, out of the rents and profits of his estate at Killinure in the county of Westmeath; £20 to be paid her immediately after his decease, and £10 per ann. more out of the lands of Portlamon, demised to him by Robert Rochfort for 41 years, when the same should be recovered from the said Rochfort; and he devised to the appellant, his son and heir, all his other real and personal estate, of about £600 per ann. and made him sole executor.

And by a codicil, which was all of the appellant's hand-writing, and dated the 24th of December following, the testator, for further securing the said £40 per ann. assigned and made over to the respondent Jane, the lands of Ballybegg, for her life; and after her decease to Arthur, his son by her, for life. And as a still further security, the testator, by deeds of lease and release, dated the 3d and 4th of February 1719, charged the lands of Ballybegg with the payment of the said £40 per ann. to the respondent Cookman, in trust for the respondent Jane, for her support for life; and after her decease, for his said son Arthur for his life.

In March 1719, the testator died; and immediately after he was buried, the appellant turned the respondent out of doors, and detained from her, her wearing apparel and other necessities; and having proved the will, possessed himself of all his father's real and personal estate, to a very considerable value; and released the lease of Portlamon to Rochfort, in consideration of £480, but refused to pay the respondent Jane one penny for her support.

Whereupon she, being admitted a pauper, exhibited her bill in May 1720, in the Court of Exchequer in Ireland, against the appellant and the said Cookman. to have a specific execution of the trust in Cookman, and to recover the said £40 and £10 per ann. and the £20 legacy.

The appellant, by his answer to this bill, admitted the will; but said, he did not know whether the respondent's name was Hatfield, or whether she was ever married to his father; and that he [102] never heard of the lease and release of February 1719, until he found the memorandum of them registered; and insisted, that before legacies were paid, all debts and funeral expences must be discharged, and that the testator did not leave sufficient assets to discharge the same.

The respondent Jane having excepted to this answer, as insufficient, the appellant answered over; and confessed, that since his former answer, he came to farther knowledge of his father's debts, credits and personal estate, and believed them sufficient to pay his debts, legacies, and all just demands.

Pending this suit, the appellant made the agreement for £480 with Rochfort: whereupon the respondent Jane amended her bill, and charged him with that agreement; which, by his answer, he confessed, and also that he had covenanted to indemnify Rochfort from the respondent's claim.

The appellant, as son and heir and sole executor of his father, on the 23d of January 1720, filed a cross bill against one Richard Porter and the respondent Jane, by the name of Jane Porter, alias Adams, alias Hatfield, (but to which Cookman was no party,) alledging, that the respondent Jane was only a servant to the testator, and received several sums for his use, which she did not account for; that he, being old, weak, and infirm, she had so great an ascendant over him, that she persuaded him to make a will, framed by herself, whereby he devised to her several

legacies; that the said Richard Porter, pretending to be the respondent's husband, by deed dated the 18th of November 1720, in consideration of £40, released to the appellant the said suit commenced by the respondent, and all claims and demands which he or the respondent had, or might have under the said will, or deeds to Cookman, in trust for the respondent, or her son Arthur, and all suits in law or equity, and covenanted to make further assurances; the bill therefore prayed to be relieved according to the nature of the case, and that the respondent Jane might set forth, whether she was not lawfully married to the said Richard Porter, in 1713 or 1714.

To this bill, the respondent answered by the name of Jane Hatfield, *alias* Adams, *alias* Chichester; and denied that the testator intrusted her with money to be expended in house-keeping, or that she received any rents, or other money from him; said, that Colonel Chichester, her uncle, bequeathed to her £100, which the testator received, and applied the same towards the appellant's education in the Temple; denied that the will was formed, dictated or directed by her, or that she was present when the same was made; the first knowledge she had of it being on the 24th of December 1719, when the appellant read it to his father; said she was a stranger to any deed executed by Porter; insisted on her rent-charges and legacy; and as to that part of the bill which required an answer to the charge of her marriage with Porter, she pleaded, that in July 1718, she was lawfully married to the testator, and cohabited with him as his lawful wife, until his [103] death in 1719, and had by him a son living, called Arthur Hatfield; and therefore insisted, she was not by law compellable to answer the said matter, it tending to criminate and make her guilty of bigamy, which, by the law of the land, is felony. And this plea being afterwards argued, was allowed.

The appellant got Porter to put in an answer, insisting, that he was married to the respondent Jane, and owning the release, as stated in the cross bill: whereupon the respondent instituted a cause in the Consistory Court of Dublin, in jactitation of marriage against Porter; and obtained judgment therein, and a definitive sentence against him.

Issue being joined in the original cause, and witnesses examined, the same was heard on the 3d of February 1723, when the appellant making default, the Court made a conditional decree against him; and reserved their judgment as to Cookman, till the cause should be heard on such conditional decree.

After which, issue being joined in the cross cause, and the appellant having paid the usual costs for the conditional decree, he obtained an order that the cross cause should be heard on the pleadings, at the same time with the original cause; and accordingly, both causes were heard on the 3d of July 1724, upon the merits, when on reading the proofs on both sides, together with the said deeds, will and definitive sentence, it was decreed, that Cookman should execute the trust reposed in him by the deeds, and permit the respondent Jane, as occasion required, to sue in his name; and that she should have and recover against the appellant, the £40 per ann. during her life, out of the rents, issues and profits of Killinure and Ballybegg, and the arrears thereof since her husband's death, and the said lands were to stand charged therewith; and that the respondent Jane should have and recover from the appellant, £10 per ann. from the time that he compounded with, or surrendered his interest to Rochfort, during the time that the said 41 years lease of Portlamon would have continued, if she should so long live, and also the £20 legacy, and interest for the same from the expiration of a year after the testator's death, together with her costs; and it was referred to the proper officer to state the account, and the Court dismissed the cross bill with costs.

From this decree the appellant appealed, and on his behalf it was said (T. Lutwyche, C. Talbot) to be fully proved in the cause, that the respondent Jane was married to the said Richard Porter; and that the decree in the Spiritual Court, if subsisting, was a collusive proceeding, founded on the consent of Porter, and therefore ought not to be admitted as evidence, in bar of any interest which the appellant claimed by Porter's release antecedent to it. That this sentence had since been reversed, by a decree of the same court; from whence, and also from the nature of the respondent Jane's case, [104] she was not entitled to any assistance from a Court of Equity. That besides other evidence in the cause, the respondent's marriage with Porter was proved by his oath, and confirmed by several other circum-

stances; such as her going by his name, writing letters to the appellant's father threatening him with her husband, procuring her liberty when arrested by another name, by making affidavit of her being Porter's wife, and giving receipts in the name of Porter. And though the respondent Jane, after all these transactions, had sworn by her answer, that she never went by the name of Porter, yet this was evidently untrue; and was not only a high aggravation of her other crimes, but afforded a further reason why a Court of Equity should not assist her, in taking advantage of her impositions upon a very infirm old man, to the prejudice of his family. That if the respondent Jane had been entitled to any thing under the said deeds and will, the release of her husband Porter was a sufficient discharge; and though what passed by the release was limited to Cookman, in trust for the sole use of her and her assigns; yet Mr. Hatfield being therein mentioned as her husband, the parties could not intend to exclude the real husband, whom they had not in their contemplation, and of whom they took no notice; and he becoming entitled to the benefit of the said trust, might well release it, at least during his own life. But if it could be construed, that by this deed the wife had a separate estate, not subject to her husband's controul as to the £40 per ann. yet it could not be pretended, but that the husband's release discharged the £10 per ann. and the £20 legacy, which were given directly to her by the will; and therefore belonged to the husband, and to the appellant as claiming under him, whose cross bill should not therefore have been dismissed, nor costs given against him. And as to the £40 being objected to as a small consideration, the husband could have released without any consideration; and the consideration of his wife's having the said annuities and legacy, arising *ex turpi causâ*, and being obtained in such a manner, might be a very reasonable inducement to him to accept of the smaller consideration for the said release.

On the other side it was said (P. Yorke, C. Wearg), that Porter was a poor pin-maker set up and supported to defraud the respondent; and that it appeared in proof, that indirect means were used, and money given to prevail on persons to swear, that the respondent was married to Porter before she married the appellant's father. But it was contended, that whether she was married to Porter or not, being a matter properly determinable in the Ecclesiastical Court, the same had been already determined there; and she had the definitive sentence of that Court in jactitation of marriage against Porter, which was read on the hearing in the Exchequer, and was all she could do against him. That if the respondent was actually married to Porter, as she was not, yet such marriage ought not to stand in her way; because the provision made for her by the appellant's father, was in the nature of a provision for [105] her separate use and maintenance, during her life. That the release insisted on by the appellant, was proved in the original cause, wherein it was not in issue; and consequently the Court of Equity could take no notice of it. But if this release had been duly proved, it ought not to influence the case; because from the smallness of the consideration of £40 for releasing £50 per ann. and £20 (which was all the respondent had to support herself and her child) it appeared to be fraudulent and iniquitous. That after the allowance of the plea, the appellant ought not to have brought the matter of the marriage with Porter in issue, or examine into it, the same being *turpis causâ*, and not fit or proper for a Court of Equity. And as to the £40 per ann. settled on Cookman, in trust for the respondent's maintenance, the appellant could have no decree for it on his bill, even though the marriage with Porter was ever so clearly proved; because he had not made Cookman a party to that bill. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 22. p. 481.)

## MARRIAGE ARTICLES.

CASE 1.—Sir EDWARD SEYMOUR,—*Appellant*; Dame LETITIA SEYMOUR and others,—*Respondents* [2d February 1711].

A. on marrying a second wife, settled lands to himself for life, remainder to the wife for life, for jointure, remainder to the issue male of the marriage, remainder over. This settlement was defeazanced by a proviso, that if A. or his heirs, should, within years next ensuing, settle other lands of equal value, to the same uses, then from and after such settlement, the uses before declared should cease, and the trustees should stand seised to the use of A. his heirs and assigns. A. lived 23 years afterwards, but made no settlement. The eldest son and heir of A. within a year after his father's death, claimed the benefit of this proviso, and he was held to be entitled to it on making a settlement of land accordingly.

This, like too many other cases in this work, seems entirely of a private nature, and to have depended upon compromise and consent, so as to form no general precedent.

Prior to the marriage of Sir Edward Seymour with Dame Margaret his first wife, the appellant's father and mother, which took effect in the year 1662; Sir Edward, in consideration of £15,000, the lady's portion, settled the manor of Maiden-Bradley, in the county of Wilts, and other lands, to the use of [106] himself for life; remainder to Dame Margaret for life, for her jointure; remainder to the issue male of the marriage, with other remainders over.

After the marriage, and during the life of Dame Margaret, Sir Edward having occasion to make a security out of this estate for £4000 which he owed, prevailed with his lady to join with him in making such security; upon a promise that he would re-settle the estate to the same uses as before, subject only to that incumbrance. Accordingly, a fine and recovery were levied and suffered; and by deed declaring the uses thereof, the remainders in the settlement were barred, and the incumbrance for the £4000 was let in upon the estate. In May 1666, Sir Edward, in performance of his promise, re-settled the lands subject to that incumbrance, to the uses in the first settlement; and, under the limitations of this re-settlement, the appellant, upon the death of his father and mother, became entitled as heir male of that marriage, to the estate in question.

Some time after the death of Dame Margaret, Sir Edward Seymour intermarried with the respondent Dame Letitia; and, in consideration of that marriage, and of £5000, her portion, Sir Edward, by indentures of lease and release, dated the 20th and 21st of February 1674, settled the said manor of Maiden-Bradley, and other the lands comprised in the re-settlement, to the use of himself for life; remainder to Dame Letitia for life, for her jointure; remainder to the heirs male of Sir Edward, on the body of Dame Letitia to be begotten; remainder to the heirs male of the body of Sir Edward; remainder in fee to his own right heirs.

But this latter settlement was defeazanced by the two following provisos: *First*, "That if the said Sir Edward Seymour, or his heirs, should, at any time during the term of years next ensuing the date thereof, settle and assure manors, messuages, lands, tenements, and hereditaments, of the clear yearly value, above reprises, of £1200, in any county within England, to the use of himself for life; and, after his decease, as to £1000 yearly thereof, to the use of the said Letitia for her life for her jointure, as aforesaid; and the remainder thereof, after her death, and also the remainder of the £200 per ann. residue thereof, after his death, to the heirs male of the body of the said Sir Edward Seymour, on the body of the said Letitia to be begotten; and, for default of such issue, to the use of the heirs male of the body of the said Sir Edward Seymour, lawfully issuing; and for default of such issue, to the use of the right heirs of the said Sir Edward Seymour for ever: that then, and from and after such settlement, all the uses before declared of and concerning the said manor and premises, should cease and be void. And, that John Lord Powlett and Francis Gwynn, the trustees therein named, their heirs and assigns, should stand and be seised of all and singular the said manors

and premises, to the use of the said Sir Edward Seymour, his heirs and assigns; [107] and that then, and from thenceforth, it should and might be lawful to and for the said Sir Edward Seymour, by any deed or writing under his hand and seal, to revoke the premises thereby granted, and the uses thereof thereby declared; and to limit new and other uses thereof, to such person and persons, and for such estate and estates, as he, by such or any other deed, should limit and declare." *Second*, "That the said £5000, the marriage-portion of the said Letitia, and all securities for the same, should be paid and assigned unto the said John Lord Powlett; and remain in his hands to be disposed of by him, for or towards the purchase of the said £1200 per ann. thereby agreed to be purchased by the said Sir Edward Seymour, and to be settled as aforesaid, and the interest in the mean time to be paid to him or his assigns." And by this settlement, Sir Edward covenanted, that he and Sir Robert Clayton, his trustee, or one of them, was *seised in fee*, and had good power to settle the estate to the above uses; and that the same was and should continue *free from all former incumbrances*, done by him or his ancestors, or any claiming under him or them.

In February 1707, Sir Edward Seymour died intestate; leaving Dame Letitia, and several children by her surviving; and she having got the re-settlement into her custody, the appellant brought an ejectment against her for recovery of the estate, a draft of that deed having been found in the custody of Sir Robert Clayton; but, upon the trial of this ejectment at the bar of the Court of Queen's Bench, Dame Letitia refused to produce the re-settlement, and the appellant not being able to make sufficient proof of it, he was nonsuited.

Whereupon he exhibited his bill in Chancery, against Dame Letitia and her children, and other proper parties, for a discovery of the deeds and writings; and praying, that if the limitations of the re-settlement should appear to be barred, he might be at liberty, under the proviso in Dame Letitia's marriage settlement, to redeem the said estates by settling lands of £1200 per ann. according to the uses of that settlement; and that the £5000 portion, and as much more as would be requisite to make the purchase, might be answered out of his father's personal estate; and that an account might be taken of such personal estate, and the plaintiff be paid his distributive share thereof.

To this bill, the defendant Dame Letitia pleaded, that she and her children were purchasers for a valuable consideration, without notice of the re-settlement; and by her answer insisted, that the plaintiff was not entitled to any redemption, because his father had not taken advantage of the proviso, in any reasonable time after the marriage. And, upon arguing this plea, it was allowed.

On the 7th of June 1711, the cause was heard before the Lord Keeper Harcourt; who declared, that the only questions then properly before the Court, were on the settlement of February 1674; and, that the defendants having fully proved their [108] plea, ought to have the benefit thereof, and of that settlement: but a question arising on the *proviso*, his Lordship declared, that there was a beneficial power of revocation lodged in the plaintiff's father, and his heirs, which was not forfeited, or waived; and there being no time fixed, but a blank left for the number of years limited for doing it, no other construction ought to be made, but that it should be in a reasonable time after any of the uses in that settlement arose; and, as the plaintiff came within a year after his father's death, to have the benefit of that power, he was entitled to it, if he made a purchase and settlement according to the proviso: but such purchase ought to be a convenient and reasonable purchase of lands, lying in such counties as were as valuable as the county in which the lands in question lay. And therefore, the plaintiff was decreed to make such purchase within twelve months, with the approbation of a master; and that on perfecting and settling thereof, according to the uses aforesaid, and payment of costs to all parties, the uses in the defendant's marriage-settlement, as to the estate in question, should cease; and the trustees should stand *seised* thereof, to the use of the plaintiff and his heirs; that the tenants who had leases, should hold and enjoy under the same; but the defendant, Dame Letitia, was not to make any new leases, till the twelve months were expired. As to any account of profits, the plaintiff's bill was dismissed; and if the plaintiff made such purchase and settlement as aforesaid, the defendant Dame Letitia was to produce, upon oath, all the deeds and writings, relating to the present settled estate, which were to be delivered over to the plaintiff. And as to the £5000, his Lordship was of opinion, that the plain-



till ought not, *at that time*, to have any benefit over for the same, he being before the Court, *only as heir at law*; but when the purchase and settlement was made, the consideration of what satisfaction the plaintiff should have out of his father's personal estate, for what demands, on perusal of the deeds, he should think fit to make, *other than as heir at law*, and touching his being reimbursed what costs he should pay to the other parties; and all further directions touching the personal estate were reserved till after the purchase and settlement made. And if the plaintiff did not make such new purchase and settlement, his bill was to be dismissed with costs.

From this decree both parties appealed; and in support of the *original* appeal it was urged (J. Pratt, P. King), that at the hearing of the cause, the appellant was taken to be before the Court, *as heir at law of his father only*; and on that foundation, the Court gave judgment only on that part of his case; whereas he fully proved, that the re-settlement was found in his father's house, and taken from thence, and wrongfully detained by the respondent Dame Letitia: and though the appellant offered, not only to prove the contents of it by witnesses, but to give in evidence the draft which had been found in Sir Robert Clayton's custody; yet the Court would neither permit the appellant to give such evidence, or compel the [109] respondent Dame Letitia, to produce the original deed. But, admitting the appellant to be only before the Court, *as heir at law*; yet he ought, in that capacity, to have the benefit not only of the £5000, but of the other personal estate of his father, towards making the new purchase and settlement, according to the proviso; because his father had *expressly agreed, that such new purchase and settlement should be made, and that the £5000 should be applied towards making the same*. That since the full relief prayed by the bill, would be a great measure arise from deeds and writings in the respondent's possession; the Court might, and ought to have ordered them to be produced, on the appellant's giving reasonable security to make a new purchase and settlement, within such time as, on an inspection of those writings, the Court should think just: and this the rather, because no sort of damage or inconvenience could arise to the respondent Dame Letitia by producing the deeds, she having an effectual remedy under the covenants of her marriage-settlement, to have that settlement made good to her out of the personal estate, which was abundantly sufficient for the purpose; while, on the other hand, by withholding these deeds, and particularly the re-settlement, the appellant was put under difficulties, which rendered it almost impossible for him to obtain that relief, which in justice and equity he ought to have. That by the express words of the settlement of 1674, the appellant's father, and his heirs, had a liberty of making the new purchase *in any county in England*; yet the Court had decreed it to be made of lands lying in *such counties only* which were as valuable as in the county where the lands in question lay, and thereby the marriage settlement was varied and altered. That the tenant's leases, made since the death of the appellant's father, were established, without any previous enquiry as to the reality and considerations thereof; and the appellant's bill, as to any account of the profits of the present settled estate, was dismissed; so that he was to be bound by the leases made since his father's death, and even pending this suit, without knowing what fines were received for granting those leases; some of which might have been made for small fines, in trust for the respondent Dame Letitia, or her younger children. That the appellant ought either to have an account of the profits of the present settled estate, or a satisfaction in respect thereof, out of the personal estate, which had been improved by interest since his father's death; and if the respondent Dame Letitia, was to have those profits till the new purchase and settlement was made, the appellant ought to have what improvements should, in the mean time, be made of the personal estate, or at least of so much as should be applied in the new purchase.

To all this it was answered (T. Powys, N. Hooper), that the respondent Dame Letitia being a purchaser, without notice of the re-settlement, if any such there was, and having pleaded and proved herself so to be, her title, according to the constant, open and uninterrupted course of justice, ought not to be in any wise impeached the [110] assistance of a Court of Equity. That the appellant had failed at law, in denying the existence of this pretended re-settlement, and was non-suited upon full defence; but, supposing it to have been ever made, yet his father being thereby tenant in tail, had it in his power to bar it by a common recovery. As to the not applying the £5000 in making the new purchase, it was conceived that the

decree had carried that matter too far already; and that the settlement of 1674, ought now to stand absolutely confirmed, and the appellant should not be permitted to purchase and settle other lands in lieu thereof: but if he was to be at liberty so to do, he ought to do it out of his own estate, and not with the £5000 or any other part of his father's estate; who was under no obligation, covenant, or undertaking to make any such purchase, or to invest the £5000 in land, for the benefit of his heir; nor did he become in any manner indebted or accountable to his heir, for not doing it; but, as he had reserved to *himself only*, a power or liberty of doing it if he thought fit, so he had waived and relinquished the exercise of that power, as it was lawful for him to do. That it would have been highly unreasonable, to compel the respondent Dame Letitia, a purchaser without notice, to produce her writings and depend on a *security for a settlement*, in lieu of her jointure; and equally so, to oblige her to part with it, without an *equivalent*; as upon any other construction of the proviso than what the decree had made, the new purchase might fall out to be of not more than half the value of the settled estate. And, as to confirming the tenant's leases, Dame Letitia had a power by the settlement to make leases; and if she had taken smaller fines than might have been had, she alone was the sufferer, and the appellant in no wise prejudiced by her so doing.

In support of the *cross* appeal, it was argued, that although by the proviso in the settlement of 1674, a power or liberty was given to Sir Edward Seymour, and his heirs, within years, to settle lands in lieu of Maiden-Bradley; yet it was a power purely for *his* benefit, at *his* election whether to be exercised or not, and therefore he might have released, waived, relinquished, or extinguished it, whenever he pleased. That as there were several things in this power, which seemed to relate to Sir Edward's *personal performance*, so there were also several facts in the case, which shewed an intent of waiving the power; particularly, his living 33 years afterwards, without attempting to exercise it, and his taking the £5000 portion out of the hands of the trustee, which was to have lain there for the purpose of making the new purchase. And therefore it was conceived, that the decree ought not to have impeached the settlement, or have given the appellant, after such a length of time, and under such circumstances, power to disturb it, under pretence of settling other lands in lieu thereof.

But to this it was answered, that the acquiescence of the father, could be no just objection to the right of the son and heir; who, by the express words of the proviso, had as good a right to re-[111]-deem the jointure, as his father ever had; and applied properly to have the benefit of such redemption, within a year after his father's death.

At the hearing of this appeal, the counsel for the appellant insisted upon reading depositions to prove the uses in the deed of re-settlement; and after consideration of what was offered thereupon, the House ordered, that the appellant's counsel should be asked, "Whether Sir Edward Seymour will be contented to be decreed to confirm and make good his father's last marriage-settlement; and that the deed of re-settlement, and all other deeds and writings in the respondent's custody or power, shall be thereupon produced; and, that on consideration of the said deed of re-settlement, and other writings, and of the last marriage-settlement, the terms of redemption, or making void the uses of the last marriage-settlement, be settled in Chancery as that Court shall direct?" And the counsel for the appellant being acquainted therewith, and consenting thereto, on his behalf; it was ORDERED, that the cause should be remitted to the Court of Chancery; and that upon the appellant's confirming his father's last marriage-settlement, as that Court should direct, the deed of re-settlement, and all other deeds in the respondent's custody or power, should be produced as the said Court should direct; and that the said Court, on consideration of the deed of re-settlement, and other writings to be produced, and of the said last marriage-settlement, should settle the terms of redemption, or making void the uses of the last settlement; and should give such further directions in the cause, as the said Court should think reasonable.\* (Journ. vol. 19. p. 369.)

\* On searching the Register Office for the further proceedings in this cause, it appears in Lib. B. 1711, that by an order of the Court of Chancery, dated the 9th of February 1711, it was ordered, that the Master should approve of a deed of confirmation, with a fine or recovery, as he should think fit; but that instead of the proviso in the last marriage-settlement, the Master was to take care, that the proviso in the deed of confirmation should be, that if the plaintiff and his heirs should perform the decree

of the Court, touching the purchase and settling of £1200 per ann. according to the intent of the last marriage-settlement, then the said deed of confirmation was to be void; and, when that deed was executed, the plaintiff was to be at liberty to apply to have the deeds and writings produced; and for such directions as the Court, on consideration of the re-settlement and other writings so to be produced, and of the last marriage-settlement, should think fit to give, for settling the terms of redemption, or making void the uses of the last settlement.—That in pursuance of this order, the Master had settled a deed of confirmation, which the plaintiff had executed, and that a fine had been levied accordingly. That the defendant Lady Seymour had stood out process of contempt, before she would produce the deed of re-settlement, and the other writings in her custody. That the same being at length produced, the cause was heard before the Lord Keeper on the 4th of July 1712; when, after hearing the several deeds and writings read, his Lordship declared, that the last marriage-settlement was but in the nature of a security, for making a settlement of lands of £1200 per ann. upon the defendant Lady Seymour, and the issue male of that marriage; and that the plaintiff Sir Edward could be admitted to the redemption of Maiden-Bradley, or to make void the uses limited thereof by the last marriage-settlement, on no other terms, than settling an estate of the clear yearly value, above reprises, of £1200 per ann. to the uses mentioned in the proviso of the said last settlement; or, upon making compensation to Lady Seymour and Lord Conway, in lieu thereof; and that such purchase of lands of £1200 per ann. ought to be a convenient and reasonable purchase, and the inheritance thereof as valuable as the estate and lands in Maiden-Bradley. And as touching the question, whether the plaintiff Sir Edward ought to have any [112] aid out of the personal estate of his father, to enable him to make such purchase or compensation; his Lordship was of opinion, that the re-settlement was not a voluntary conveyance, but made on valuable considerations; and therefore decreed, that the plaintiff Sir Edward should stand in the place of the defendants Lady Seymour and Lord Conway, on the last settlement, to receive a satisfaction out of his father's personal estate, for making such purchase of £1200 per ann. or a compensation for the same: but Sir Edward Seymour, the father, having since the re-settlement, exonerated the estate from an incumbrance of £3710; therefore, that £3710 with interest for the same since Sir Edward's death, at the rate of £5 per cent. was to be taken as part of what the plaintiff was to have, towards making up the value of the £1200 per ann. And the Master was to set a value upon such an inheritance of £1200 per ann. of lands, as valuable as lands in Maiden-Bradley. And it was further ordered, that the Master should take an account of the personal estate of Sir Edward Seymour, the father, and the usual directions were given for that purpose; and if such personal estate should be sufficient to make a full compensation for the said £1200 per ann. discounting the £3710 and interest as aforesaid; then the same was to be brought before the Master, to make such compensation accordingly: but if the personal estate should be deficient, then the plaintiff Sir Edward was to bring before the Master so much as would make good such deficiency; and, from the time that the same should be so brought before the Master, the uses in the deed of confirmation, and in the said last marriage-settlement, were to cease; and the uses thereof were, from thenceforth, to be to the plaintiff Sir Edward Seymour and his heirs: and thereupon, the said deed of confirmation, together with the several leases made by the defendant Lady Seymour, and all other deeds and writings then before the Master, were to be delivered up to the plaintiff; and the defendants Lady Seymour and Lord Conway, and their trustees, were to re-convey and deliver the possession of Maiden-Bradley to him. But the plaintiff was to pay the defendants their costs, to be taxed by the Master; and to have the same again, together with his own costs of this suit, out of the personal estate of his father, so far as the same would extend. And as to the account of the rents and profits of Maiden-Bradley, from the time of the death of the plaintiff's father, the defendant Lady Seymour was to have a month's time given her to answer, whether she would go into that account or not; and, if she should not think fit to go into it, then Maiden-Bradley was to be taken to be £1200 per ann. for the time past; and the plaintiff Sir Edward was to have satisfaction out of the personal estate, for that £1200 per ann. from his father's death; deducting thereout only the like taxes as were payable for Maiden-Bradley. And what surplus should be remaining of the said personal estate, after such deductions and allowances thereout as aforesaid,

was to be divided according to the act for the distribution of intestates' estates; and the defendants Lady Seymour and Lord Conway were to be at liberty to apply to the Court, for investing or settling the same, according to the proviso in the last marriage-settlement; or to have it apportioned between them as should be just.

On the 31st of the same month, the cause came on again, when Lady Seymour, by her counsel, declaring, that the Maiden-Bradley estate had not, since the death of her late husband, answered to her £1200 per ann. above reprises, and that therefore she could not take the same at that value; the Court declared, that the plaintiff Sir Edward Seymour could not be admitted to redeem or make void the uses of the last marriage-settlement, but upon making good the said deficiency, as well as settling £1200 per ann. or making a compensation in lieu thereof, as aforesaid; it was therefore ordered, that the defendant Lady Seymour should come to an account before the Master for the rents and profits of the said estate, since the death of Sir Edward Seymour her husband; and if such rents and profits should not amount to the clear yearly sum of £1200 above reprises, then the plaintiff Sir Edward was to make good the deficiency; and such deficiency was to be made good to him out of his father's personal estate; and he was also to have a satisfaction thereout, for so much as the clear yearly profits of the said premises should, upon such account, appear to amount unto, since the death of his said father. But if such clear yearly profits should be more than £1200 above reprises, the defendant Lady Seymour was to account for the same.

[113] CASE 2.—MORETON SLANEY,—*Appellant*; ROBERT SLANEY, and others,—*Respondents* [5th May 1714].

[Mews' Dig. xii. 880.]

R. S. on his marriage, covenanted to lay out £1000 in the purchase of lands of inheritance, to be settled on his wife for life, and that the reversion should descend to the child or children of the marriage. There were issue three children, but no purchase or settlement was made pursuant to the covenant. R. S. by his will gave his eldest son sundry debts, amounting to about £2400; and having made a provision for his daughter, he gave the residue of his estate, which was all personal, and amounted to upwards of £20,000, to his youngest son. Held, that the eldest son should have a satisfaction for the £1000 and interest out of his father's assets.

DECREE of the Master of the Rolls REVERSED.

That money articted to be laid out in land shall be taken as land in equity, and descend to the heir; see 1 Salk. 154: 1 P. Wms. 204, 5: 2 P. Wms. 171: and *post.* Ca. 4, 7, of this title.

By articles dated the 9th of August 1653, made previous to the marriage of Robert Slaney, the father, with Ann, the daughter of Elizabeth Moreton, widow; he the said Robert Slaney, in consideration of the marriage, and of £300, the portion of the said Ann, covenanted with the said Elizabeth Moreton, her executors, administrators, and assigns, that he would within three years after the marriage, lay out £1000 in the purchase of lands of inheritance in possession, or a lease for lives, to be settled on the said Ann for life, for her jointure; and that the reversion of the said lands or lease should descend to the child or children of that marriage.

The marriage soon afterwards took effect, and there were issue of it three children; namely, the appellant, the respondent Robert Slaney, and Elizabeth, the late wife of the respondent Robert Moreton; but no purchase or settlement was ever made pursuant to the articles.

In 1672, Ann, the wife, died; and in August 1696, Robert, the younger son, married; on which occasion, the father settled upon him a real estate of £400 per ann. in possession, and the reversion of another real estate of £200 per ann.

On the 24th of August 1701, the father made his will, and after directing his just debts to be paid, he gave to the appellant, his eldest son, several debts which were due to the testator from John Finch, John Sparry, Andrew Thomas, and William

Mutchall, amounting to about £2400, together with all bonds and securities for the same; he also gave to the appellant's two daughters £100 a-piece, when of age; and after some other legacies, the testator devised all his real estate in Kemberton, Grindle, and Ryton, of about £62 per ann. to his son Robert, for his life; and after his decease to the appellant in fee; and all the residue of his personal estate, which amounted to upwards of £20,000, he gave to his said son Robert, and appointed him sole executor.

[114] In August 1706, the testator died; whereupon, the respondent proved the will, and possessed himself of all the real and personal estate of the testator, together with all his deeds and writings.

The appellant was a total stranger to the marriage-articles during all his father's life-time; but one part thereof having, at the time of execution, been left in the hands of Elizabeth Moreton, party thereto, the same, after her death, came to the hands of one, Dorothy Scruton, her representative; and sometime after the death of the testator, this part was found by Mrs. Scruton, and delivered to the appellant, who sent a copy thereof to the respondent, requesting a performance of the covenant.

But the respondent refusing to comply with this request, the appellant, in Trinity term 1711, exhibited his bill in Chancery against the respondent and other proper parties; praying, either that the covenant in the marriage-articles might be specifically performed, or that the defendant Robert Slaney, might pay the plaintiff the £1000 thereby covenanted to be laid out in lands, with interest from his father's death.

On the 22d of February 1711, the cause was heard at the Rolls; when his Honour was pleased to order the bill to be dismissed, but without costs; and the defendant Slaney having hastily got this decree signed and inrolled, the plaintiff was thereby precluded from re-hearing the cause, or appealing to the Lord Chancellor.

He therefore brought the present appeal; and on his behalf it was said (R. Raymond, S. Cowper), that the only reasons on which the decree was grounded were, 1st, That from the great length of time which had elapsed since the date of the articles, without any performance or execution thereof being required, it ought to be presumed that the benefit of them was waived. And 2d, that if the articles were still in force, yet the legacies given to the appellant by the testator's will, ought to be taken as a satisfaction of what he might be entitled to under these articles. As to the length of time, it was insisted, that under the circumstances of the case, the same ought not to hinder the performance of the articles; for by the express tenor of them, the father had three years to make the purchase and settlement, before he could even be required to make it; that he was in very great business as an iron master, and employed all his substance in that trade, so that he might not think it so proper for him to purchase lands, as to apply his money in a trade, by which he afterwards acquired so considerable a fortune.—That Elizabeth Moreton, with whom the covenant was entered into, and who had one part of the articles in her custody, died in June 1664; and the appellant's mother died in November 1672; during all which time the appellant was under age; so that there was no person capable of calling upon the father for a performance of the articles until the appellant attained his age; and even then, as it might reasonably have been expected that his father would leave him a much larger fortune than what he could claim under the articles, he could not be blamed for not running the risk of disobliging his father, by [115] compelling a performance of these articles. And as to the supposed recompence under the will, the several debtors therein named, whose debts were given to the appellant, had all died insolvent, near thirty years before the will was made; so that the giving those debts, amounted in fact to nothing at all, as the appellant could never be one farthing the better for that bequest. Neither was the devise of the reversion of the real estate of any great value to the appellant, as he might probably, in the course of nature, die before his younger brother; but let the value of this devise be what it might, yet as by the articles, if they had been performed, the appellant upon his father's death would have been entitled to an estate in *possession*, the devise of an estate in *reversion* could never be deemed an equivalent or satisfaction: and in case of the appellant's death before the respondent, his younger brother, he, though heir at law, would not have had one farthing by his father's will, nor any provision made for him in his father's life-time. But admitting this devised reversion to be of the full value of £1000, the money

covenanted to be laid out; yet still it was conceived, that the appellant ought to have the benefit of the articles, and be in the same condition, as if a settlement had been made within the time thereby limited; for if such settlement had been so made, the appellant would not only have enjoyed the provision which his mother purchased for him under the articles, but also whatever his father should have given him, or the law have cast upon him: and if otherwise, the respondent, his younger brother, would go away with an estate real and personal, of the value of £30,000.

On the other side it was argued (J. Jekyll, T. Lutwyche), that after so great a length of time, and no demand made for a performance of these articles, they ought to be presumed to have been satisfied in some other manner; and the nature of this satisfaction was very apparent by the proofs in the cause; for the testator not only gave the appellant a liberal education at school, but was at the expence of maintaining him a long time at the University; he afterwards placed him, with a considerable fee, to an attorney, supported him handsomely during his clerkship, and then gave him a large sum of money to set out with in the world. That the testator had not only given the appellant by his will, the debts before mentioned, and £200 to his daughters, but also the reversion in fee of his devised estates, after the respondent's death; which reversion was worth at least £1000, as the respondent would give him that sum for the purchase of it, if he was inclinable to sell. The appellant had likewise under the respondent's marriage-settlement, the reversion of the estates therein comprised, which were worth £8000, in case the respondent should die without issue male, and which was highly probable, as he had been married eighteen years, and had only one daughter, about seventeen years of age. That supposing a specific performance of the articles had been in due time demanded, and lands had been purchased and settled accordingly; yet as such lands were thereby to descend to the child or children of the marriage, it might have been a matter of [116] great doubt, whether the eldest son would have been entitled to the whole: however, upon all the circumstances of this case, there could be no ground for an execution of these articles; and therefore the dismissal of the appellant's bill was perfectly just and reasonable, and ought to be affirmed with costs.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree should be reversed; and that the appellant should have a satisfaction of the sum of £1000, with interest, to be computed from the death of Robert Slaney his father, together with his costs of this suit, out of the assets of the said Robert Slaney: and that the Court of Chancery should give proper directions, in order to the appellant's receiving such satisfaction. (Journ. vol. 19. p. 676.)

CASE 3.—ADAM CUSACK,—*Appellant*; ELINOR CUSACK,—*Respondent*  
[10th May 1714].

[See *Davies v. Davies*, 1841, 4 Beav. 54.]

- C. by articles on his marriage with his first wife, covenanted that all the lands which he should purchase during her life, should descend to, or be settled upon the heirs male of her body by him begotten. No settlement was made pursuant to these articles; but C. upon his marriage with a second wife, settled his estate to different uses. Held, that the eldest and only son of the first marriage was entitled to a specific performance of these articles, and a conveyance was decreed accordingly.

DECREE of the Irish Chancery REVERSED. See the succeeding case.

Adam Cusack Esq. one of the Judges of the Court of Common Pleas in Ireland. being seised in fee of certain lands and tenements in the counties of Meath, Down, Kildare, and Dublin, of the value of near £700 per ann. by deed-poll, dated the 15th of February 1675, declared the uses of several recoveries which he had suffered of the premises, to be to the use of himself and Catherine his wife, for their lives; remainder to Robert Cusack, the appellant's father, in tail male; with other remainders over: and reserved power to himself, to charge any part of the premises, in such manner as he should think fit; and to make leases, and to revoke any of the uses.

Mr. Cusack, by his will, dated the 30th of March 1681, charged his lands in the county of Meath with £40 per ann. payable to the said Robert Cusack, during the widowhood of his said wife Catherine; but in case she married again, then Robert was to have the whole profits of those lands during her life.—The testator soon afterwards died without issue, leaving his wife surviving.

[117] By certain articles, dated the 13th of August 1683, entered into between Francis Coghlan Esq. of the one part, and Robert Cusack of the other part; reciting an intended marriage between the said Robert Cusack and Mary the daughter of the said Francis Coghlan; Robert covenanted, that in consideration of the marriage and marriage-portion, he would settle on the said Mary, for her jointure, lands and tenements of the value of £100 per ann. and, in consideration of such settlement, the said Francis Coghlan covenanted, that he would secure and pay to the said Robert Cusack £800, as a portion with his said daughter Mary, in manner following; viz. £500 within a month after the jointure should be secured; £100, which Cusack owed him, was then to be released; and the remaining £200 was to be paid upon a certain contingency, which never happened. Robert Cusack also covenanted, that as well all the real estate which he then had, and which should thereafter come to him by deed, will, or otherwise, from the said Adam Cusack, within the kingdom of Ireland; as also all the lands and tenements which he should purchase during the life of the said Mary Coghlan, *should descend and come to the heirs-male to be begotten on the body of the said Mary, by the said Robert; and should be secured and settled on the said heirs-male, by the said Robert Cusack, as the counsel of the said Francis Coghlan should advise.*

The marriage soon afterwards took effect, and there was issue of it, the appellant and two daughters named Barbara and Ann. Francis Coghlan paid Cusack £500, part of the marriage-portion, and gave judgment in the Court of Exchequer in Ireland, for securing the remainder; but no settlement was ever made by Robert Cusack, in pursuance of the articles.

In 1689, Mary the wife of Robert died; and in 1696, Catherine the widow of Adam also died; whereupon Robert became entitled to all the real estate of Adam, under the above deed-poll, and he entered upon and enjoyed the same accordingly.

In 1700, Robert Cusack entered into a treaty of marriage with Jane, the youngest daughter of James Barnewall Esq. and apprehending her fortune to be in her own power, he promised to make a settlement for securing her a jointure of £300 per ann. and £5000 for the issue of the marriage; on the faith of which promise he obtained her consent, and the marriage was soon afterwards had, without any articles or other agreement in writing on that occasion.

But Robert Cusack, having by some indirect means, obtained the articles of August 1683, from the said Francis Coghlan, and cancelled the same; he and his wife Jane went together to a gentleman at the bar, and gave him instructions to prepare a settlement; who, having advised several fines and recoveries to be levied and suffered of Robert's estates, and the same being done accordingly, a settlement was prepared and executed, by indentures of lease and release, dated the 3d and 4th of March 1700, between Robert Cusack of the first part, Dennis Dally, Robert Leigh, and Henry Oxborough Esquires, of the second part, and Christian Borr Esq. and Richard Tisdale Gent. of the third part; [118] whereby, "in consideration of a marriage formerly had and solemnized between Robert Cusack and Mary his deceased wife, and of a marriage-portion of £800 secured to be paid to Robert, by Francis Coghlan the father of the said Mary, and in accomplishment of certain articles of agreement, made and perfected between the said Francis Coghlan and Robert Cusack; as also in consideration of a marriage then lately had between the said Robert Cusack and Jane his then wife, and of an agreement and promise made by him to her before marriage; and in consideration of £1500 marriage-portion, which the said Jane gave and secured to Robert, on the said promise and agreement; and for settling the lands in the blood, name, and family of the said Robert Cusack, according to the uses limited by the said Adam Cusack, and in pursuance of his last will, dated the 30th of March 1681; " Robert Cusack conveyed all his estates to Dally, Leigh, and Oxborough, and their heirs, to the following uses; viz. As to the lands in the counties of Meath and Down, to the use of the said Christian Borr and Richard Tisdale, for a term of 41 years, upon the trusts afore-mentioned; remainder as to these and all other the pre-

mises, to the use of the said Robert Cusack for life, without impeachment of waste; remainder, as to one third part of the premises, to Jane his wife for life, for her jointure, and in lieu of dower; remainder to Adam Cusack (the appellant) for life, without impeachment of waste; remainder to his first and other sons, in tail male; with other remainders over. The trusts of the 41 years term were declared to be, that the trustees should receive a clear rent of £275 per ann. for ten years, from the 10th of December 1701, payable half-yearly, and place the same, as received, out at interest; and after the expiration of the said ten years, then to receive £750 out of the rents, for the said 41 years, with interest thereof, at £8 per cent. until paid by £275 a-year; and also, after the said ten years, to receive £200 a-year during Robert's life, out of the rents and profits; which £275 a-year and £750, and the interest thereof, and likewise the said £200 a-year during Robert's life, were intended for the portions and provisions of Robert's children by Jane. And the premises were also charged with the two several sums of £800 and £700, for the portions of Barbara and Ann, the two daughters of Robert Cusack, by his first wife.

By other indentures of lease and release, dated the 10th and 11th of August 1701, between James Barnewall and Walter Bagnall and Elinor his wife of the first part, the said Christian Borr and Richard Tisdale of the second part, and the said Robert Cusack of the third part; reciting, that by indentures of lease and release, dated the 22d and 23d of May 1698, Barnewall had conveyed the manor and lands of Bremore, etc. to Walter Bagnall and his heirs, to the intent, *inter alia*, that Jane, the wife of the said Robert Cusack, should, out of the rents and profits of the premises, be paid £50 yearly for her maintenance, until she was married; and that she should, for her portion, have and be paid on the day of her marriage, £1500; the said James Barnewall [119] and Walter Bagnall and his wife conveyed to Borr and Tisdale and their heirs, certain lands, parcel of the said manor of Bremore; with a proviso to be void, if they or any of them should pay to Robert Cusack £105 yearly, for the interest of the said £1500, being at the rate of £7 per cent. during the life of the said James Barnewall; and if the said £1500 was not paid before the end of a year from the death of Barnewall, then his heirs, executors, or assigns should pay interest for the same, at the rate of £8 per cent. until it was paid.

At the time of these settlements, the appellant was not above 14 years of age; and differences afterwards arising between his father and him, on account of his conversion to the protestant religion, he was not permitted to have any access to his father, nor was anything allowed him for his subsistence. So soon therefore as the appellant had attained the age of 21, and come to the knowledge of the articles, he exhibited his bill in the Court of Chancery in Ireland against his father, for a specific performance of these articles; but, to avoid the consequences of this suit, as well as still further to distress the appellant, Robert Cusack and his wife withdrew themselves into England; where, on the 9th of October 1707, he died; leaving issue by Jane, his second wife, two children, namely James and the respondent.

After the death of Cusack, Jane, his widow, having waived her jointure, brought writs of dower, and recovered judgment, and obtained possession accordingly.

In Trinity term 1708, James Cusack and the respondent filed their bill in the Court of Chancery in Ireland against the appellant and others, to have an execution of the trusts of the 41 years term; whereupon, in Hilary term following, the appellant exhibited his cross bill for a specific performance of the articles made on his mother's marriage, and to have the full benefit thereof.

On the 8th of June 1711, these causes were heard; when the Court decreed, that the settlement of March 1700, was a good and reasonable settlement, and well executed, and that the plaintiffs James and Elinor Cusack were thereby well entitled to have their portions raised out of the lands made liable thereto; that the cross bill should be dismissed; and that there should be no costs on either side: but as to the account and possession prayed by the original bill, his Lordship took time to consider.

The next day after making this decree, the plaintiff James Cusack died, an infant; but notwithstanding this, the Lord Chancellor, on the 26th of the same month, made a further decree, whereby it was referred to the Master, to take an account of what arrears were due for the £275, at the death of Robert Cusack, and who received the same; and what money was received by the trustees, or any employed by them; and what securities were taken by them in Robert's life-time; and that the securities so taken,



together with the securities given by Robert, should go towards discharge of the £275 per ann. during the life of Robert; an injunction was also awarded to the sheriffs of Meath [120] and Down, to put the trustees Borr and Tisdale into possession of the lands in those counties, until what fell short of the £275 per ann. which became due since Robert's death, and the arrears which accrued during his life, should be satisfied; and until they should, out of the profits of the said lands, receive the £750, according to the settlement. And the trustees should put the same out at interest, to the uses of the settlement; but if the defendant Adam should pay the trustees what remained due for those sums, then the lands should be discharged from the same, and he was to be let into the possession thereof.

To reverse these decrees, the defendant Adam Cusack exhibited his bill of review: and the principal error thereby assigned, was the death of James Cusack one of the plaintiffs, before the last decree was pronounced, and under the age of 12 years; and that as the portion did not vest in him till that age, the same became merged, for the benefit of the present plaintiff.

But the defendant Elinor, having by her guardian demurred to this bill, the same was argued on the 9th of December 1712; when the demurrer was allowed, and the former decrees affirmed.

The present appeal was therefore brought; and on the appellant's behalf it was insisted (R. Raymond, S. Cowper), that an equitable settlement ought to have been decreed, in execution of the first articles, whereby Robert Cusack should have been but tenant for life, with remainder to the first and other sons of that marriage, in tail male; that it ought not to have been in his power to have barred his issue male; and that the appellant ought to have been relieved against the cancelling of the articles, which should, in equity, have been considered as still remaining in full force. That Jane, the second wife, and all the other parties, who treated concerning her marriage with Robert Cusack, had notice of the articles before the marriage; and even the settlement made afterwards, and under which the respondent claimed, was mentioned to be made in *accomplishment* of those articles; so that all persons claiming under Robert, came in with full notice of the articles, and therefore ought in justice and equity to be bound by them. That the settlement did not appear to be made, upon a real and valuable consideration. That Jane, the widow, had recovered dower of the whole estate; had secured the £1500 portion and interest, for the respondent her only daughter, and also all the trust-money which was raised in her husband's life-time, and yet sought to raise £4000 more for her benefit, out of the estate; whereby the appellant would be reduced to great necessities, and not have wherewith to support himself, his wife and three children; but would be defeated of the whole estate, although he was a purchaser of the same, for a real and valuable consideration, by virtue of the articles. The appellant therefore hoped, that the decrees would be reversed, and the settlement adjudged voluntary and fraudulent; that he should have the full benefit of the articles, as if they had not been cancelled, and a conveyance executed pursuant thereto; and that the respondent's bill should be dismissed, and the appellant have his costs in both causes.

On the other side it was contended (E. Northey, P. King), that by the articles in question, Robert Cusack was tenant in tail; the words being, *that the estate should come to the heirs male of his body*; which could never be designed to take away his own estate, and it would be very unaccountable, by guessing at intentions, to deprive children of their portions and necessary maintenance. That a child of the first venter ought not, unless the fact was very plain, to run away with the whole estate from the children of the second. That Jane, or any that were authorised to act for her, had no notice of the articles; and the recital of them in the settlement was only presumptive evidence of notice, which could hold no longer than till the contrary was proved, as in the present case it clearly was: besides, Jane had married, and paid her consideration before any such notice; and could not go back, as one agreeing for a purchase might, who had not paid his money. But if notice was at all material in this case, it ought to have been notice of the pretended intent of the parties to the articles; for, by having notice of, or perusing the articles themselves, every body must be of opinion, that Robert Cusack was tenant in tail; and if he had made a settlement, limiting an estate tail to himself, it would have been a full execution of the articles. Upon the whole, Robert Cusack, at the time of making the settlement for

the benefit of the issue of his second marriage, was tenant in tail, and had power by law to charge or alien his estate; there being no words in the articles on his first marriage, which made him tenant for life only. Jane, the second wife, at the time of her marriage, had no notice of the articles; and the recital of them in the settlement, was by the direction and contrivance of Robert Cusack and Francis Coghlan, without Jane's knowledge or privity, nor was she even made a party to that deed. As the settlement now stood, there was but a small provision for the respondent, the issue of the second marriage, but a plentiful estate for the appellant, the issue of the first marriage; whereas, if the decree should be set aside, there would be nothing for the respondent out of her father's estate.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree, as to the several matters therein contained, complained of by the appeal, should be reversed; and that the appellant ought to have the benefit of the articles of the 13th of August 1683, made before, and in consideration of his father's marriage with Mary, his mother, and be deemed and taken as tenant in tail male under those articles; and hold and enjoy the lands, tenements, and hereditaments, thereby agreed to be settled upon him and the heirs male of his body, against all persons claiming under the settlement of March 1700, made by Robert Cusack after his second marriage; and that the trustees of the 41 years term, should, at the appellant's cost, surrender the said term and all their interest therein, to the appellant, and deliver up to him [122] the said settlement of March 1700; and that all profits arising out of the lands, tenements, and hereditaments, limited for the said term of 41 years, since the decease of the said Robert Cusack, should be accounted for to the appellant; and that possession of the said premises should be forthwith delivered to him, and the tenants thereof should attorn to him; but without prejudice to Jane the second wife, in respect of her dower: and the Court of Chancery in Ireland was to give such directions, in pursuance of this order, as should be just. (Jour. vol. 19. p. 681.)

CASE 4.—JOHN TREVOR and others,—*Appellants*; EDWARD TREVOR and others,—*Respondents* [5th February 1719].

[Mews' Dig. xii. 1127; xiv. 375.]

J. S. on his marriage, covenants to settle lands to the use of himself for life, remainder to the heirs of his body by his intended wife; and to make a settlement accordingly within two years, or in default thereof, to stand seised to the same uses; though this is an estate-tail in J. S. at law, yet a Court of Equity will turn it into a strict settlement. If marriage-articles are for a settlement to be made to the husband for life, then to the wife for life, and then to the first and other sons, and the heirs male of their bodies, etc. the Court of Chancery will decree a limitation to trustees, to preserve the contingent remainders. And if by fine or otherwise, these remainders are destroyed before they take place, this Court will set them up again. And if a defective settlement in any particular has been made, a second must be made till the uses in the articles are well and effectually raised, for till then the covenant subsists.

DECREE of Lord Chancellor Parker AFFIRMED.

This Case is very fully reported in 1 *Eq. Abr.* 387-391, where the reasons of Lord Chancellor Parker's decree are given even more at length than in 1 *P. Wms.* See also, in confirmation of the points determined in this case, *Jones v. Laughton*, 1 *Eq. Abr.* 392. c. 2: *Nandick v. Wilkes*, 1 *Eq. Abr.* 393. c. 5: *Rep. Eq.* 114: *Cusack v. Cusack*, ante Ca. 3, of this title; and *West v. Erissey*, 2 *P. Wms.* 349, where an actual settlement was made before marriage, and the father having attempted to bar his heirs female by a recovery, and then devised the settled estates, the devisee was compelled to convey the premises to such heirs female.

In 15 *Vin.* 282, ca. 5, it is noticed, that though a much greater estate descended to the eldest son as heir at law, it was not deemed a satisfaction, and cites 9 *Mod.* 161, 179.

1 *Wms.* 622. 9 *Mod.* 161: 10 *Mod.* 436: 1 *Eq. Ca. Ab.* 387. c. 7: *Viner*,

vol. 10. p. 247. ca. 17; 260. ca. 2; 291. ca. 7: (N. a. 2.) vol. 14. p. 572. c. 1:  
vol. 15. p. 282. ca. 5; 285. ca. 4: 2 Eq. Ca. Ab. 505. ca. 1.

Sir John Trevor, Knight (formerly Master of the Rolls,) being seised in fee of divers messuages, lands, and hereditaments, in the counties of Denbigh and Salop, of the yearly value of £240; by articles dated the 23d of October 1669, in consideration of his intended marriage with Mrs. Jane Pulestone, widow, covenanted with William Salisbury Esq. and Sir Richard Lloyd, Knight, that he would, before the end of two years next after the date of the articles, at the request of the trustees, their heirs or assigns, settle, convey, and assure to them, and their heirs, as they and their heirs, or their counsel in that behalf, should direct and ap-[123]-point, the said messuages and premises, to the several and respective limitations and uses, in the said articles mentioned and expressed, and also in the said settlement and conveyance, as should be limited and agreed upon by the said Sir John Trevor, and the trustees as aforesaid, and to no other use, intent or purpose whatsoever; (that is to say) to the use of him the said Sir John Trevor, for life, *without impeachment of waste*; remainder to the use of the said Jane his intended wife, for her life; remainder to the use of the heirs males of his body, on her body to be begotten, and the heirs males of such heirs males lawfully issuing; with remainder to the use of his own right heirs. And the said John Trevor did thereby for himself and his heirs, covenant with the said trustees, that the said premises should remain to the said Jane, his intended wife, during her life, after his own decease, free from all incumbrances: *and, that in case the said uses and limitations in the said articles were not thereafter well raised, according to the true intent and meaning of the articles; that then he and his heirs should stand and be seised of the said premises, until such time as a further assurance should be thereof made, to the uses of the said articles.*

The marriage soon afterwards took effect, and Sir John had issue by the said Jane, the respondent Edward Trevor, his eldest son; and the appellants, and the respondent Lady Middleton.

No settlement was ever made pursuant to these articles, nor was any request made by the trustees for that purpose; but the respondent Edward having incurred his father's displeasure by an improvident marriage, and Sir John apprehending that he had an estate tail vested in him, which it was in his power to bar; he and his Lady accordingly, in the years 1692 and 1698, levied three several fines of the premises, and by indenture dated the 29th of September 1699, the said fines, as to all the premises therein comprised, (except some part thereof in the county of Salop,) were declared to enure to the use of the said Sir John Trevor and Dame Jane his wife, for their lives; remainder to their second son, the appellant John Trevor, and the heirs males of his body; remainder to the appellant Arthur Trevor in tail male; remainder to the appellant Tudor Trevor in tail male; remainder to such uses as the said Sir John Trevor, by deed or will, should appoint; and for want of such appointment, to the use of his eldest daughter the Lady Middleton, and his second daughter the appellant Prudentia Trevor, and the heirs of their respective bodies. And as to some part of the excepted premises, to the use of the right heirs of Thomas Edwards; to whom Sir John had before that time sold the same: and as to the residue thereof, to the use of the said Sir John Trevor and his heirs. And, in order to prevent any of his younger sons from being guilty of the like acts of disobedience in marriage, as had been committed by their elder brother; it was by this deed provided, that in case any of his said younger sons should, in his life-time, marry any woman without his consent first had in writing, under his hand and seal, [124] that then it should be lawful for him the said Sir John Trevor, to demise and lease the premises so settled upon his said sons as aforesaid, or any part thereof, to any person or persons, for the term of 500 years, or any less number of years, without impeachment of waste, and with or without any rent; if they, or any heirs of their bodies, should so long continue in being.

This settlement was delivered to Edward Vaughan Esq. one of the trustees therein named, who kept the same till after Lady Trevor's death; when, by Sir John's consent, it was delivered to the appellant John Trevor.

On the 20th of May 1717, Sir John Trevor died intestate; and upon his death, the respondent Edward, as his eldest son and heir at law, became entitled to the ancient estate of the family in Ireland, worth above £20,000, to another estate in England

of £300 per ann. and to about £10,000 as his distributive share of Sir John's personal estate.

In October following, the respondent thought proper to exhibit his bill in the High Court of Chancery against the appellants and others, praying a specific performance of his father's marriage articles, and to have a conveyance made according to the intention thereof; insisting, that those articles were only an executory agreement, for a further settlement of the premises therein comprised, and that it was not in the power of his father to bar the limitations thereof.

The defendants, the younger children, by their answers to this bill insisted, that the articles ought to be considered as a compleat settlement; and that Sir John Trevor had thereby an estate tail, which, by the fines of 1692, and the deed of September 1699, was docked, and the lands vested in the defendant John Trevor in tail male, with the several other remainders over. But if the articles were to be looked upon as executory, and as an agreement for a future settlement only; that then the plaintiff had lands descended to him from his father, of far greater value than those comprised in the articles, besides his share of the father's personal estate; which ought to be taken as a satisfaction for the lands agreed to be settled by the articles, and that therefore he was not entitled to a specific performance thereof.

On the 5th of June 1719, this cause was heard before the Lord Chancellor Parker, when his Lordship decreed, that the plaintiff and the defendants should execute conveyances of such of the lands comprised in the articles, as were by the deed of September 1699, settled or conveyed to the defendant John Trevor, with such remainders over as aforesaid, to the use of the plaintiff and the heirs male of his body; with like remainders to the defendants John, Arthur, and Tudor, successively in tail male; remainder to the defendants Lady Middleton and Prudentia Trevor, and the heirs of their bodies; remainder to the right heirs of the said Sir John Trevor, for ever. And, as to the other lands comprised in the said articles, which descended or came to the plaintiff, after the death of the said Sir John, it [125] was decreed, that the plaintiff should convey the same to the use of himself, and the heirs male of his body; with like remainders over to the defendants John, Arthur, and Tudor Trevor, successively; with remainder to the right heirs of the said Sir John Trevor, for ever. And that the parties should, for that purpose, levy and suffer such fines and recoveries, as the case should require, at the costs and charges of the plaintiff. And that the defendant John Trevor should deliver possession of the said premises to the plaintiff, and account with him for the rents and profits thereof, received from the death of his said late father.

From this decree the present appeal was brought; and on behalf of the appellants it was argued (T. Lutwyche, W. Peere Williams), that as no new settlement was made within two years next after the date of the articles, or at any time afterwards, nor any request made for that purpose, Sir John Trevor, by virtue of the articles, became actually seised of an estate tail in the premises, subject to his wife's estate for life therein; and that the articles themselves amounted to a settlement, and operated as such, by way of a covenant to stand seised. That this settlement was acquiesced in as such, and so understood to be by Sir John Trevor himself; who, though he had long presided as a Judge in Equity, was so far from thinking that he was disabled by the articles from disposing of the premises, that in the settlement of 1699, he recites his intention of inrolling the articles in the Court of Chancery; and had actually sold part of the premises to Mr. Edwards, who had ever since continued to enjoy the same. That it was very remarkable, that the covenant against incumbrances, related only to the wife's estate for life; and that after her death, Sir John having a legal estate in tail in the premises, with remainder to his own right heirs; it must be admitted, that at law he might and did well bar that estate tail, by the fines which he levied as aforesaid. That since the articles had been made so long ago as the year 1669, and had so long been taken and accepted as a settlement executed, they were not now to be considered as executory only. That the respondent Edward Trevor, being barred in law of the estate tail created by the settlement, was not entitled to the aid of a Court of Equity, to impeach the subsequent settlement, which was occasioned by his own undutifulness; especially, as notwithstanding that settlement, he took by descent from his father, above four times the value of the premises in question, exclusive of his share of the personal estate, amounting to about £10,000; all which it was cer-

tainly in his father's power to have given away from him. That a Court of Equity was not bound to execute articles in all cases, even where they are executory; and especially in a case circumstanced like the present, where the uses actually vested by the articles would be defeated, and the intention of the settlor frustrated. It was therefore hoped, that the decree would be reversed, and the respondent Edward Trevor's bill dismissed.

[126] On the other side it was contended (L. Carter, C. Phipps), that by the whole scope of the articles, it manifestly appeared they were never designed for a settlement, but only a bare agreement how and to what uses the lands comprised therein should be settled; and that the covenant to stand seised in the latter part of the articles, could not be taken as a final settlement, either from the words of it or the precedent parts of the articles; but as provisional only, and till a settlement should be made in form, and effectually to answer the intent and agreement of the parties. That it could never be presumed, that Sir John was to have any greater estate than for life, without impeachment of waste; or that it should be in his power to defeat the heirs male of that provision, which by the articles was intended to be made for them, after the death of Sir John and his Lady: for the articles were founded upon consideration of the marriage, and Sir John's affection for his then intended wife, and the heirs male of their bodies to be begotten; so that the consideration extended as well to the issue male of the marriage, as the intended wife. That the estate limited to Sir John was in express words, *for his life only, without impeachment of waste*; which would have been vain and to no purpose, if he was to have been tenant in tail, as he would thereby have been dispunishable of waste. That the lands were directed to be limited, after the death of Sir John and his Lady, *to the use of the heirs male of the body of Sir John, on the body of the said Jane to be begotten, and to the heirs male of the body of such heirs male issuing*; so that the first words were only a description of the persons who were to take, viz. *the first and other sons*; and the subsequent words declared what estate they were to take, viz. *to the heirs male of their bodies*. That what was necessary to make these uses effectual, was what is necessarily implied, and what was meant and intended by the articles, touching such *further limitations and uses, as should be agreed between Sir John and the trustees*; namely, the limiting the estate over to trustees, for preserving contingent remainders, in such manner that it might come to the first and other sons of the marriage; and without which limitation, the articles could not effectually be performed. But this clause respecting the *further limitations and uses*, could never be intended to give Sir John and the trustees a power, either to defeat his Lady of her estate for life, or to prevent the first or other sons of the marriage from succeeding to the estate, after the death of the father and mother; nor could it be presumed, that the trustees would ever have agreed to such a settlement. And as to the point made by the appellants, that the respondent Edward had received satisfaction by the descended estates; it was insisted, that the point of satisfaction was not an ingredient in the case, the respondent not coming for a satisfaction or recompence by way of damages; but as a purchaser of the specific lands comprised in the marriage-articles, and desiring a settlement of those lands, pursuant to the articles, against persons claiming under a voluntary settlement, made to defeat the [127] articles; and not in favour of children unprovided for, but who had a plentiful provision otherwise; the appellant John having an estate of more than £600 per ann. under the settlement of October 1699, and the others being amply provided for by their shares of their father's personal estate.

AFTER hearing counsel on this appeal, the question was put, "Whether the said decree should be reversed?" Which being resolved in the negative; it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree therein complained of, affirmed.\* (Jour. vol. 21. p. 221.)

\* Mr Peere Williams (who was counsel for the appellant John Trevor) in the conclusion of his report of this case, says, "The matter was greatly debated by the Lord Chancellor and Lord Nottingham for the decree, and the Lords Trevor and Harcourt against it; but at length the decree was affirmed, without any division."

CASE 5.—Sir WILLIAM BARKER,—*Appellant*; THOMAS IVERS and others,—*Respondents* [18th December 1724].

[Mew's Dig. xii. 827.]

- A. covenants by marriage-articles, that the estate agreed to be settled is worth £500 per ann. clear of all incumbrances; and also to purchase other lands of £300 per ann. and settle them to the same uses. The new purchase was never made, and the estate settled was incumbered beyond its value. Held, that out of the purchase money of A.'s estate not settled, so much shall be paid to the eldest son, as is equivalent in value to £800 per ann. computed at 22 year purchase.

DECREE of the Irish Chancery reversed. See the preceding case.

Sir William Barker, the appellant's father, in the year 1696 married Elizabeth Alexander, daughter and heir of Sir Jerom Alexander, who was seised and possessed of lands of inheritance and chattel leases, to the value of £1500 per ann.

Previous to this marriage it was, by articles dated the 13th of June 1696, agreed that the said Elizabeth should settle her estate on the issue of the marriage, which was accordingly done; and Sir William agreed to settle the manor of Bocking, in the county of Essex, which he covenanted to be worth £500 per ann. clear of all incumbrances, on himself for life; remainder to his wife for a jointure, and afterwards upon the several sons of the marriage; and that he would purchase £300 per ann. more in England, and settle it to the same uses. He also covenanted, that within a year after the marriage, an estate, which Alderman Barker, his father, had in the county of Limerick, should be settled upon the said Elizabeth, for an addition to her jointure; but to be discharged therefrom, when he should purchase and settle the £300 per ann. in England. It afterwards appeared, that at the time of this marriage, and of entering into the said articles, the Bocking estate was mortgaged for £5000; and the equity of redemption was sometime afterwards foreclosed.

[128] Sir William Barker having performed no part of the marriage-articles but instead of so doing, having prevailed upon his wife to let him sell part of the estate for £1550; she and her trustees, and the appellant, (the first son of that marriage) in March 1698, preferred a bill in the Court of Chancery in Ireland against Sir William, to compel him to make good his said marriage-agreement, and to raise money by sale of the Limerick estate for that purpose; but this Limerick estate had been mortgaged by Sir William, part to one Freake, for £2000, and other part to Riggs for £2000 more; the said Freake and Riggs were made parties to the bill.

Sir William Barker put in his answer, and thereby confessed, that the Bocking estate was in mortgage for £5000 prior to the marriage-articles; that he received by sale of part of his wife's estate £1550; and that he had mortgaged the Limerick estate to Freake and Riggs; but he consented that the Limerick estate, or so much thereof as should be necessary, should be sold, to pay all these incumbrances, and other debts then due; and with the remainder of the money, to purchase £300 per ann. in England: and he further said, that since making the said mortgages, he had given bonds and warrants of attorney for debts amounting to £1187, which, with the £4000 due to Freake and Riggs, he intended to make up £7000, and which, with all the debts he owed, exclusive of the debt upon Bocking, and a debt to one Street, would make up the £5000.

Upon hearing this cause, on the 7th of December 1702, it was decreed, that Sir William Barker should sell the Limerick estate, and that the mortgagees Freake and Riggs should be paid what they had lent to him, and also what they had paid to discharge in other incumbrances; and on payment, that they should assign their securities; and that out of the produce of the said sale, £300 per ann. should be charged in England, and settled upon the appellant, as by the articles was agreed; and the remainder of the purchase-money was to be deposited with the Master of the Court, that all other the said William's creditors might come before the Master to prove their debts, and how secured, that the Court might hear what they had to offer, why the remainder of the purchase-money should not be applied to discharge the incumbrances on the Bocking estate, and to purchase as much lands as would

take up Bocking £500 per ann. ; and that then the Court would make such order, as to the remainder of the purchase-money, as should be fit.

But upon the petition as well of Sir William Barker, as of the appellant, the cause was re-heard on the 27th of November 1707 ; when it was decreed, that Sir William should perform the marriage-articles, and that accordingly he should disencumber the Bocking estate, and purchase £300 per ann. more in England, pursuant to the articles : and it was further decreed, according to Sir William's answer, that the Limerick estate, or so much thereof as should be necessary, should be sold ; and with the pro-[129]-duce thereof, the incumbrances due to Freake and Riggs should be discharged, and that the remainder of the purchase-money should be brought into Court, and deposited, to the intent, that the other creditors of Sir William Barker, whose debts did any way charge his estate at the time of filing his answer, might be paid what should be due to them, on ascertaining their several demands ; and for purchasing £300 per ann. in England, to be settled according to the marriage articles. And upon a further application of Sir William Barker, it was, on the 14th of May 1708, ordered, that this last decree of the 27th of November 1707, should be rectified in this particular, viz. that the Limerick estate should be sold, and that the debts, amounting to £7000, should be first paid, and the remainder of the money applied to purchase the £300 per ann. in England.

Sir William Barker being still dissatisfied, filed a bill of review to reverse both the decrees ; which being dismissed upon a demurrer, he then appealed to the House of Lords ; and upon hearing this appeal, on the 23d of June 1714, the several decrees, orders and proceedings complained of, were affirmed ; and Sir William was ordered to pay £50 costs. (Jour. vol. 19. p. 727.)

In consequence of this determination, a particular of the Limerick estate was made by Sir William Barker's agent, and published, in order to a sale ; but the appellant objecting thereto, as not being made on sufficient grounds to ascertain the truth thereof, the Master refused to make the sale, till the lands should be surveyed. But a petition being preferred in the name of Sir William Barker, grounded on an affidavit of Thomas Ivers the respondent, complaining, that the Master did not make the sale ; it was ordered, that the Master should proceed to sell the said lands ; and accordingly, on the 27th of July 1715, the sale was had ; when the appellant offered £400, and the respondent Ivers bid £21,410, which being £10 more than the appellant offered, Ivers was declared the purchaser.

But Ivers neglecting to pay his purchase-money, the appellant moved the Court, that the purchaser might pay his purchase-money, or that the sale should be discharged ; but that motion was refused.

The appellant afterwards took an assignment of part of the mortgage decreed to be made : and upon a petition preferred by Ivers, in the name of Sir William Barker, on the 23d of December 1715, ordered, that the purchaser should pay what was due on the mortgages, to the appellant and Riggs ; and that thereupon he should have the possession of all the purchased lands ; although the appellant insisted, that he ought not to have such possession, until he paid the purchase-money.

The appellant, conceiving himself aggrieved by this order of the 23d of December, by which he was to account, and give Ivers the possession of the lands, before he paid his purchase-money ; did not comply with, but petitioned against it, praying, that the purchaser might pay his purchase-money, before he took [130] possession. Notwithstanding this application, process of contempt was ordered against the appellant, and he was thereupon forced to give possession of the lands to Ivers.

The respondent Ivers, to avoid paying the money into Court, obtained an order for part of it to such persons, as Sir William Barker should certify were his creditors, though not mentioned as such in his answer ; and accordingly Ivers (as it was alleged) paid such creditors several sums of money, and also paid Sir William Barker or his agent, £4675 7s. but which payments, it was conceived, were not intended by the decrees affirmed by the House of Lords : however, Ivers never put any part of the purchase-money into Court, except £1000 deposited at the time of the sale.

The appellant having in the year 1710, served Sir William Barker with the said writ, (on which service he could not proceed further, being stopt by Sir William Barker's bill of review and appeal,) he, on the 6th of June 1716, obtained an order for an attachment against Sir William, for not obeying those decrees. But on the

25th of the same month, this order for the attachment was set aside; because grounded on an affidavit made so long before as the year 1710, being the time when Sir William was served with the decrees. The appellant therefore, was under the necessity of taking out a new writ of execution under the Great Seal, and to send a messenger into England to serve Sir William Barker with it: but he absconding, the appellant could not get him served therewith. The appellant then obtained an order, for the service of the said writ of execution, at Sir William Barker's lodgings, should be of good service; which being accordingly done, and the decrees still not obeyed, the appellant, on the 16th of July 1717, obtained a sequestration against Sir William Barker, with which he served Darby Egan Esq. Sir William's agent, and also the purchaser.

On the 20th of November following, the respondent Ivers, still to delay payment of the purchase money, filed a bill against Sir William Barker and the appellant demanding a great allowance out of his purchase-money, upon pretence of errors in the particular of the said estate; to which the appellant answered, and insisted he ought not to have any allowances on that account, because it was his own fault to hasten the sale; that the appellant was not concerned in, or privy to, the making of the particular, and offered that Mr. Ivers should waive his purchase, and that the appellant would stand as the purchaser in his place; but Sir William Barker was not required, or forced by any process, to answer this bill, though he lived near two years after it was filed.

On the 19th of May 1719, Sir William died, having made his will, and appointed the respondent Letitia, an infant under the guardianship of the respondent Ivers sole executrix; and on the 11th of July following, Ivers revived the suit against said Letitia, who, by her answer, submitted to the judgment of the Court.

[131] On the 16th of January 1719, the appellant filed a cross bill against Ivers, praying, that he might pay his whole purchase-money, according to the decree affirmed by the Lords, notwithstanding his pretence of errors in the particular; that the appellant might have the benefit of the said affirmed decrees, by him £500 per ann. in lieu of the Booking estate, and £300 per ann. purchased for out of the purchase-money, pursuant to the marriage agreement; or that Mr. Ivers might waive his purchase, which the appellant was willing to take in his stead, at the price he was to pay for the same.

To this bill Ivers put in an answer, confessing all the material allegations therein, but alledged, that Sir William Barker, on the 15th of February 1717, after the services of the aforesaid sequestration, had conveyed to him all the surplus of the purchase-money, which was payable to him, in consideration of Ivers's pretence of losses by the mistakes in the particular.

On the 20th of February 1719, this cause was heard, when it was referred to the Master to certify, whether any, and what errors were in the particular, and how the respondent Ivers was damnified thereby.

Accordingly, the Master, on the 24th of March 1720, made his report; and he certified that several of the lands were let for longer terms, and for less rents, than were subject to greater quit-rents, than what were stated in the particular, and also to a chief-rent not mentioned therein.

To this report both parties took exceptions, and on the 22d of May 1722 the causes were heard; when the Lord Chancellor was pleased to decree, in the cause wherein Ivers was plaintiff, that the residue of the purchase-money which would belong to the late Sir William Barker, after performing the decrees by which the said lands were sold, should go to the said Ivers, in full satisfaction of all mistakes and deficiencies in the posted particular. And in the cause wherein the appellant was plaintiff, his Lordship decreed, that Ivers should account with the appellant for the purchase-money of the Limerick estate, together with the interest thereof to be computed from the time of Sir William Barker's death; and Ivers was allowed what money he had paid in discharge of the said purchase-money, pursuant to the said decrees, and subsequent orders of the Court; and it was referred to the Master to settle the account accordingly.

But upon the petition of Ivers, both causes were, on the 27th of June 1722 heard; when his Lordship was pleased to decree, in the cause wherein Ivers was plaintiff, that the residue of the purchase-money, after payment of Frederick Rigg's mortgages, and other demands decreed to them, and over and above the



mentioned in Sir William Barker's answer, amounting to £7000, and over above such sum as should be necessary to purchase £300 per ann. in England, for the use of the appellant, according to the marriage-articles and the decree in [132] 1709, was the money of the late Sir William Barker, and that it belonged to the said Mr. Ivers. And on the same day, his Lordship was pleased to decree, in the cause wherein the appellant was plaintiff, that the appellant should have £300 per ann. purchased for him in England, according to the articles and decree in 1709, out of the said purchase-money; and it was referred to a Master to settle an account of what was due to the appellant for £300 per ann. English money, with interest from the time of the death of the said Sir William Barker, and to report what sum would be necessary to purchase the said £300 per ann. in England; and that the appellant should have interest for the same, till such purchase should be made: and it was further decreed, that the remainder of the purchase-money, after purchasing the said £300 per ann. should not be applied to disencumber the Bocking estate, and to make the same of the yearly value of £500; but that the appellant should be at liberty to prosecute the sequestration which he had obtained against the late Sir William Barker, in such manner as the course of the Court would allow; and that the said £300 per ann. and interest, should be paid to the appellant upon his executing conveyances to the purchaser, according to the decree in 1709: and that the appellant should account before a Master, for the profits which he had received out of any part of the estate, since the said purchase was made; and that the same should be allowed the said Ivers, in the account of the £300 per ann. and interest.

From these decrees the appellant appealed (C. Wearg, T. Lutwyche), because he was thereby to have but £300 per ann. under his father's settlement; whereas it was expressly agreed by the marriage-articles, that he should have the Bocking estate of £500 per ann. clear of all incumbrances, and £300 more purchased in England, making in all £800 per ann. That Sir William Barker submitted, by his answer, that his estate in the county of Limerick should be sold; as well to discharge his debts on the Bocking estate, as to purchase the £300 per ann. in England. That by the decrees in 1702 and 1707, affirmed by the Lords, Sir William was to perform his marriage articles, and the purchase-money for the Limerick estate was to be brought into Court; to the intent, as the appellant conceived, that thereout the articles should be specifically performed. That the order of the 23d of December 1715, and the orders subsequent thereto, were contrary to the decrees of 1702 and 1707, whereby the purchase-money was decreed to be brought into Court; and which decrees having been affirmed as aforesaid, it was conceived, the Lord Chancellor of Ireland could not controul or dispense with them. That all the purchase-money not being paid in pursuance of those decrees, was so attached by the sequestration, as that the same could not be taken out of Court, until the decrees against Sir William Barker were performed; and yet, the Lord Chancellor had decreed great part of the said purchase-money to the respondent Ivers; and giving the appellant leave to prosecute his sequestration, after the money [133] sequestered was decreed to the respondents, seemed to be of no avail, but putting the appellant to unnecessary charge and trouble; and to hazard the payment of that money, which the Court had power, and ought to have decreed the purchaser to pay, for the benefit of the appellant. That the decrees now made, would engage the appellant in a new and long account; whereas he apprehended, that after having been twenty-five years in the Court of Chancery, to get his mother's marriage-articles performed; and after having spent therein more than the value of what was decreed to him, it was high time to put an end to the cause, by decreeing him an immediate satisfaction for his demands: it was therefore hoped, that the said decrees would be reversed, and the respondent Ivers ordered to account for the whole £21,410, and the interest thereof, from the time of his having possession of the purchased premises, and without any regard to his pretended deficiencies; that thereout, £800 per ann. in England should be purchased for the appellant; and that he should be allowed the same from his father's death.

On the other side it was contended (P. Yorke, C. Talbot), that if the estate had been fairly posted, it could not have honestly sold for so much as would pay the £7000 debts, and purchase the £300 per ann. and this the appellant admitted by his counsel, on the re-hearing in 1707, and also on hearing the former appeal: besides, the appellant was in the possession of the whole estate, made leases, and received

the profits for many years before the sale, and yet he suffered, if he did not contribute to the frauds in the particular; and being disappointed in his design of buying the estate at an undervalue, he, and others by his means, *canted it up*, till the respondent was thereby induced to bid above £8000 more than the value; the whole estate though posted at £1152 3s. per ann. being then let, and mostly by the appellant for no more than £668 19s.; so that it was over-valued above £4000, besides quit rent and Crown-rent; which being deducted out of the yearly value posted, there remained clear to the respondent, but about £630 per ann. and which, at twenty years purchase, being the price given by the respondent, amounted only to about £12,700 which would not pay the £7000 debts, and purchase the £300 per ann. That the respondent, at all events, ought to have an allowance for the deficiencies in the particular, out of the purchase-money; even if the estate had not been sold for so much as would pay the £7000 and purchase the £300 per ann. And his relief would have been so, had not the Court decreed he should be satisfied with the surplus conveyed to him by the late Sir William: and by this, the respondent would lose about £600, not being decreed a remedy for the deficiency, beyond the money particularly signed for that purpose. That the Court could not regularly decree the Limerick estate to be liable, but according to the late Sir William's answer; which was to pay £7000 debts then due, and purchase the £300 per ann. and could only direct Sir William to make good the Bocking estate, in a manner [134] merely personal, but not so as to bind the land, or the purchase-money thereof; and this decree, making it only a personal charge, having been affirmed by the Lords, it was conceived to be improper in the appellant, to attempt to have it altered, or extended further, disencumbering, or making good Bocking, out of the Limerick estate, or its purchase-money. That the intent of the decree in 1702, for bringing the money into Court, plainly appeared to be only, that the debts due to the creditors might be ascertained and thereout satisfied: and as to the other part, for shewing cause why the residue should not go to disencumber Bocking, it was never made absolute, but altered by the decree of 1707. That it was not only unreasonable, but highly unjust, that the respondent should quit his purchase, having laid out above £3000 in improvements, and sold £500 per ann. of his own estate, and borrowed other sums at £8 per cent interest, to pay the purchase-money; and having also expended about £1300 in suing for justice, and defending his title to an estate, in every respect fairly chased by him under a decree: and therefore it was hoped, that the orders and decrees would be affirmed, and the appeal dismissed with costs.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the several orders, proceedings and decrees complained of, should be reversed; and the judgment goes on in these words; "And whereas the appellant, by virtue of his father's marriage-articles, and of the said several decrees affirmed by this House aforesaid, on the said 23d of June 1714, ought, from the time of his father's death to have had and enjoyed an estate in Bocking, in the county of Essex, of the full value of £500, free from all incumbrances, and also one other estate of £300 per ann. which should have been purchased in England, and settled in pursuance of the said marriage-articles and decrees affirmed by this House; and upon the decease of his father, would have become tenant in tail in possession of such several estates, had the said Bocking estate been disencumbered, and the said £300 per ann. purchase-money settled according to the said marriage-articles, and decrees affirmed by this House as aforesaid; and it now appears to this House, that £300 per ann. or any part thereof hath never yet been purchased, according to the said marriage-articles and decrees; and that the said appellant hath never yet had, nor can ever have the benefit of the said Bocking estate, or of any part thereof, by reason of the said incumbrances thereupon, precedent to the said marriage-articles; it is therefore hereby further ORDERED and ADJUDGED, that no such purchase of £300 per ann. shall at any time hereafter be made; but that in lieu thereof, and of the said Bocking estate, so much money shall be paid to the appellant or his heirs, or to his or their assigns at any such time and place in London, as the said Court of Chancery in Ireland shall appoint for the payment thereof, out of the money or lands herein after declared to be subject [135] to the payment thereof, as far as the same will extend, to answer and make good the value of £500 per ann. and £300 per ann. computed at twenty-two years purchase; that is to say, the sum of £17,600 and the arrears

£500 per ann. and £300 per ann. from the death of the said appellant's father, until such time as the said sum of £17,600 and the said arrears shall be paid as aforesaid; for or towards which satisfaction, it is hereby further ORDERED and ADJUDGED, that so much of the purchase-money of £21,410, agreed to be paid by the respondent Ivers for the Limerick estate in question, as exceeds what the respondent Ivers hath really paid to the creditors of the said Sir William Barker the father, in pursuance of the said decrees, affirmed by this House as aforesaid, in discharge of such debts as were owing by the said Sir William Barker the father, and legally affected the said Limerick estate, at the time of putting in the said Sir William the father's answer, on the 21st day of May 1701, to the said bill, together with Irish interest for such part of the said purchase-money, exceeding what shall appear to have been so paid as aforesaid, shall be paid by the respondent Ivers, his heirs, executors or administrators, to the said appellant or his heirs, at such time and place as aforesaid; for which purpose, it is hereby further ORDERED, that the Court of Chancery in Ireland do forthwith order an account to be taken, of what hath been really and *bona fide* paid by the respondent Ivers, in pursuance of the said decrees affirmed by this house, in discharge of such debts of the said Sir William Barker the father, as were owing by him, and affected his Limerick estate, at the time of the putting in his said answer; and also an account to be taken of what shall be due for Irish interest, for the surplus of the said £21,410, which shall appear to remain due after such payment by the said Ivers, until satisfaction shall be made of such surplus, with Irish interest for the same, to such time as shall be appointed by the said Court at the request of the said appellant or his heirs for payment thereof as aforesaid; and that the said Court do further order, that such surplus of the said £21,410 above what shall appear, on such account, to have been so paid by the said Ivers, together with Irish interest for such surplus, to be computed as aforesaid, be paid by the said Ivers, his heirs, executors or administrators, to the said appellant, or his heirs, at such time and place in London, as the said appellant shall request the said Court of Chancery to nominate and appoint for that purpose: and it is hereby further ORDERED and ADJUDGED, that if default shall be made by the respondent Ivers, his heirs, executors or administrators, in payment of such surplus, and of such Irish interest for the same as aforesaid; the said respondent Ivers, and all persons lawfully claiming, by, from, under, or in trust for him, shall convey all his and their estate, right, title, and interest, in and to the said Limerick estate by him purchased, unto the said appellant and [136] his heirs; the said appellant or his heirs, upon such conveyance, paying to the said Ivers such sum and sums of money, as shall appear, upon the account herein before directed, to have been paid by the said respondent Ivers, in discharge of such debts of the said Sir William Barker as aforesaid; and so much as shall appear to be due on the other account herein before directed, for Irish interest to be computed as aforesaid, shall be adjudged and taken to be a satisfaction of so much thereof; and the said Court of Chancery is hereby directed to order the same accordingly, and to cause the recognizance entered into by the said appellant to be forthwith vacated, and also to order the appellant's costs to be taxed, for all the proceedings in the said Court of Chancery in Ireland, subsequent to the said affirmance by this House of the several decrees aforesaid, and such costs to be paid to the appellant by the respondent Ivers; and that the said Court of Chancery do give such further necessary directions as shall be just, for carrying this judgment into execution." (Jour. vol. 22. p. 374.)

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CASE 6.—CHARLES HANKES,—*Appellant*; THOMAS JONES and others,—*Respondents* [13th May 1756].

[Mew's Dig. xii. 820.]

A. on his marriage, covenanted that if his wife should die before him, leaving issue of their bodies, he would pay, grant, secure, or sufficiently settle to and for such issue, one third part of all his chattels, real and personal, which at the

death of the wife he should be possessed of, to be divided between them, if more than one, as he should direct. The wife died, leaving two daughters, and the husband, during the coverture, acquired some freehold leases for lives. Held, that these leases were included in the covenant, but that the daughters were not entitled to a division until after the father's death; which he was decreed to give security to make.

DECREE of the Irish Chancery REVERSED. See *ante*, Case 4.

The appellant, by articles dated the 26th of July 1703, made on his marriage with Ellen Loftus, in consideration of £300 to be paid him by Thomas Loftus, her father, by several instalments, within three years, covenanted, that if his wife should die before him, leaving issue of their bodies, he would pay, grant, secure, or sufficiently settle, to and for such issue, the like sum of £300, together with one third part of all his chattels, real and personal, money, plate, jewels, or any other goods of what nature soever, which at the death of the said Ellen he should be possessed of, to be divided between them, if more than one, as the appellant should direct. And if he should die before his wife, then that he would leave or sufficiently secure to her £300, together [137] with a fourth part of all his chattels, real and personal, and would grant, leave, or sufficiently secure to the issue of the marriage, the other three parts of such chattels, etc. to be divided between them, as the said Ellen in her discretion should think fit.

The marriage soon after took effect, and the appellant was then possessed only of one moiety of the town and lands of Skeheen, in the county of Roscommon, by virtue of a lease for 21 years, commencing the 1st of May 1692, at the yearly rent of £33 9s. with a covenant on the part of the lessor, to grant a further term for ten years, if he had power so to do. This leasehold estate, and the stock thereon, was then the whole of the appellant's fortune, and his interest by virtue of the said lease would have expired on the 1st of May 1723.

But in 1704, the appellant purchased a new lease in the lands of Skeheen, for three lives, renewable for ever, in consideration of one shilling per acre to be paid yearly, over and above the rent reserved by the former lease, which made the whole rent amount to £44 12s.

The only issue of the marriage were the respondents Susannah and Sarah. And in 1732, Susannah intermarried with the respondent Thomas Jones, without the appellant's consent; notwithstanding which, he at several times supplied them with divers considerable sums of money, goods and cattle, for their advancement; and also maintained them, their servants and horses, for several years, and educated their son for more than fifteen years, at a very great expence, to the amount in the whole of £1000 and upwards.

In 1738, the appellant obtained a lease for twelve years of the lands of Carrobans and Ronemankegh, in the county of Roscommon, of the then yearly value of £30, from one Edmund Winston; to whom the appellant having lent £100, Winston, for securing the repayment thereof with interest, executed a mortgage of the same lands to Thomas Contrainne, clerk, in trust for the appellant; but these lands being subject to a discovery upon the Popery acts, John Shiell, in trust for the appellant, did, to secure the appellant's debt, exhibit his bill in the Court of Exchequer in Ireland, praying to have the benefit of Winston's estate and interest in the said lands, then by him held by lease for ten years, granted by Christopher Talbot to Patrick Netterville, in trust for the said Winston, or his father.

On the 1st of May 1740, the appellant and respondent Jones entered into an agreement in writing, whereby the appellant agreed to pay the respondent any sum not exceeding £500, as the portion of the respondent Susannah; provided Loftus Jones Esq. brother of the respondent Thomas, would pay the said respondent twice as much without further reservation. And after reciting, that there were articles of intermarriage between the appellant and his then wife, whereby distribution was made of the appellant's personal estate, and that the appellant had acquired chattels real; it was agreed, that if the covenants of the said articles [138] should affect the said chattels real, the respondent Jones should have it in his choice, whether he would accept the £500 or abide by his articles. And the respondent agreed, that he would not give the appellant any molestation, or commence any lawsuit against

him during his life, on account of the said articles, or of any right or claim which the respondent might happen to have by virtue thereof.

In August 1741, the appellant's wife died, and in March following the respondents Thomas Jones and Susannah his wife, and Sarah, who was then unmarried, without the privity of the appellant, executed an agreement, whereby it was stipulated, that they should be entitled in equal shares to all money, goods and chattels, which the appellant was possessed of on the death of Ellen his wife.

In 1742, a decree was obtained in the before-mentioned cause in the Court of Exchequer, by virtue whereof the appellant was put into possession of the said lands of Carrobane and Ronemankegh, for the term which Winston then had therein. And in 1746 he purchased the inheritance of those lands for £1011 7s. 6d. and for that purpose borrowed £900 of Richard Hull Esq. upon securing to him a rent-charge affecting the appellant's whole estate.

In 1748 the respondent Sarah intermarried with one Thomas Isaac, whereupon the appellant paid them £500 as a marriage portion; in consideration whereof they, on the 18th of March 1748, executed to the appellant a release of all their demands under his marriage articles.

In March 1749 the appellant married Margaret Kirkpatrick, and to avoid any controversies which might afterwards arise between him and the respondents his daughters, he, in January 1750, exhibited his bill in the Court of Chancery in Ireland against them, and also against the other respondent Thomas Loftus, as grandson and heir of Thomas Loftus Esq. father of the appellant's late wife Ellen, who had the custody of the said marriage articles; praying that the respondents Jones and wife might account for the money, cattle and other things, to the amount of £1000 and upwards, with which the appellant had supplied them, and for their maintenance, and the maintenance, clothing and education of their son for several years, to a very large amount, and for an account of two bond debts due to him from the respondent Thomas Jones, and that they might release their demands under the said articles.

The respondents respectively answered the bill, and Jones and his wife admitted that the appellant had advanced them several sums of money, and the other matters aforesaid; but insisted that what had been so advanced was to be considered in the light of presents from the appellant. And in April 1751, the respondent Jones and his wife exhibited their cross bill against the appellant, and also against the other respondents, for a specific performance of the appellant's marriage articles, and a discovery of [139] the chattels real and personal, of which he was possessed at the death of Ellen his late wife, and the produce thereof, and the profits of Skeheen, Carrobane and Ronemankegh; and that £300 and interest, and their share of a third part of all the said premises should be forthwith paid or secured, according to the said articles.

The appellant by his answer to this cross bill insisted that the respondents Jones and wife had no right to any part of the lands of Skeheen, as the appellant had a freehold and not a chattel interest in those lands when his wife died; and that they were not entitled to any share of the inheritance of Carrobane and Ronemankegh, he having purchased the inheritance as aforesaid; and also insisted that the said respondents ought to account with the appellant for the money, goods and cattle, where-with he had supplied them, and for the maintenance of themselves and their servants; and also for the maintenance, clothing and education of their son; and that they were over-paid all their demands, which they might have been entitled to under the said marriage articles.

Thomas Isaac, the respondent Sarah's first husband, having died pending this suit, she intermarried with the respondent Gilbert Allison; and issue being joined, and publication passed in both causes, they came on to be heard on the 8th of July 1754, and several subsequent days, before the Lord Chancellor of Ireland, and on the 20th of that month it was decreed, that the respondents Jones and his wife, upon the death of Ellen her mother, on the 12th of August 1741, by virtue of the said articles, became entitled to £150 with interest from her death, and to a sixth part of the chattels real and personal which the appellant was possessed of when she died, and to interest for the same from that time, and to a sixth part of the estate and interest which the appellant then had in the lands of Skeheen, by virtue of the lease for lives renewable for ever, taken by the appellant in the year 1717, before the expiration of

the term which he had in the said lands of Skeheen, at the time of entering into the said articles; and it was ordered, that the bill of discovery in the pleadings mentioned, and the decree obtained thereon by John Shiell, in trust for the appellant, should be a trust as to a sixth part of the estate, term and interest in the lands of Carrobane and Ronemankegh thereby decreed, and as to a sixth part of the rents and profits thereby recovered, for the use and benefit of the respondents Jones and his wife, they contributing a sixth part of the expence the appellant was put to in prosecuting such suit, and obtaining the said decree; and it was further ordered, that the purchase made by the appellant of the rent and reversion of the said lands of Carrobane and Ronemankegh, as to a sixth part thereof, should be a trust for the respondents Jones and his wife, they paying also one sixth part of the purchase-money agreed to be paid for the same; and it was referred to a Master to state and settle an account of what remained due from the appellant for the [140] said £150 and interest, and the value of the sixth part of the said chattels real and personal, of which the appellant was possessed at the death of his said wife, and to compute interest thereon from her death, and to take an account of the rents, etc. of the lands of Skeheen, from the death of the said Ellen, and to whose hands they came, and what the said lands were or might have been let for yearly to a solvent tenant, without wilful default, and to report what the said lands of Carrobane and Ronemankegh might have been let for yearly, without wilful default, to a solvent tenant, from the time of obtaining the said decree, to the time the appellant purchased the rent and reversion thereof; and for how much the same had been, or without wilful default might have been let yearly to a solvent tenant, from the time of making the said purchase, and who received the rents during the said respective periods of time; and whether any and what sums of money were paid by the appellant to the respondents Jones and his wife, on account of all or any of the sums or estates to which they became entitled as aforesaid; and to report specially the consideration paid by the appellant, for the purchase of the rent and reversion of the said lands of Carrobane and Ronemankegh, and by whom the purchase-money was paid, and what remained unpaid; and also to report the costs of prosecuting the said bill of discovery, and obtaining the said decree.

The appellant conceiving himself aggrieved by this decree, appealed from it; contending (W. Murray, C. Yorke), that upon a fair construction of the words of the articles, he had a right to the use of the £300, and the third part of the chattels, etc. during his life; and that he was not compellable to pay the respondents his children any part thereof while he lived, but that the words and intention would be fully complied with, by securing the same to be paid to his children in such shares and proportions, and at such periods of time as he should think fit. That his wife's fortune was too inconsiderable to make her children become purchasers of a greater settlement, especially as this fortune was under the articles agreed to be paid by several instalments of £50 each, and at such distinct payments as that it could not be fully discharged in less than three or four years after the marriage. That the parties to the articles had themselves clearly and expressly declared, that the provision intended to be made for the issue of the marriage, was to arise out of the chattels real and personal only; and therefore no freehold, or estate of inheritance was or could be within their view or intention; consequently the decree ought to be varied with regard to the lands of Skeheen, of which the appellant had on his marriage only a lease for years; that lease would have expired in 1723, if the appellant had not long before the death of his wife purchased the freehold, by taking a lease for lives renewable for ever; and which so entirely changed the nature of his estate and interest in the lands, that it immediately became not liable to be affected by the covenant. That the appellant being at the death of his wife entitled to the lands of Carrobane and [141] Ronemankegh, for the residue of a term of twelve years only, at a rack rent, the respondents had no right to any interest therein, other than a sixth part of the same for the remainder of that term, and to a sixth part of the £100 secured by mortgage from Winston; nor ought they to be decreed to any chattel interest gained under the bill of discovery, or to any share of the inheritance of the lands purchased after the death of Ellen, the appellant's late wife. For as to the chattel interest in Winston's lease, though the bill of discovery was filed in Ellen's lifetime, yet no interest vested in the discoverer till some time after her death, the decree being obtained in 1742: and as to the purchase of the inheritance, it was not only an acquisition made several

years after her death, but could not be considered as within the meaning of the articles, unless the money advanced for it was part of the personal estate bound by them, but which was not pretended.

On the other side it was insisted (R. Henley, C. Pratt), that the respondents rights were founded on marriage articles, which being executory in their nature, are always carried into execution according to the intention of the contracting parties, and have ever received a liberal construction in favour of the wife and children. The intention of the parties to these articles was, that all future acquisitions and improvements of their fortune should be bound by them; and the only reason why all the husband's lands of inheritance were not secured by the articles, was the small likelihood or expectation at that time, that he would ever be able to acquire so considerable a property: for if such an acquisition had been thought probable at the time of the marriage, and worth inserting in the articles, the provision which was meant to be co-extensive with the husband's property, would certainly have comprehended that. And as to freehold leases, however they happened to be omitted in words, they were certainly meant to be comprised under the description of chattels real, which no one could doubt when they saw the appellant himself by his own acts, all along considering the articles in this sense. Upon this notion he obliged the respondents to join in the grant of the annuity to Mr. Hull; and upon the same notion by the agreement of May 1740, in the lifetime of Ellen, and before the right of the respondents to any fortune became vested, he obliged the respondent Thomas not to demand the share which his wife might be entitled to, till after the appellant's decease. In this case, therefore, besides all other obvious arguments which arose in favour of the children, there was the authority of the appellant himself, to give the articles a liberal construction for his children against himself. By these articles, the appellant became a trustee for his children in the strongest light, and therefore every act to defeat or prejudice their interest, must be in him a breach of trust of the grossest kind: he acquired the lease for lives in the lands of Skeheen by surrendering the term for years, of which there were then six years to run, and by an advanced rent; surely then, it was but just and reasonable, that such new acquired interest [142] should pursue the nature of the old, and come in lieu of what he had extinguished by his own act: the consideration of this lease plainly arose from what was subject to the articles, it should therefore be considered as a resulting trust for the wife and children, in proportion to their respective interests in the old lease; and if there was a resulting trust for the benefit of the children at the creation of the new lease, it always continued; nor could it be material to this purpose, whether the death of the wife happened in 20 years or 20 days after the alteration of the leases. As to the lands of Carrobane and Ronemankegh, the appellant's first interest in them was a chattel real, subject to the articles; the mortgage on Winston's term was the same; and had the appellant foreclosed the equity of redemption, that term would have been subject to the articles as the mortgage was. The bill of discovery was but another method to obtain the same end, and to make that title good, which might otherwise be defeated by another discoverer: and though the appellant's title was not perfect and complete by filing the bill of discovery, until the decree obtained after his wife's death; yet that decree when obtained had a retrospect, and the appellant thereby became entitled to the meane profits from the time of filing the bill, at which time it must certainly be considered as part of the trust. And as the purchase of the rent and reversion might be considered as an extension or enlargement of the former interest, it should be considered as subject to the same trust; and more especially, as the trust effects were made the security for the purchase money.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed: and it was DECLARED, that as between the appellant and the respondents, Jones and his wife, the articles entered into on the marriage of the appellant with Ellen his first wife, ought to be performed and carried into execution; and that according to the true construction and intent of the said articles, the respondent Susannah and her sister the respondent Sarah Allison, upon the death of the said Ellen their mother, became entitled to the sum of £300 in the said articles mentioned, and also to one third part of the value of all the clear personal estate (chattels real being therein included) which the appellant, or any other person in trust for him, was possessed of or entitled unto at the time of the said

Ellen's death, to be divided between the said respondents Susannah and Sarah, in such proportions as the appellant in his discretion should think fit; and that the same ought to be paid to them immediately after the death of the appellant, unless he should pay or make satisfaction for the same in his lifetime: and it was therefore ORDERED and ADJUDGED, that it should be referred to a Master of the Court of Chancery in Ireland, to take an account of all the personal estate (chattels real being included) which the appellant, or any other person in trust for him, was possessed of or entitled unto at the time of the death of Ellen his first wife; and to take an account of all the debts which were [143] really and *bona fide* due and owing by the appellant at the same time, and to deduct the same thereout; and that the Master should enquire into and state what was the amount of the value of the appellant's clear personal estate, after such deduction made as aforesaid: and it was also DECLARED, that the interest either in law or equity, acquired by the appellant in the lands of Carrobane and Ronemankagh, under the decree obtained by John Shiell in trust for the appellant, during and until the expiration of the term granted therein by Edmund Winston to the appellant, and also the lease for lives renewable for ever of the lands of Skeheen, ought to be deemed part of, and be brought into the account of the said personal estate, within the true intent of the said articles; and that the appellant having compounded with his daughter the respondent Sarah, for the share which she was entitled to under the said articles, without making a regular division thereof, the respondent Susannah ought to be deemed entitled to one moiety of the said sum of £300 and to one sixth part of the value of the clear surplus of the said personal estate, to be paid or secured as aforesaid. And it was therefore ORDERED, that the appellant should give security, to be approved of by the Master, to pay to the respondents Thomas Jones and Susannah his wife, the moiety of the said £300 and so much money as one sixth part of the clear residue of such personal estate should amount unto, within six months after the appellant's decease, with interest for the same from the time of his death: and that in taking these several accounts, the Master should make to all parties all just allowances: and that all parties should be examined upon interrogatories, as the Master should direct; and that all books of accounts, deeds, securities, writings and papers relating to the matters in question, in the custody or power of any of the parties, should be produced before the Master upon oath, as he should direct: and that no costs of this suit should be paid on either side to this time; but that the consideration of the subsequent costs, and of all further directions should be reserved, until after the Master should have made his report; and that any of the parties should be at liberty to apply to the said Court of Chancery in Ireland, in the said cause, as there should be occasion: And it was further ORDERED, that the said Court of Chancery should give all proper directions for carrying this judgment into execution. (Jour. vol. 28. p. 598.)

[144] CASE 7.—GEORGE BOWES,—*Appellant*; Earl of SHREWSBURY and others,—*Respondents* [10th February 1758].

[Mews' Dig. iv. 331, 350; xii. 99.]

In what case money covenanted by Marriage Articles to be laid out in lands, and not laid out, shall still be considered as money, and go to the personal representative of the party entitled to the money, in prejudice of the heir.

A papist, by marriage-articles, previous to the disabling statute 11th and 12th Will. 3 [c. 4. repealed by 9 and 10 Vict. c. 59, s. 1], covenants to lay out £12,000 in the purchase of land. The money is never laid out; and therefore shall be still considered as money, and go to the personal representative, instead of the heir, though that heir be a protestant.

DECREE of the Commissioners of the Great Seal AFFIRMED.

The point on which cases of this nature in some measure differ, seems to be the following, *i.e.* whether the mere circumstance of the fund remaining in the shape of money, in the hands of the person absolutely intitled to it in all events, shall of *itself* be evidence of the party's intention to give it the quality of personal estate; (for the cases agree that any proof of such intention will conclude the question;) and *if not*, whether the heir has any equity



against the personal representative in this respect. See *Edwards v. Warwick, (Countess)*, 1 P. Wms. 171, and Mr. Cox's note thereon; *ante*, Ca. 2 of this title: *Chichester v. Bickerstaff*, 2 Vern. 295: *Lingen v. Souray*, 1 P. Wms. 172: *Lechmere v. Carlisle, (E.)* 3 P. Wms. 211, and Mr. Cox's note there: *Talb. 80: Guidot v. Guidot*, 3 Atk. 254: *Crabtree v. Bramble*, 3 Atk. 680: *Bradish v. Gee*, Amb. 229: *Hewitt v. Wright*, 1 Bro. C.R. 86: *Pulteney v. Darlington, (E.)* 1 Bro. C.R. 223: *Rashleigh v. Master*, 3 Bro. C.R. 99.

By articles, dated the 29th of March 1692, between Ann Lady Belasyse, relict and one of the executors of John Lord Belasyse deceased, of the one part, and John Talbot of Longford in the county of Salop, Esq. of the other part; reciting, that a marriage was agreed upon between the said John Talbot and the Honourable Catherine Belasyse, one of the daughters of the said Lord and Lady Belasyse; and that in consideration of such marriage, and of £14,000 secured to be paid, as therein after mentioned, unto the said John Talbot, for the marriage portion of the said Catherine, several of his estates, consisting of divers manors, lands, tenements, and hereditaments, in the counties of Salop, Gloucester, Hereford, Leicester and Warwick, were by him and others, by indenture tripartite, bearing equal date with these articles, settled and assured to himself for life; and then as to part, to the said Catherine for her life, in jointure, with remainders over. And further reciting, that Hugh Lord Viscount Cholmondley stood indebted to the estate of the said John Lord Belasyse in £6000, Thomas Brome Whorwood Esq. in £5100, and Thomas Whyte Esq. in £3000 upon several mortgages; she the said Ann Lady Belasyse, in consideration of the said marriage, covenanted, declared, and agreed, to and with the said John Talbot, his executors and administrators, that such mortgages for the said several sums, amounting to £14,100 should from thenceforth be holden by the several persons interested or estated therein, upon the following trusts; viz. as to £100, parcel of the said £5100, and as to the interest then due on all the said principal sums, upon trust, for the said Ann Lady Belasyse and the other executors of the said John Lord Belasyse; and as to the principal sum of £14,000, *resi*-[145]-due of such £14,100, and the interest from thenceforth to grow due for the same £14,000, in trust for the said John Talbot, his executors and administrators, for and in satisfaction of the said marriage portion.

"To this intent and purpose, nevertheless, and under this express agreement made between the said John Talbot and the said Ann Lady Belasyse, that £2000 only of the said £14,000, with the interest henceforth to grow due for the said £2000, shall be taken and applied for the sole use and disposal of him the said John Talbot, his executors, administrators, and assigns; and that the £12,000, residue of the said £14,000, shall, *with what convenient speed may be*, be called in: and the said John Talbot doth for himself, his heirs, executors, and administrators, hereby expressly covenant, promise, and agree to and with the said Ann Lady Belasyse, her executors and administrators, that he the said John Talbot, his executors or administrators, shall and will, *with what convenient speed may be, after the said marriage shall be solemnized*, call in the said £12,000, residue of the said £14,000 principal money, and dispose the same wholly in and for the purchase of lands, which shall be situate within the counties of Salop, Gloucester, Hereford, Leicester, Warwick, Chester, Stafford, or Worcester, some or one of them, the title whereof shall be approved by the said Ann Lady Belasyse, her executors or administrators, or her or their counsel learned in the law, and after such purchase made, shall and will settle the lands so to be purchased, to the uses herein aftermentioned; that is to say, to the use of the said John Talbot, for and during the term of his natural life, without impeachment of or for any manner of waste; and after his decease, to the use of the said Catherine, for the term of her natural life, in augmentation of her jointure; and after the determination of the said several estates limited to the said John Talbot and Catherine, to the use of the said Ann Lady Belasyse and Thomas Earl Falconberge and their heirs, during the natural lives of the said John Talbot and Catherine, and the life of the longer liver of them, upon trust, to support and preserve the contingent uses and estates thereof hereinafter limited from being destroyed or discontinued; and for that purpose, to make entries as occasion shall require; but nevertheless to permit and suffer the said John Talbot, during his life, and, after his

decease, the said Catherine and her assigns, during the term of her life, to have, receive, and take the rents and profits of the same premises, to his, her, and their own use and uses; and after the several deceases of the said John Talbot and Catherine, to the use of the first son and of all and every other son and sons of the said John Talbot, on the body of the said Catherine to be begotten, severally and successively, one after another, according to their seniorities of age, and priority of birth, and the heirs male of their several bodies issuing; the elder of such sons, and the heirs male of his body issuing, be-[146]-ing always preferred, and to take before the younger of such sons, and the heirs male of his or their bodies issuing: and for default of such issue, to the use of the said Ann Lady Belasyse and Thomas Earl Falconberge, their executors, administrators, and assigns, for the term of 500 years, without impeachment of waste, upon the trusts, and as a supplemental security, for the better and more speedy raising of the portions and maintenances intended for the daughter or daughters of the said John Talbot, to be begotten on the body of the said Catherine, in case there shall be a failure of issue male between them, as in the said indenture tripartite is mentioned; and under the like provisoes and agreements, touching the raising and payment of the said portions and maintenances, as in the said tripartite indenture is mentioned; and after the determination of the said 500 years term, to the use of the said John Talbot, his heirs and assigns for ever.

"Provided always, and it is declared and decreed, by and between the said parties to these presents, that the interest henceforth to grow due for the said £12,000 principal money, agreed to be laid out and disposed for the purchase of lands, as aforesaid, until the same shall be disposed, shall be had and taken by the said John Talbot and Catherine, and the survivor of them; and after their deceases (in case they shall both happen to die before such purchase made) by those *to whose use in remainder the lands so to be purchased are to be settled, as aforesaid*, according to the true intent of these presents; and as the profits of the said lands, so to be purchased and settled, are to be enjoyed, in case such lands shall be purchased and settled as aforesaid."

The marriage soon afterwards took effect; and Mr. Talbot, by a writing under his hand, dated 13th April 1692, acknowledged that the said £14,000 had been paid or secured to him, to his content and good liking; and he thereby released Lady Belasyse and the other executors of Lord Belasyse, from the said £14,000 and all demands concerning the same.

But before a proper purchase of lands was found, wherein to invest the said £12,000, an act of parliament passed in the 11th and 12th years of King William III. whereby it was enacted as follows; viz. "That from and after the 10th day of April 1700, every Papist, or person making profession of the Popish religion, shall be disabled, and is hereby made incapable to purchase, either in his or her own name, or in the name of any other person or persons to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, rents, terms or hereditaments, within the kingdom of England, dominion of Wales, and town of Berwick upon Tweed; and that all and singular estates, terms, and any other interests or profits whatsoever out of lands, from and after the said 10th day of April, to be made, suffered, or done, to or for the use or behoof of any such person or persons, or upon any trust or [147] confidence mediately or immediately, to or for the benefit or relief of any such person or persons, shall be utterly void and of none effect, to all intents, constructions, and purposes whatsoever."

It was a fact agreed upon, as well by the appellant as by the several respondents, to be allowed and taken for granted on both sides, in the present controversy between them, that the said John Talbot and Catherine his wife, at the time of the articles, were Roman Catholics, or persons professing the Roman Catholic, or popish religion, and so continued till the times of their respective decease.

Mr. Talbot and his wife had issue between them several children, who all died very young, in the lifetime of their father and mother. Mrs. Talbot died on the 11th of February 1737. Mr. Talbot survived her, and all their children, upwards of five years and a half, and died without issue, and intestate, on the 23d of June 1743; possessed of a personal estate to the amount of £12,000 and upwards, but not of any of the mortgages mentioned in the marriage-articles.

Gilbert Earl of Shrewsbury, after the decease of Mr. Talbot, obtained administration of his personal estate, as his only next of kin; and as such, by the statute of distributions was solely entitled to the whole of his personal estate, subject only to his debts and funeral expences.

Earl Gilbert, who was uncle of the present respondent the Earl of Shrewsbury, soon after obtaining such administration, duly made his will, and thereby directed the surplus of his personal estate to be divided into moieties; and gave one moiety to his nephew the present Earl, and his other nephews and nieces; and the other moiety to the respondent Maire, and made him sole executor. And soon after Earl Gilbert's death, Mr. Maire proved his will, and also obtained administration *de bonis non* of the said John Talbot.

The Earl of Shrewsbury and his family, though nearly related to Mr. Talbot, were only of the half-blood, and therefore his Lordship was not his heir at law; and for a considerable time after Mr. Talbot's death, it remained uncertain who was such heir; but it being discovered, that an ancestor of the appellant Mr. Bowes, about 200 years ago, intermarried with a daughter of the Talbot family, and there not appearing any claimant who seemed to stand nearer in point of heirship, the appellant, in Trinity Term 1753, brought his bill in the Court of Chancery against the respondents, insisting, that he was entitled to the benefit of the said articles, and to have a specific performance thereof; and praying, that the respondent Maire might lay out the £12,000 in the purchase of lands, and convey the same to him and his heirs, and pay him interest for the said £12,000 until such purchase; or otherwise, pay him the £12,000 out of Mr. Talbot's personal estate, with interest from his death.

To this bill the several respondents put in their answers, admitting that the £12,000 had not been laid out in the purchase of land; and the respondent Maire admitted assets, and said, that though he had heard of no person who appeared to him nearer than the appellant, in point of heirship to Mr. Talbot, yet did not know that the appellant was his heir at law; and therefore put upon him the proof thereof. And all the respondents submitted to the judgment of the Court, in case the appellant was such heir, whether he was entitled to have the £12,000 taken from the personal estate, and considered as land.

The appellant examined several witnesses to authenticate his pedigree, and in proof of his heirship; but no witnesses were examined on the part of the respondents; because the appellant had entered into a written agreement with them, for admitting that Mr. Talbot, at the time of executing the articles, was a Roman Catholic, or Papist, and continued to profess the Roman Catholic, or popish religion, to the time of his death.

On the 22d of February 1757, the cause came on to be heard before Sir Sidney Stafford Smythe, and Sir John Eardley Wilmot, two of the Lords Commissioners for the custody of the Great Seal; when their Lordships, after long debate of the matter, were clearly of opinion, that the £12,000 ought to be considered as money, and not as land; and that the heir at law of Mr. Talbot was not entitled to have it paid him, or to have the same laid out in a purchase of land; and therefore dismissed the appellant's bill without costs.

From this order of dismissal the present appeal was brought; and on the appellant's behalf it was argued (C. Yorke, G. Perrott), that by the marriage agreement, the specific money was made subject to the trusts; and in the judgment of a Court of Equity acquired, by force of the covenant, the nature and property of land, from the very instant of executing the articles. That as money thus bound by covenant to be laid out in land, is considered as land, many legal consequences must necessarily flow from that notion. Whether it remains in the hands of the covenantor, or be placed under the direction of trustees, the rules are the same: the remainder in fee will descend, and is deviseable as real estate; though it is never laid out during the life of the covenantor, and though all the uses of the marriage determine by the death of the wife and issue, and the covenantor himself happens to be the sole survivor, and entitled to dispose of the whole, either as land or money at his election, yet it shall go to his heir, and not to his executor, or administrator; unless, as owner of the remainder in fee, he has expressly declared his intention to vary the trust, and add the money to his personal estate. But in the present case, no express declaration of such intent appears; no acts, no words are proved which imply it. All the

issue of the marriage died in their infancy: the wife outlived her children, and at last the husband was the sole survivor; but neither by deed executed in his lifetime, nor by will, nor even by parole declaration, did any thing to vary the trust. If however, the disabling statute of [149] 11th and 12th William III. which makes Papists incapable of purchasing lands, was the ground of the decree; it was submitted, that the statute could never operate to make void or impossible an antecedent covenant or trust, for the purchase of lands, entered into for valuable consideration. Such a retrospect by construction, would not only be cruel in itself, but contrary to the rules of law. Lands actually purchased by a Papist before that law commenced, are clearly not within it; it would have been injurious to the vested rights of parties, and destructive of contracts for sale, and family settlements, to have acted otherwise. The like injury would be done to rights vested before the act, if money, bound by trusts in equity to assume all the qualities of real estate, were taken to be within it: and from hence it follows, not only that a Protestant wife, and Protestant issue, would be entitled to have the trusts performed, but that a Papist should not lose the benefit; for if a specific performance of the covenant or trust must be decreed, it must by the rules of equity be decreed *in toto*; and being lawful at the time when the covenant was created, the subsequent prohibition shall not disable the Papist from performing that covenant, though some of the trusts affecting the lands to be settled, might be beneficial to himself and his heirs.

Much weight was laid in the argument of this cause upon the words of the covenant, which give *convenient time* to invest the money in land; and it was said, that by virtue of those words, the covenantor having time during his whole life to make the purchase, and the disabling act intervening before any purchase was made, he was absolutely discharged by a parliamentary incapacity from the performance of his covenant. But it was submitted, that this reasoning could have no weight. If the covenant had directed the money to be laid out in land within six months, or any other short limited time after the marriage, and that time had elapsed before a purchase made, or the disabling statute had passed, the breach of it would have bound the assets of the covenantor at law, and the heir would have been entitled to damages against the executor, on the foundation of the covenant: and though the present covenant allowed *convenient time* to the covenantor, *i.e.* his whole life, so that he could not be charged for a breach of covenant at law; yet it must be understood in this qualified sense, unless hastened by the request of the trustee. Eight or nine years passed between the marriage-agreement, and the disabling statute; it was the neglect of the trustee, not to call for a performance before that law passed; and his negligence ought not to prejudice the *cestui que* trust, or affect the operation of the covenant in a Court of Equity. But supposing the covenant might be severable after the disabling statute, and was capable of being performed only in favour of Protestants, and not in favour of Papists, by an actual specific execution of the trusts, in purchasing lands under a decree; yet still, unless the covenantor had done some act to declare his intention to discharge the [150] descendible quality which the trust had given to the money, his heir might take it *quasi* by descent; and even if he were a Papist, the Court of Chancery might decree the payment of it to him, though that Court would not aid him by the sanction of a decree, to lay it out in lands; and this without the possibility of any inconvenience designed to be prevented by the statute, or apprehended in any one case ever adjudged upon it. If indeed, after payment of the money under such a decree, the popish heir should think fit to invest it in lands, he would do it at his own peril; and the disabilities imposed by law would have the same force against him, as if the money had been originally part of his own personal estate. And as there seemed to be no ground for contending, that the covenant was made void or impossible by the subsequent disabling statute, at least to every purpose; so neither was there any colour, from the disability imposed on the popish covenantor, to raise a presumption of his intent to consider the money as personal estate, so far as concerned the uses, which were within his own power. There is no instance in law, where the implied consent of every subject to an act of parliament, has been held to infer a mutual consent between contracting parties, to supersede actual preceding contracts, or an intention in any person beneficially interested in a particular trust, to renounce or alter that trust, without plain words, or necessary implication upon the act; and in this case, the policy of

the disabling statute was not advanced or supported, even if the appellant had been a Papist, as he was not, by changing the settled course of equity in favour of an heir against an executor, without such express declaration or acts of the covenantor, as would be expected in all other cases. It was therefore hoped, that the order of dismissal would be reversed; and that the respondent Maire would be directed to lay out the £12,000 in a purchase of lands, or pay the same to the appellant, with interest from the time of Mr. Talbot's death.

On the other side it was contended (C. Pratt, R. Clayton), that Mr. Talbot was not limited by the articles, to any precise time for laying out the money in the purchase of lands; and the disabling statute having passed before the money was actually laid out, he could not afterwards invest the same in land, to the uses agreed upon and specified in the articles. That the appellant could only claim by descent from Mr. Talbot, as his heir at law; and the ancestor being by the act disabled from purchasing lands, or taking any interest therein, his heir could inherit nothing in right of such heirship, nor take any thing by descent from such ancestor; it being an undoubted and invariable rule in law, that before the heir can in any wise be allowed or admitted to succeed, or be entitled by descent, he must first shew that his ancestor was actually seised, and died so seised. That it was not necessary to shew any express declaration by Mr. Talbot, that the £12,000 should be considered as money, and not as land: for after passing the act, it became impracticable for him to convert it into land; [151] and the operation of the act in disabling him to purchase land, and in altering the nature of the estate, was equally, if not more strong and effectual than any declaration which Mr. Talbot could have made. Besides, he must have thought it unnecessary to declare that it should be money, when the legislature had already in effect enacted, that it should so remain and be considered, and should not be invested in, or considered as land. But if it was necessary to shew any such consent or intention of Mr. Talbot, in the eye of the law, his consent as well as that of all other subjects, is supposed and considered as given to every act of parliament; and therefore Mr. Talbot, by passing this act, consented in the most binding manner, that the £12,000 should not be laid out in land, but remain in money. Further, Mr. Talbot from the time that the mortgages mentioned in the articles were paid off, till his death, never kept this £12,000 as a separate fund, but suffered it to be mixed and blended with his other personal estate; which was an additional proof of his intention, that the same should be deemed money, succeeded to as such, and go to his personal representative.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the order of dismission therein complained of, affirmed. (Jour. vol. 29. p. 230.)

CASE 8.—NAPHTALI FRANKS and others,—*Appellants*; JOSEPH MARTIN and others,—*Respondents* [11th March 1760].

[Mew's Dig. xii., 813. S.C. 1 Eden, 309.]

A. on the marriage of one of his daughters, covenants that she and her children should, after his death, divide with his sons, half a share of what he should *think proper to be inherited* by the most beloved of his sons. A. afterwards made his will, without leaving any thing to this daughter, or her children. Held, that the covenant was intended to operate only in the event of an intestacy.

DECREE of Lord Keeper Henley AFFIRMED.

The question arose on a Jewish contract of marriage, and is curious from that circumstance, but can scarcely be thought to form a precedent.

Mr. Moses Hart was in the year 1720, and for some years before, deeply engaged in buying and selling of stocks, in which business the greatest part of his fortune, which was at that time very considerable, was necessarily employed. About this period, Mr. Hart proposed a match, which afterwards took place, between Mr. Isaac Franks, who was then a considerable dealer in jewels, and worth about £80,000, and his eldest daughter Sincha, or Frances, who was then about fifteen years of age.

Mr. Hart, on the treaty about the marriage-settlement, was unwilling to [152] part with any considerable share of his estate, which was employed in so lucrative a way, and therefore proposed to Mr. Franks, to give him a present fortune of £6000 with his daughter, together with £600 for clothes, and to secure the payment of such additional fortune, as is mentioned in the following articles, for the benefit of the intended husband, and his wife, and their issue. Mr. Franks accepted the proposal, and accordingly articles of agreement in the Hebrew language, were entered into and executed by Moses Hart, Isaac Franks, and Sincha Hart, which articles being translated by a notary public, skilled in that language, are to the following effect:

"On Tuesday the 5th day of the month Sivan, in the year 5480, from the creation of the world, according to the way of reckoning we use here in the city of London. Before us the underwritten [witnesses] personally came and appeared Mr. Moses, the son of Naphtali Hart, deceased, and Mr. Isaac, the son of Naphtali Hart Franks deceased, who in order to confirm and corroborate these presents, did before us sign the same, as also the translation thereof, which was made from the Hebrew into the English language, in presence of the notary public, named Thomas Baky [Booking] both being of the same tenor and date, the only difference being, that the said translation, which they have likewise signed, is written in the English language, in order for them the better to understand the true meaning of the contents thereof. And these are the conditions mentioned with truth and justice, which are made, pursuant to the commands and statutes of our holy law, and the institutions of our rabbies of blessed memory. The first condition is as usual; the gentleman [the said Isaac Franks] did declare before us, that he doth intend to marry the maiden lady Miss Sincha, the daughter of the said Moses, with a wedding ring, and under a canopy, according to the law of Moses and Israel; and did say, by reason of the love and affection he doth bear for her, he is willing to make an addition to her marriage portion; whereupon we the underwritten witnesses took possession of him (the said Franks) by his signing these presents; and he did oblige himself to give unto her, the sum of nine thousand pounds sterling; and agreed also that all her paraphernalia, be the same of silver, gold or jewels, for the use or ornament of her person, and all her wearing apparel, and the furniture belonging to the house, do and shall belong unto her. This is the first condition. The second condition. It is declared and agreed, by and between the said parties, that if the said Isaac shall happen to depart this life, within the first year of his marriage, without leaving any issue, begotten on the body of his [said intended] wife, the said Sincha daughter of the said Moses, then and in such case, his said wife shall have but £6000 sterling, (being the sum of £6000 sterling, her father did give her,) and all the silver, gold, and jewels, belonging to her as aforesaid, and her wearing apparel and furniture [153] belonging to the house: and if the said gentleman shall happen to die after the first year of his said marriage, then, and in such case, his wife the said Sincha shall have the sum of £7500 sterling, and all the silver, gold, jewels, wearing apparel, and furniture abovementioned; but if the said gentleman shall happen to die after the expiration of two years, to be accounted from the time of his said marriage; then, and in such case, his said wife shall have the sum of £9000 sterling, and all the silver, gold, wearing apparel, and furniture belonging to the house. This is the second condition. Thirdly, if the said wife, Sincha, the daughter of the said Moses, shall happen to die within the first year of her marriage; then, and in such case, the said Isaac shall be obliged to return the marriage portion, being the sum of £6000 sterling, and all her wearing apparel and paraphernalia, which her father the said Moses did give her; and if the said wife Sincha shall happen to die in the second year after her said marriage; then, and in such case, the said Mr. Isaac shall be obliged to return the sum of £3000 sterling, and all her paraphernalia and wearing apparel, which her father did give her; but if the said wife Sincha shall die after the expiration of two years; then, and in such case, the said Isaac shall be free, and shall not be obliged to return to her father the said Moses, his heirs or assigns, any thing whatsoever, agreeable to our law; which is, that the husband doth inherit the marriage portion brought by his wife, which said law is agreeable to the law received on Mount Sinai. This is the third condition. The fourth condition. The said Mr. Moses spontaneously of his own accord, and without the least compulsion whatsoever, but heartily with a willing mind, and after mature deliberation did oblige himself, say-

ing in manner following; I do take upon myself as an absolute debt, and will that the same shall be upon me, and upon my heirs after me, as an absolute debt, that my children after my decease shall perform all the articles herein mentioned; that my said daughter Sincha, the intended wife of my intended son-in-law, Mr. Isaac, the son of Mr. Naphtali Hart Franks deceased, he and her children begotten by her said husband the said Mr. Isaac, shall divide with my sons, half a share of a son, that is to say, all what I shall think proper to be inherited by the most beloved of my sons, my said daughter and her issue shall inherit half a share of a son; and my said intended son-in-law shall be curator and guardian of her share, which she shall so inherit from me in his lifetime; and after my decease, I have conditioned and obliged myself in this express manner, that my daughter Sincha, and her issue, and her said husband shall inherit half a share of a son, exclusive of the real estates, houses and lands, which I have purchased to this day, in which my said son-in-law and daughter shall not have any share or inheritance, but the same shall all belong to my sons only. And my meaning and intention likewise is, that if when God shall be [154] pleased to take me out of this world, any of my daughters shall happen to be spinsters and unmarried; then, and in such case, each and every of my said maiden daughters shall first of all take their portion of £6000 sterling, and £600 sterling more for clothes or apparel, for her or their share out of the whole estate which I shall die possessed of: And the reason why they shall so take first the said sums, is, because I now give my daughter Sincha the [intended] wife of my said [intended] son-in-law, Mr. Isaac Franks, £6000 sterling, for her marriage-portion, and clothes or apparel to the amount abovementioned: and after my said unmarried daughters shall have received the same, then the rest, residue and remainder I shall die possessed of, shall be divided in manner following: That is to say, to my sons two shares, and to the gentleman my [intended] son-in-law, and my daughter Sincha, and her issue, and the rest of my daughters, to each of them half a share of a son as aforesaid, exclusive of the real estates, houses and lands, I am at this present time possessed of: and my meaning and intention also is, that if my said daughter Sincha shall die without leaving any issue, then, and in such case, my said [intended] son-in-law shall have no claim or demand upon me, or upon my children: And if my said daughter shall die leaving issue, and afterwards the said issue shall also die, then, and in such case, after the death of my said [intended] son-in-law Mr. Isaac Franks, the sum which my said [intended] son-in-law, my daughter and her issue, shall have inherited, shall be and belong to me, and my children and heirs for ever, for their inheritance; and this is expressly so conditioned, in order that my estate may not be lessened upon that account. All which said conditions they the said parties [to wit] Mr. Moses, the son of Naphtali Hart deceased, and Mr. Isaac, the son of Mr. Naphtali Hart Franks deceased, have bound and obliged themselves to perform. And thereupon we [the said witnesses] on the part and behalf of the said woman, have taken possession of the said parties, by a proper instrument for taking possession, without ambiguity or reservation, and not as if it was a copy of an agreement, but an absolute one, annulling and making void any protests or writings, which do or shall contradict these presents, in the same terms our rabbies make use of to annul protests, etc. and all is right, strong and binding."

Two parts of these articles were written in Hebrew, and in the character made use of among the German Jews, by Aaron Hart, head rabbi of the German Jews synagogue in London, and brother of the said Moses Hart, who was a German Jew, upon paper duly stamped, and were signed, sealed and delivered by the parties, and *Kinyan*, or possession taken thereon, which is a ceremony used among the Jews in the obligations which they mean to make the strongest and most binding. And these deeds were executed, and the ceremony performed, in the presence of Jehiel Michael, the son of Moses Joseph, reader to the synagogue of London, and Samuel, the son of Judah Leb, clerk to the said synagogue, [155] both of whom subscribed their names as witnesses to the said deed, and the contents of it, and one of the parts of the deed remained with the father Mr. Hart, and the other with the husband Mr. Franks; but the English translation referred to by the articles, as having been signed by the parties, was not to be found, and it was doubted, whether any such was ever signed or executed, as a parchment ingrossment unexecuted, and with many blanks in it, was found after the death of Mr. Hart, among Mr. Isaac Franks's papers, which seemed to agree in substance with the translation since made of the said articles.

At the time the above articles were entered into, Mr. Hart had only one son living, named Hyam, who was then about ten years of age, and four daughters, viz. the said Sincha, or Frances, his eldest daughter, Judy, Bilah, and Rachael.

Mr. Moses Hart was a German Jew, and Mr. Isaac Franks the son of a German Jew; and the above contract so entered into between them, was the usual marriage-settlement between German Jews, among whom it is common, on the marriage of a daughter, to secure to her or her issue, a share of their fortunes in proportion, or with reference to the share of a son, so that in case of intestacy, the estate of the father shall be considered as divided among his children, in such manner, that the son or sons, if any such shall be living at the death of the father, shall take double the share of a daughter; and if the father shall by his will give to any son more than he would have been so entitled to in case of an intestacy, then the daughter or her issue shall have a moiety of such larger share; and if there shall be no son living at the death of the father, then she or her issue shall be entitled to an equal share with the other daughters, considering the estate as to be divided among them.

On the 31st of May 1720, the marriage was solemnized by Aaron Hart, the rabbi, the said Moses Hart's brother; and it being usual to read over and explain such marriage contracts in the presence of the subscribing witnesses, to the parties who declare their assent or agreement to the contents thereof, the same was done in the present case, and the said Aaron Hart, who wrote over the two parts thereof to be executed, was perfectly skilled in the Hebrew language; and Moses Hart himself also understood that language, and had a counter part of the articles executed by all the parties in his custody, from the time of the execution thereof to the time of his death; and the same was, upon his death, found among his papers by his executors, and was produced by them at the hearing of the causes aftermentioned.

There was issue of this marriage Henry Isaac Franks, and the appellant Phila, the only two children of the said Isaac Franks and Sincha his wife.

In 1723, Judy, Mr. Hart's second daughter, intermarried with Mr. Elias Levy, to whom he gave the same fortune as Mr. Isaac Franks had with his wife; and in 1743, Bilah, his third daughter, intermarried with Aaron Franks, who being a gentleman of large fortune, and in great esteem, Mr. Hart, in order to engage him to marry his daughter, gave him £10,000 for a portion, and some time after added £4000 more to Mrs. Levy's fortune, to make her equal with Bilah, the wife of the said Aaron Franks; but he gave nothing more to Sincha, as she was so well provided for under her marriage articles.

In 1730, Rachael, the fourth daughter, intermarried with Michael Adolphus; but Mr. Adolphus being a gentleman of no large fortune, Mr. Hart, in order that his said daughter Rachael might live in the same rank of life as his other daughters, thought proper to settle an annuity upon her for life of £1000 per ann. to which he afterwards made an addition.

The said Isaac Franks, who died in October 1736, by his will gave his said wife £9000 sterling, and all her jewels, not exceeding £500, and all his plate, linen, &c. in both his dwelling-houses, and also an annuity of £300 during her widowhood, and which by his will he declared to be in satisfaction of all claims and demands she might have upon his real or personal estate, by virtue of a certain deed or paper writing thentofore signed by him in the Hebrew language (meaning the said marriage articles) or otherwise howsoever; and appointed the said Aaron Franks sole executor of his will, who duly proved the same, and paid Mrs. Franks her legacies, and her annuity till she died, in January 1754.

In 1738, Hyam Hart, the only son of Moses, died intestate and unmarried.

In November 1742, the appellants intermarried; and on the 16th of December following Henry Isaac Franks was, by an inquisition taken upon a commission of lunacy, found to be a lunatic; and the said Aaron Franks was appointed committee of his personal estate.

Mrs. Judy Levy survived her husband Elias, who left issue by her only one daughter, who died intestate in 1754; Mrs. Bilah Franks, wife of the said Aaron Franks, likewise died in 1749, leaving Phila Franks, and Priscilla Franks, the infants, her only two daughters, and no other issue: Mrs. Adolphus is still living, but hath not, nor ever had, any issue.

Moses Hart died in November 1756, having, on the 2d of April preceding, made



his will, and appointed the said Michael Adolphus, together with Joseph Martin and Lazarus Simons, executors thereof; and he afterwards made several codicils. And by his said will and codicils, he confirmed the settlement made on the marriage of his said daughter Rachael, and gave life annuities to his three sisters, Margoles, the wife of Mr. Lazarus Simons, and the respondents Judith Hart and Jacobed Hart, spinsters, and several other legacies and annuities, and chargeable therewith; he gave the *residuum* of his estate to his executors, in trust for his two daughters, Mrs. Levy and Mrs. Adolphus, and the issue of the latter, if she should have any; and after the decease of his [157] said daughters, if Mrs. Adolphus should die without issue, then in trust for his said three sisters, and the survivors and survivor of them; and after their deceases, in trust for the respondents Moses and Naphtali Hart, the two sons of his half brother Solomon Hart, and their issue; and in default of issue by them, then in trust for his right heirs. But he did not in such will so much as mention the names of his grand children, Henry Isaac Franks, and the appellant Phila, or either of them. In one of the codicils, however, there was the following clause: *Whereas I gave so large portions to my sons-in-law, and the immense sums they have got by my means, and also the large estates they are and will be possessed of, is the reason of my not leaving my dear grandchildren (meaning the appellant Phila and her brother, and the daughters of Aaron Franks) any legacies; and I do hereby declare, that I always had and have the greatest love and regard for them, and wish them health and long life, that they may live and enjoy their plentiful fortunes.*

The executors of Mr. Moses Hart proved his will and codicils in the Prerogative Court of Canterbury, and possessed themselves of his personal estate, and, as trustees under his will, entered on and received the rents and profits of his real estate (consisting partly of freehold and partly of copyhold) exclusive of the real estate which he was seised of at the time of entering into the marriage articles; and soon after Mr. Hart's death, the appellants applied to the executors for an account of the estate, and satisfaction of their claims under the said marriage-articles, but which the executors refused to give, on pretence that Mr. Hart was imposed on in entering into the said articles, if he really executed the same, and that they were not binding on him or his estate.

Whereupon the appellants, in Trinity term 1757, exhibited their original bill in the Court of Chancery, which was afterwards amended, against the respondents, setting forth the said articles, and the several other matters before stated, and insisting on a satisfaction of their claims under the articles out of the estate of Moses Hart, who had it not in his power to dispose of his estate by will, contrary to the tenor of the said articles, so far as concerned the right and interest of the appellants under the same, or so as to deprive them of the benefit thereof; and that he himself was sensible thereof, and well knew the same, and had in his lifetime produced the counterpart of the said articles to one or more persons, and spoke and discoursed of the contents thereof, and considered the same as binding on him, and never complained or pretended that he had been anywise imposed on therein. The appellants therefore prayed by their bill, that an account might be taken of the said Moses Hart's estate, and that they might be paid such share thereof as they were entitled to under the said marriage-articles, and that the articles might be established and carried into execution.

To this bill the respondents put in several answers, and such of them as were claimants under Mr. Hart's will insisted, that he [158] being unacquainted with the language and character in which the articles were written, was, in case he signed the same, imposed upon therein; that he always understood the articles to be only a *ketuba*, which did not bind the father of the bride, but the husband only, and that he had frequently in his lifetime declared, that he had power over his fortune, and could dispose of the same as he thought fit; that it was in his power to give and devise his real and personal estates as he had done by his will, and that the appellants, or either of them, had no right to any part thereof under the said marriage contract.

The respondents Joseph Martin, Michael Adolphus, and Rachael his wife, Lazarus Simons and Margoles his wife, Judy Levy, Judith Hart and Jacobed Hart, Naphtali Hart, and Moses Hart, thought proper to exhibit a cross bill against the appellants, and the said Aaron Franks and his two daughters Phila and Riscilla Franks; thereby alledging (among other things) that Isaac Franks was, at

the time of his intermarriage with Sincha, possessed of a small fortune, and that Moses Hart not only gave him £6000 as the portion of Sincha, with proper and suitable clothes, but did also, at or about the time of such marriage, give or pay unto the said Isaac Franks £3000 which appeared by entries made by Isaac Franks, in books kept by him, and also by entries in books kept by Mr. Hart's bankers: that Moses Hart and Isaac Franks professed the Jewish religion, and that it was usual for persons professing such religion, upon their marriage, to enter into and sign a writing called a Ketuba in the Hebrew tongue: that in conformity to such custom, there was on the marriage of the said Isaac Franks with the said Sincha Hart, not only a Ketuba entered into by them in the ancient Hebrew tongue, but that there was also an agreement, or proper deed of settlement, drawn in the English tongue, and signed by the parties thereto, or otherwise properly acknowledged or agreed to be the settlement made on the said marriage, as a provision for the wife and children of the marriage. That if Mr. Hart did execute or sign such Hebrew writing, or the duplicate thereof, the same was a fraud upon him, and that he was imposed upon therein, and that such Hebrew writing was delivered to him as the Ketuba made on the marriage of his daughter Sincha, and that he, believing it to be nothing more than a Ketuba, never looked upon the same in his lifetime as containing any agreements therein, which would be binding on his estate and fortune; and that in fact such Hebrew writing, if really executed or signed by Mr. Hart, (which they did not admit,) did not, as they insisted, contain any agreement whatever which ought to bind his estate, and that he had no valuable consideration for entering into the same. The bill also charged that the appellants, or Aaron Franks, had in their custody the English contract which had been entered into on the marriage of the said Isaac Franks with the said Sincha, and that being advised, or believing, that neither the children of the said Sincha, or Bilah, would be entitled to any part of Mr. Hart's estate under the said [159] Hebrew contract, in case such English agreement, or any copy or minute, draft of such agreement, was to appear or be produced, the appellants concealed the same and the said copy, and set up a claim under the Hebrew contract. The appellants therefore prayed, that they might be decreed peaceably and quietly to enjoy the several legacies under the will and codicils of Moses Hart, freed and discharged from all claims and demands to be made on them by or under the said Hebrew contract, that the plaintiffs might have a discovery of the several matters mentioned in the bill, and that the Hebrew contract might be delivered up to be cancelled.

The appellants, by their answer to this cross bill, denied the several charges therein, and set forth a copy of the English blank and unexecuted ingrossment found among Mr. Isaac Franks's papers, and denied that they knew or believed there was any English writing entered into on the said marriage, or that they ever saw any agreement or writing made, or intended to be made on such marriage, except the Hebrew contract, and except that they had found such English ingrossment as was said, which they had never seen, or heard of, till after the death of Moses Hart; that they believed Mr. Hart understood the nature and force of the said Hebrew contract, and the language in which it was written, and that he could not be imposed upon therein, if he had been ignorant of the language, because the same was explained as usual at the time of the execution: that such contract totally differed from a Ketuba, which is always in one form, and is considered as an obligation on the husband only, to provide his wife with a small sum of money: that the Ketuba is an instrument entered into, according to the Mosaic law, by the husband, and is necessary to make the marriage valid, and is executed by the husband only, and delivered to the father of the bride, who never executes any duplicate thereof; that the contract in dispute was an obligation on the father, as well as the husband, and was signed by both; that Mr. Hart, from the time of the marriage to the time of his death, looked upon the said contract to be binding on his estate and fortune, and had made several declarations to that effect. The appellants also stated particularly as they had done by their original bill, the nature of the Hebrew instrument in question; that the same was called a *shtor*, which word in the Hebrew language signifies a contract, and that as distinguished from other contracts in general, it was called a *shtor chozi chelec zachar*, which words in the Hebrew language signify a contract for the half of a male's share; that the same was the common and usual description of such a contract. And that such marriage contracts, when entered into between German Jews, as Moses Hart was, are always in the Hebrew language.

Both causes being at issue, several witnesses were examined by all parties in the original cause, but the respondents did not at [160]-tempt to establish any of the allegations of their cross bill, nor did they examine any witnesses in the cross cause.

Most of the witnesses gave an account of the nature of this deed, and that the same contained a contract, called in the Hebrew language, by such name, and of such import as aforesaid; and that the same was the common and known description among the German Jews of such kind of contracts; and the respondents witnesses, as well as the appellants, agreed, that it is very frequent for German Jews following commercial business, either in Germany, Holland, Poland, or England, (in order to avoid the parting with a large share of their estate, in portioning their daughters in their lifetime,) to settle, by contracts of this kind, half a share of a male, out of what the father should die possessed of, on the daughter married, and her issue: and if a Jew entered into such contract, having a son who afterwards died, (which is the present case,) the contract was still binding, and that the *shtor'd* daughter or her issue would still be entitled to the share stipulated by such *shtor* or contract. And the respondents as well as the appellants witnesses, also said, that when a Jew entered into a contract of this kind, he could not make any subsequent will, even in favour of his wife or children, to the prejudice or injury of the stipulations in such contract. And Abraham Elias, one of the witnesses, said, he gave a *shtor* on the marriage of his daughter; and Solomon Nathan, another of the witnesses, said, he received a contract of the like nature, on his marriage. The appellants witnesses also proved, that Mr. Hart well knew the nature and effect of this contract; and that the same was penned in the strongest terms that could be used, was written by the rabbi Aaron Hart, the brother of the said Moses Hart, and was executed with all the formalities and solemnities, necessary to establish and strengthen a Jewish contract; that it was always usual, before the execution of a contract of this nature, to read it over distinctly, and to explain the contents thereof to the parties and witnesses, and that the parties declare to the witnesses their assent thereto; that there were two parts executed, one of which remained with Mr. Moses Hart, and the other with Mr. Isaac Franks: the said Aaron Franks (examined by order) proved that Mr. Hart, in his conversations with him on occasion of the treaty of marriage between him and the said Bilah, (which was five years after the death of Hyam Hart, his son,) had recognized the said contract, and admitted that he was bound thereby.

The plaintiffs in the cross cause, having given no evidence of any imposition on Moses Hart, or of his ignorance of the nature and effect of the said contract, and the contrary having been proved by the appellants witnesses; thought proper, on the hearing, to waive their objections, as to any fraud or imposition on Mr. Hart therein.

On the 7th, 8th, and 9th of May 1759, both causes came on to be heard together, before the Lord Keeper Henley, when his [161] Lordship was pleased to order and decree, that the bills in both causes should stand dismissed without costs.

From this decree or order of dismissal, the plaintiffs in the original cause appealed: insisting (C. Pratt, T. Sewell), that this was a marriage contract, by which the lady's father stipulated to give something more at his death, than the portion then advanced; and for the performance of this agreement, undertook that this future or additional portion, *should bind himself and his children after him, as an absolute debt*; so that this further provision, whatever might be the *quantum* of it, had the sanction of a solemn bond, and was grounded upon the highest consideration, that of marriage. That this additional portion was to take place of every testamentary provision; for when the *shtor* says, the daughter and her issue *shall inherit* half the share of a son, which was twice repeated, it is the same thing as if it had said, *shall receive the same at the time of the father's death*; the word *inherit* not being used to denote the mode of descent, (in which sense it would be improper, if applied to the course of descent according to the law of England,) but only to mark the time when the daughter was to take this share out of her father's inheritance: and the witnesses all concurred in saying, that the principal view of such an instrument, was to secure this future portion, by controuling the father's power of disposing of his whole fortune by his will. That by the Jewish law, a married daughter having received a portion at her marriage, was totally excluded from any share of the father's estate, if he died intestate; and therefore this instrument was equally necessary to secure the share in case of an intestacy, as against the disposition of a will. The only seeming

difficulty in this case, was to ascertain what that share is, which by the *sh'tor* is called half the share of a son: as to which it was conceived, 1st, That the *sh'tor* itself had directly and plainly described the *quantum* of this share in one case, viz. if there had been any son actually existing at the time of the testator's death; for in that case, after the unmarried daughters had taken the like portion out of the estate which Mrs. Franks had received, the residue was to be divided thus: two shares to the sons, and half a son's share to each of the daughters. Here therefore, the half share of a son was clearly described, and the rule being laid down in one case expressed, would be a rule to find out what this half share of a son must be in every other case, which happened not to be particularly expressed. 2d, That in the case which had happened of no son living at the time of the father's death, it was apprehended that Mrs. Franks became entitled to an equal share of the whole, with the rest of the testator's daughters, considering the same as to be divided amongst them; because the *sh'tor* declared there was to be a strict equality amongst the daughters, as between each other; and as Mrs. Franks was to take an equal share at least with the sisters, against the claim and interest even of a son; *a fortiori*, she ought to take an equal share with them, when that more favoured object, who was to be first and [162] more amply provided for, was removed. But, 3d, if the true spirit of the deed could not in this case prevail against the letter, and an equal share with the daughters of the whole (there being no son) could not come within the description of half the share of a son; then, in order to divide the estate according to the letter, a son must be supposed, and the estate divided accordingly; and Mrs. Frank's issue be entitled to the same share as if a son had actually existed at the father's death. This was the smallest share that Mrs. Franks could be reduced to, for if she was not entitled to this she was entitled to nothing; and then the contract on Mr. Hart's part must have this strange meaning, that he would give his daughter a considerable part of his estate beyond her present portion, even though the necessary provisions for sons might make it inconvenient: but that in default of sons, when that inconvenience was removed, he would give her nothing. But this was a proposal which no father in his senses would offer, and which no husband would accept.

But it is said, that this was a deed of jealousy only, to operate in case of a will actually made in favour of sons; and to guard against the father's partiality to his male issue, particularly to a beloved son. The true reason however of putting that case, was to obviate a doubt which might have arisen, if Mr. Hart had given a larger portion to one of his sons, than he was impowered to do by the rule of equality in the Jewish law, and had given less to the others; for in that case, the *sh'tor* might have been evaded; to prevent which, the father engaged in favour of Mrs. Franks, to give her even more than the common half share of a son. In this view, the case of a will making an extraordinary provision for a beloved son, was so far from being the only case in which the deed was to operate, that it was a strong case to shew, that this half share of a son was in all events, and in every case whatsoever, to be secured in favour of Mrs. Franks and her issue. But if the meaning of the deed was otherwise, and as the respondents contended, the chance and engagement would be quite nugatory, and the daughter's share would be more, or less, or nothing, according to the pleasure or caprice of the father; for according to this, the father must have sons, he must make a will, and the daughter's share must be governed by the share which he should think fit to give to some of his sons by that will. Now, besides the absurdity of such an engagement, which was not to take place if there were no sons, or no will, or where the sons were disinherited; the value of such a contingency was too inconsiderable, and the benefit of it too precarious, to be the object of a marriage settlement.

As to the dismissal of the cross bill without costs, it was apprehended, there was not the least reason or foundation for bringing it. All the matters put in issue by that bill, were fully in issue in the original cause: the several facts alledged and relied upon in the cross bill (and particularly the charge of fraud and imposition, and there having been an English contract entered [163] into between the parties, which would supersede or take away the effect of the Hebrew contract in question) were false and groundless in themselves, wholly unsupported by any proof, and, so far as they were capable of being contradicted by any direct and positive proof, were fully contradicted by the proofs on the part of the appellants. The only part of the relief

prayed by this bill, which was proper for a decree if the fact had warranted it, was to have the contract delivered up to be cancelled, for fraud and imposition; but this totally failed, and was deserted. Independent of this, what was further prayed by way of relief, was not only unnecessary, but in its nature improper for a decree. Considered therefore as a mere bill of discovery, the plaintiffs ought, according to the course of a Court of Equity, to pay the defendants their costs; especially in the present case, where they had not availed themselves of any discovery against the defendants, but the same had turned wholly against themselves.

On the part of the respondents, the executors of Moses Hart, it was argued (E. Willes, G. Perrott), that on the contingency which had happened in his family, the fourth article of the Hebrew instrument, on which the appellants founded their claim, could have no effect or operation. The provisions therein in favour of Mrs. Franks, being to take place only in case Moses Hart should leave issue male; to which event, the clause throughout was plainly relative. It was a natural jealousy to be entertained by Mr. Franks, that Mr. Hart would, in case he had sons, be inclined to give the bulk of his fortune to them; and for this reason it was stipulated, that Mrs. Franks, her husband and issue, should have half the share of what he should think proper to be inherited by the most beloved of his sons. This instrument, therefore, seemed calculated only to prevent the partiality which Mr. Hart, in conformity to the Jewish law, might shew in favour of sons to the prejudice of daughters. For it was observable, that Mr. Hart did not mean to give any advantage to Mrs. Franks over the rest of his daughters, they being all put upon the same footing in case there should be sons; and if there was no son, Mr. Franks did not apprehend, that any partiality might be shewn as between the daughters; in that event, Mr. Hart was at liberty to dispose of his fortune as he pleased; Mrs. Franks trusting that she should be able to preserve and merit as great a share in her father's affections, as any of her other sisters. Supposing, however, that this should not be the true construction, but that Mr. Hart ought to be considered as having entered into an agreement for the distribution of his whole estate amongst his children; yet this stipulation must be understood as intended to take place only in case of his intestacy: for it could not be imagined, that Mr. Hart, who had then a son and four daughters, the youngest only two years old, and might probably have had many more children, should mean to preclude himself from making such a provision for them, as their conduct, of which he could then have no experience, might deserve: he had also at that time several poor relations, brothers and sisters, [164] who were supported by his bounty, and who at his death might be left totally destitute of subsistence, if he had restrained himself from making any provision for them by his will. Besides, Mr. Hart's riches were all of his own acquiring, and his children had not any claim thereto, as a patrimony descended to him from their ancestors. This instrument therefore, might be a proper division of his effects in the case of his intestacy; but could never be intended to control any future disposition which he might make of his fortune by will. But supposing neither of these to be the true construction, yet in every sense which the appellants attempted to put upon this clause, it would appear to be an unreasonable agreement, precluding Mr. Hart from the future disposition of his estate, and rendering his children totally independent of him. The instrument also was of so complicated a nature, and so obscurely worded, that neither the Jewish rabbies could give it any precise denomination, nor was the Court able to put any construction upon it, agreeable to the pretensions of the appellants, which would not be liable to infinite difficulties, absurdities and contradictions. It was therefore conceived, that as the appellant's bill was brought for the specific performance of an agreement so circumstanced, the Court did right in dismissing it; and more especially, because if they had any right, they might still have their remedy at law.

On behalf of the rest of the respondents who were legatees under Mr. Hart's will, it was contended (C. Yorke, A. Forrester), that the several settlements made by him on the marriage of his other daughters, to some of whom he gave better fortunes than to his daughter Sincha, and his procuring the obscure Hebrew instrument in question (the very name of which was not agreed upon by the Jewish witnesses) to be translated into English a little before his death, and a declaration that the supposed incapacity he laboured under of disposing of his fortune by will, was contrary to his intention; manifestly proved, that he was not only not master of the contents of that instrument,

but that he never meant to make so improvident a bargain, as by stipulating to Isaac Franks and his children, a certain sum out of his fortune equal to a moiety of the best beloved son, to tie himself up in all events from providing for his wife, or other relations; and this for no other consideration moving from Isaac Franks, than an eventual sum of £3000 to the wife out of his estate, in case he died after the expiration of two years from the marriage. Words must be very clear and positive indeed, to inforce the belief of so irrational an agreement. That the most consistent and rational construction of the fourth article seemed to be this, that it was adapted to the event of Moses Hart's leaving male issue, who by the father's partiality might inherit, or by will succeed to his whole fortune, without the hope of any accession to Sincha's portion, notwithstanding his estate might be greatly improved before his death: it was therefore a stipulation to prevent the effects of such partiality. If Moses Hart should make a testament in favour of a son or sons, [165] this instrument provided an addition to her fortune, equal to half the share of the most beloved son. But in case he should die intestate, the instrument laid down a rule of distribution, viz. that after deducting a portion of £6600 for each of his unmarried daughters, equal to that portion with which he had advanced Sincha in marriage, the residue of his estate should be divided between his sons and his daughters, by a peculiar rule of distribution under the instrument, corresponding neither with the Jewish law, or the law of England; viz. that each daughter should take only a moiety of that provision which was given to a son. This rule did not correspond with the Jewish law, because in case of leaving sons, daughters were entirely excluded; nor was it agreeable to the law of England, which distributes personal estate equally among all the children, and transmits the real estate by descent to an eldest or only son, without admitting the daughters to share in it. But this construction necessarily supposed, that the clause in question was adapted to the event of Moses Hart's advancing a son in the world during his life, or leaving issue male at the time of his death. If he should leave no sons, the instrument was not intended to operate at all; the cause of jealousy and suspected partiality naturally ceased; and it was not to be presumed, that in case his daughters only should survive him, he would prefer any of the younger and their issue to Sincha who was the eldest child. It seemed, therefore, the most probable construction to say, that Moses Hart the father did not intend by the clause in question, to lay down an *immediate absolute rule* for the disposition of his fortune, to control all future wills which the situation of his family might induce him to make; but merely a *contingent relative rule* applied to the probable event of his son's life, and a supposed partiality in favour of his male issue. That every construction attempted by the appellants, was attended with insuperable difficulties. The pretence that the fourth article fixed his daughter Sincha's share to half the share of the most beloved son, and took from the father the power of making a will, was inconsistent with the instrument itself; for if the father's power of shewing love and affection to any son was taken away, the measure of the daughter's share was gone. The next pretence, that though he could not bar the interest of this daughter by will, he might bar that of his other children, was equally inconsistent with the instrument: which provided £6600 for such unmarried daughters, for no other reason than that he had given to this daughter that value; and as expressly gave each of his other daughters half a share of a son, as he did to Sincha, hereby establishing amongst them an equality of fortune, and an equality of right also, if this instrument could give any. And the last pretence, that the half share of a son related not to any act of love or preference in Moses Hart, but to the right of primogeniture under the Mosaic law, was no less contradictory to the instrument than the two former; since it established an equality between the sons, by giving them two shares, and thereby [166] excluded the Mosaic right of primogeniture: so that from whatever part of the fourth article of this instrument the appellants drew an argument in their favour, that same or some other part of this article overturned and contradicted it. But the respondents need not labour to give this instrument a meaning, it was enough that the appellants, who claimed under it, could not give it a rational one; and as Moses Hart had died without a son, there was an end of every thing they could urge: the share of a son was the measure for determining Sincha's half share, and there being no son to inherit a share, either by the predilection of his father, or the Mosaic right of primogeniture; no measure for determining her share ever existed, and consequently, her and her children's pretensions, such as they were, never arose.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed. (Jour. vol. 29. p. 603.)

CASE 9.—Earl of INCHQUIN,—*Appellant*; JOHN HAMILTON FITZMAURICE, and others,—*Respondents* [13th May 1785].

A. by articles previous to the marriage of his daughter agrees to settle several real estates to certain uses, but reserves to himself a power of charging them with £30,000 to pay his debts. He had previously mortgaged those estates for £27,000, but it did not appear that that fact was disclosed to all the parties at the time of executing the articles. On a question, whether the £30,000 should be raised over and above the prior incumbrances, it was held, that these prior incumbrances should be paid out of the £30,000; and that A. should have the residue, after paying the costs of the suit.

DECREE of Lord Chancellor THURLOW VARYED.—The variation arose from private and peculiar circumstances in the case. Lord Thurlow appears to have pronounced his decree from a consideration of the positive words of the articles, which the parol evidence was not sufficient to alter: the admission of this parol evidence his Lordship thought he could not reject; but expressed himself on the subject in the following manner: "If," said his Lordship, "there be a latent ambiguity, it must be explained by parol evidence; for though the words do not *prima facie* import an ambiguity, yet if such ambiguity can be made to appear from parol evidence, it must be admitted to explain it as well as to raise it; but if words have in themselves a positive precise sense, I have no idea of its being possible to change them, and I take it to be an established rule, that words cannot be changed in that manner."—"On the whole, (his Lordship concluded,) whether the case is considered in the articles merely, or on the evidence; which I do not think should be admitted to the extent of changing the effect of these articles; or in any other point of view, I cannot deprive the children of their interest under these articles." His Lordship also relied on the insufficiency of the estates to answer both the £30,000 agreed to be raised, and the former incumbrances also.

1 Bro. C. R. 338.

On the appellant's marriage with the Countess of Orkney, then Lady Mary O'Brien, daughter of the late Earl of Inchiquin, the appellant's uncle, and Ann Countess of Orkney, his wife, [167] divers estates in the counties of Oxford, Berks, and Bucks, formerly belonging to the Earl of Orkney, deceased, were, by indentures of lease and release, dated the 25th and 26th February 1753, settled (subject, as to part thereof, to prior limitations long since expired) on the appellant for life, remainder to the Countess his wife, for life; remainder to the first, and other sons of the marriage, in tail; remainder to the first and other daughters of the marriage, in tail, with remainders over.

The Oxfordshire estate was afterwards inclosed by act of parliament; and, by virtue of a power in the act, charged with £3675 for expences attending the inclosure.

Lady Mary, now the respondent Thomas Fitzmaurice's wife, being the only issue of the marriage, became intitled to the estates as tenant in tail expectant on the death of the appellant, and the Countess of Orkney, her father and mother.

The appellant being greatly in debt, and embarrassed in his circumstances, and Lady Mary being desirous to extricate him therefrom, and having attained her full age, a common recovery was duly suffered of the estates in Oxfordshire and Berks, in Michaelmas Term 1776; the use of which was declared to be to the appellant, his heirs and assigns; and by indentures of 11th and 12th July 1777, and fine, the appellant, and the Countess of Orkney and Lady Mary, conveyed the Oxfordshire and Berkshire estates to John Chambers and his heirs, by way of mortgage, for securing £24,000. These estates were afterwards charged by lease and release, bearing date the 25th and 26th of September 1777, with the payment of a further sum of £3000 to the honourable George Grimston.

About November 1777, the respondent Thomas Fitzmaurice applied to the appellant, and made proposals of marriage with his daughter, which he said were made with the consent and approbation of his the respondent's mother, the late Countess Dowager of Shelburne, who was ready and willing, if the marriage took place, to settle a very considerable estate in Ireland, by way of jointure, for Lady Mary, and a provision for the issue of the marriage. The appellant, after some conversations with the respondent, consented to his paying his addresses to Lady Mary: and the respondent having obtained her consent, had several conversations with the appellant on the subject of the intended marriage, and of the settlements proposed to be made; in which conversations the appellant acquainted the respondent Mr. Fitzmaurice, that his affairs were very much embarrassed, and that he had, before the death of his late uncle William Earl of Inchiquin, in July 1777, contracted several debts, and raised money on granting life annuities, a considerable part of which were post obits, after the death of his uncle, on whose death he was greatly disappointed in his expectations, being only tenant for life of his Irish estates, and those estates being of a very inferior value to what he was made to believe they were; *and the appellant informed the respondent Fitzmaurice of the annual income and value of the several estates in the counties of Bucks, Berks, and Oxford, and of the [168] said several incumbrances of £3675, £24,000, and £3000 upon the Oxfordshire and Berkshire estates; and acquainted him that a further large sum would be wanted to pay and discharge the remaining annuities; for raising which further sum, the appellant proposed selling the Oxfordshire estate, which it was supposed would sell for £45,000 or £50,000, and to charge the remainder of such further sum on the Clifden and Taplow estates; but Mr. Fitzmaurice objected to the selling the Oxfordshire, or any of the estates, and proposed that all the estates should be charged with such further sum; because he might possibly have it in his power to discharge the whole sum raised, and to be raised, from his own private fortune, and by that means he might keep the several estates in the family.*

Upon a computation made of what would be necessary to be raised for paying and discharging the annuities and other incumbrances beyond what had already been raised on the Oxfordshire estate, it was computed that the sum of £30,000 would be sufficient to pay off the most pressing debts and annuities; *and the respondent Fitzmaurice readily consented, that such further sum of £30,000 should be charged on all the estates, in addition to the sums then charged on the Oxfordshire estate.*

Several meetings were afterwards had between the appellant, the respondent Mr. Fitzmaurice, and their mutual friends and agents, respecting the treaty of marriage; and he and the Countess Dowager of Shelburne were very anxious to have the marriage concluded; but the appellant wished not to have it so, till proper settlements were drawn and executed, so as to prevent any possibility of disputes occurring after the marriage.

Mr. Paterson, a solicitor of great eminence and character in the city of London, having been for many years employed by the Countess of Shelburne in all her law affairs, and her Ladyship placing great confidence in him; Mr. Fitzmaurice informed him of the treaty, and they met the appellant, and had a long conversation together upon the nature and value of the appellant's and Lady Mary's estates intended to be settled, the incumbrances then affecting them, and the further sum of £30,000 to be charged thereon, which further charge was fully understood and agreed to by Mr. Fitzmaurice, who then desired Mr. Paterson to wait on his mother Lady Shelburne, and learn from her what estates she was willing to settle; which Mr. Paterson did, when her Ladyship expressed the highest opinion of Lady Mary's character and disposition, and her own readiness to promote a marriage which seemed so agreeable to her son, although the terms thereof did not appear so advantageous as, in her opinion, a person of his fortune and expectations might reasonably demand; she then gave instructions to Mr. Paterson as to what estates she would give up at present, what she would settle in jointure on Lady Mary, and what she would have settled on the younger children of the marriage; which instructions were immediately put into writing by Mr. Paterson.

Several meetings were afterwards had between the appellant Lord Inchiquin, Mr. Fitzmaurice, Mr. Paterson, as Lady Shel-[169]-burne's agent, and Mr. Dagge on the appellant's behalf, for adjusting the terms of the settlement, which, on the 14th of



December 1777, were finally adjusted; and amongst other things, *it was agreed, that the said estates should be charged with £30,000 for the appellant's use, to pay debts over and above the incumbrances then upon the Oxfordshire estate;* and thereupon Mr. Paterson, at their desire, and as agent for Lady Shelburne, prepared the following articles:

"Articles of agreement, quinquartite, indented, made, and concluded this seventeenth day of December, in the year of our Lord 1777, between the right honourable Mary Countess Dowager of Shelburne, in the kingdom of Ireland, etc. widow and relict of the late right honourable John Petty Earl of Shelburne, in the kingdom of Ireland, etc. deceased, of the first part: the honourable Thomas Fitzmaurice, of Llewenny in the county of Denbigh, youngest son of the said late Earl of Shelburne, of the second part: the right honourable Morough Earl of Inchiquin, in the kingdom of Ireland, of the third part: the honourable Lady Mary O'Brien, only child of the said Earl of Inchiquin, of the fourth part: Henry Dagge, of Great Russel Street, Bloomsbury, in the county of Middlesex, Esquire, and John Paterson, of New Burlington Street, in the same county, Esquire, of the fifth part. Whereas a marriage is intended to be shortly solemnized between the said Thomas Fitzmaurice and Lady Mary O'Brien, it is in contemplation thereof agreed between the said parties as follows: she the said Countess Dowager covenants and agrees with the said Henry Dagge and John Paterson, their heirs and assigns, that she the said Countess Dowager shall and will, as soon as conveniently may be after the said marriage shall take effect, by virtue and in pursuance and execution of the power and authority to her in this behalf given or granted, in and by the last will of the said Earl of Shelburne, and enabling her thereunto by some good and sufficient deed or deeds in writing, to be duly signed, sealed, and delivered, in the presence of three or more credible witnesses, direct, limit, and appoint unto the said Thomas Fitzmaurice and his heirs, all those three several farms or holdings in the Queen's County, and county of Lowth, in the said kingdom of Ireland, now in the occupation of Thomas Wright, John Darley, and John Taaffe, of the yearly value of £1460 Irish, or thereabouts; and also all that farm or holding in the county of Tipperary, in the said kingdom of Ireland, now in the occupation of Brian Keeting Esquire, of the yearly value of £734 Irish, or thereabouts; and also all that other farm in the said county, now in the occupation of Dean Coote, of the yearly value of £950 Irish, or thereabouts; which said five several farms or holdings are part of the real estates, to which the said late Earl of Shelburne was, at the time of making his said will, either legally or equitably intitled, in possession, reversion, remainder, or expectancy, and whereof he had power to dispose: to have and to hold the said three first mentioned farms or [170] holdings, with their appurtenances, unto the said Thomas Fitzmaurice, his heirs and assigns, from and after the day on which the said intended marriage shall take effect, to his and their own use for ever: and to have and to hold the said two other farms or holdings, with their appurtenances, unto the said Thomas Fitzmaurice, his heirs and assigns, from and after the decease of the said Countess Dowager, to his and their own use for ever: and the said Thomas Fitzmaurice covenants and agrees with the said Henry Dagge and John Paterson, their heirs and assigns, that he the said Thomas Fitzmaurice, or his heirs, shall and will, as soon after the execution of the said deed or deeds, by the said Countess Dowager, as conveniently may be, effectually grant, convey, and assure, all his or their estate, right, title, and interest, of and in the said five several farms or holdings, unto and to the use of the said Henry Dagge and John Paterson, their heirs and assigns, but to, for, and upon the several trusts, intents, and purposes following; that is to say, as to the said three first mentioned farms or holdings upon trust, to permit the said Thomas Fitzmaurice and his assigns, during his life, to take the rents and profits thereof, to his and their own use, and from and after his decease to permit the said Lady Mary O'Brien and her assigns, during her life, to take the rents and profits thereof, to her and their own use, in part of her jointure: and as to the said farms or holdings in the occupation of Brian Keeting and Dean Coote, upon trust, to permit the said Thomas Fitzmaurice and his assigns, during his life, and from and after the decease of the said Countess Dowager, to take the rents and profits thereof to his and their own use; and from and after the decease of the said Countess Dowager and Thomas Fitzmaurice, to permit the said Lady Mary O'Brien, and her assigns, during her life, to take the rents and

profits of the said farm or holding, in the occupation of Brian Keeting, to her and their own use, in farther part of her jointure; and during the joint lives of her and the said Earl of Inchiquin, to take the rents and profits of the said farm or holding, in the occupation of Dean Coote, to her and their own use, in full of her jointure, such jointure to be in bar of dower, and such settlement to contain all proper clauses and limitations, for preserving the contingent remainders therein, during the life-estates to be thereby created: and the said farms or holdings shall, in such settlement, after the said several deceases of the said Countess Dowager, Thomas Fitzmaurice, and Lady Mary O'Brien, be limited to trustees for a term or terms of years, for raising such portions for younger children, as herein-after mentioned: and the said Earl of Inchiquin and Lady Mary O'Brien covenant and agree with the said Henry Dagge and John Paterson, their heirs and assigns, that they shall and will, as soon as conveniently may be after the said intended marriage, convey and assure unto the said trustees, their heirs and assigns, the manors, lands, tenements, and hereditaments, with the capital messuages, park, garden, and appurtenances there[171]-unto belonging, at Taplow, Clifden, Bradwell, and Filking, in the counties of Bucks, Berks, and Oxford, now in the possession of the said Earl of Inchiquin, or his under-tenants, in trust, by mortgage or mortgages of the whole or any part thereof, either in fee or for a term or terms of years, to raise the sum of £30,000 towards *discharging the present debts and incumbrances of the said Earl of Inchiquin*, and subject thereto in trust, to permit the Earl of Inchiquin, and his assigns, to take the rents and profits thereof during his life; and after his decease, to permit the said Thomas Fitzmaurice to take the rents and profits thereof for his life, subject to and charged with a yearly rent of £1000, payable to the Countess of Orkney, wife of the said Earl of Inchiquin, for her life, by equal half-yearly payments; and after the decease of the said Countess of Orkney and Thomas Fitzmaurice, in trust, to permit the said Lady Mary O'Brien to take the rents and profits of the said several estates in England for her life; and after the several deceases of the said Earl of Inchiquin, Countess of Orkney, Thomas Fitzmaurice, and Lady Mary O'Brien, the said estates in the counties of Bucks, Berks, and Oxford, shall be limited to trustees for a term or terms of years, for raising younger children's portions, as herein-after mentioned, and subject to the said mortgage or mortgages *so to be made as aforesaid*, and the said several life estates and terms of years so to be limited as aforesaid, the said estates so to be conveyed by the said Thomas Fitzmaurice, and the said Earl of Inchiquin and Lady Mary O'Brien, shall be limited in use to the issue male and female of the said intended marriage in strict settlement, with remainder as to the estates settled by the said Thomas Fitzmaurice to and to the use of the said Thomas Fitzmaurice in fee, and as to the estates settled by the said Earl of Inchiquin and Lady Mary O'Brien, to and to the use of the said Earl in fee: and it is hereby agreed that the said portions of the younger children shall be as follows: if only one, his or her portion to be £15,000; if two, then £20,000, equally to be divided between them; and if three or more, then £25,000 to be equally divided amongst them; one-third of such portion or portions to be charged on the said English estates, and the remainder on the said Irish estates, and in such intended settlement shall be contained the usual powers to the tenants for life to grant leases, and also all such other powers, clauses, and provisos, as shall be agreed upon by and between the said Thomas Fitzmaurice and the said Earl of Inchiquin. In witness, etc."

Mr. Paterson being hurried and straitened in point of time through the impatience of the respondent, Mr. Fitzmaurice, and the anxiety of Lady Shelburne to expedite the marriage, the directions were given on the 14th December, and the articles drawn, and the rough draft on the 16th shewn to Mr. Dagge as counsel for the appellant, who did not settle it; however, it was carried to Twickenham that day to Lady Shelburne, and the blanks filled up with the description of the farms, and then engrossed and exe[172]-cuted by Lady Shelburne about one in the morning of the 17th December.

Mr. Paterson, in the hurry, and by mistake, emitted to insert in the articles proper words to signify that the £30,000 then agreed to be raised, were meant and intended as, and should be a farther charge upon the estates beyond the incumbrances then upon the Oxfordshire and Berkshire estates, though he was particularly required so to do by Mr. Dagge, who furnished him with words for the purpose; and he, Mr. Paterson, approved of such words as right and proper.

The same hurry prevailed as to the execution by the other parties: Mr. Fitzmaurice took his attorney, Mr. Wallis, with him to Taplow, where Lord Inchiquin and Lady Mary were; they brought down the articles which had been executed by Lady Shelburne, and they were executed by the other parties, in presence of Mr. Wallis. After the articles were executed by all parties, and the marriage had, which was on the 21st of December 1777, it was discovered that £30,000 would not be sufficient to pay the appellant's debts; and it being represented to the respondent Fitzmaurice, he expressed his readiness to accommodate the appellant, and to have £35,000 raised on the estates, instead of £30,000, agreed to be raised. This he communicated to Mr. Paterson, and he was desired to form a plan for that purpose, which he accordingly did by way of proposal, and laid it before the appellant; in which he took notice, that, *at the time of the original treaty, the incumbrances upon the Oxfordshire estate were represented to be £30,000, and that the appellant's other incumbrances, agreed to be farther charged, were estimated at £30,000.* But the appellant objecting to the mode proposed, nothing came of it at that time; but afterwards, upon discovery of more debts, the respondent Fitzmaurice agreed that £8000, instead of £5000, should be added to the £30,000.

In Trinity term 1778, a recovery was suffered of the Bucks estate, and the uses were declared by indenture, dated the 16th of June 1778, to be to such person or persons, and for such estates, and in such manner as the appellant Lady Inchiquin, and the respondent Fitzmaurice and Lady Mary should appoint; and in default of appointment, to the uses therein mentioned.

By indentures of the 26th and 27th of June 1778, the appellant Lord Inchiquin, and the respondent Thomas Fitzmaurice, and Lady Mary, appointed the Bucks estate to Edmund Burke and John Dagge for 2000 years, in trust, by rents or profits, sale or mortgage, to raise £23,000, and to pay the same to the appellant, or as he should direct, for his own use, and subject thereto to the use of the appellant for life; remainder to trustees in trust, to permit the Countess of Orkney to receive thereout a rent-charge of £1000 a year for life; remainder to the Earl of Clarendon for 99 years, for better securing the said rent-charge; remainder to the respondent Thomas Fitzmaurice, and Lady Mary his wife, and the survivor of them, in fee.

[178] James Royer and Peter Prevost Esquires, having agreed to advance the sum of £2000, Mr. Burke and John Dagge executed certain indentures, bearing date the 21st and 22d of February 1779, for conveying a farm called Barge farm, part of the Bucks estate, for securing that sum.

Before the remaining £21,000 were advanced, or any other part of the trust executed, Mr. Tomkinson being employed as attorney for the respondent Fitzmaurice, told him, that he thought he might take advantage of the wording of the articles, so as to prevent the appellant from raising any more money than had been then charged on the Oxfordshire estate; *at which the respondent then expressed his dislike, as being contrary to what was understood at the time of the articles, and always since; and that if such advantage could be taken of the wording of the articles, he should scorn to do it.*

However, notice was soon after given on the part of Lady Shelburne, to Mr. Royer and Mr. Prevost, and to Mr. Burke and Mr. Dagge, of the articles, and of the mortgage for £24,000 on the Oxfordshire and Berkshire estates; and that no more money ought to be raised under the articles than £6000. And on the 4th of October 1779, a bill was filed in the name of Lady Shelburne and John Hamilton Fitzmaurice, the only child of the respondent Thomas Fitzmaurice and Lady Mary, by the said Mr. Tomkinson as their attorney, against the appellant Lord Inchiquin and the other defendants, stating the late Earl of Shelburne's will of 5th of April 1756, empowering the Countess to appoint the estates therein mentioned to all or any of his children or grandchildren, or nephews, the sons of his sister Lady Charlotte Colethurst; and in default of appointment, the same were given after her death to his younger son, the respondent Thomas Fitzmaurice, by his then name of Thomas Petty: and also stating the recovery and mortgage of the Oxfordshire and Berkshire estates by the appellant and Lady Mary, the articles made on their marriage, the recovery of the Buckinghamshire estate, and declaration of uses by the indentures of the 15th and 16th of June 1778, the appointment by the indentures of the 26th and 27th of June 1778, the intended mortgage for raising £2000, and the notice as before mentioned; and

prayed, that the said articles should be decreed to be performed; and that it should be declared that the £24,000 mortgage was to be considered as part of the sum of £30,000 provided by the articles; and that the settlement of the 26th and 27th of June 1778 should be rectified by restraining the trust of the 2000 years term thereby created to raising the sum of £6000, and by letting in the limitations to the issue male and female of the marriage in tail male and tail general, according to the articles; Lady Shelburne submitting to perform the articles specifically on her part, and to execute such appointment as she had agreed to do. Lady Shelburne and Mr. Chambers the mortgagee, afterwards dying, the respondent Thomas Hamilton Fitzmaurice, by Nicholas Colthurst his next friend, filed his supplemental bill and [174] bill of revivor against the several defendants; and the suit was accordingly revived.

The appellant put in his answer to this bill, setting forth the settlement made on his marriage with the Countess of Orkney; and that Lady Mary was the only issue of the marriage; also the mortgages on the Oxfordshire estate; the treaty of marriage between the respondent Thomas Fitzmaurice and Lady Mary, with the approbation of the Countess of Shelburne; that Mr. Paterson was agent for the Countess, and made acquainted with the mortgages and incumbrances on the Oxfordshire estate: *that he agreed to the terms of the articles which were settled and agreed upon in manner before set forth; and particularly, that £30,000 should be charged on the Buckinghamshire, Berkshire, and Oxfordshire estates, over and above the mortgages then subsisting on the Oxfordshire and Berkshire estates.* He also stated, that Mr. Paterson had prepared the articles; and the hurry in which they were prepared, engrossed, and executed, also the subsequent treaty for increasing the sum to be raised, and Mr. Paterson's proposals on that occasion; and also the recovery of the Bucks estate, and the several deeds declaring the uses, and the deed of appointment before set forth.

The respondent Fitzmaurice and Lady Mary put in their answer without oath and submitted that the articles should be performed and carried into execution, so far as the same could or ought to be performed.

The several other defendants having put in their answers, and the cause being at issue, several witnesses were examined on both sides, and the cause came to be heard on Saturday the 24th of January 1784, and after several days hearing, the Lord Chancellor Thurlow, on the 3d day of February 1784, was pleased to declare, that the articles entered into previous to the marriage of the respondents Thomas Fitzmaurice and Lady Mary his wife, dated the 17th of December 1777, ought to be specifically performed; and did order and decree the same to be carried into execution, by a proper conveyance and settlement of the estates thereby covenanted to be settled agreeable to the said articles, and referred it to the Master to settle such conveyance, and that all proper parties were to join therein as the Master should direct: and his Lordship declared that the estates to be conveyed pursuant to the said articles, were to be subject only to the payment of £3675, the charges and expences attending the inclosure of the estate of the appellant at Brodwell and Filkins, in the county of Oxford, under the act of parliament in the pleadings mentioned, and to the term to be created and vested in trustees for the purpose of raising £30,000 for the benefit of the appellant; and his Lordship also declared, *that the mortgage for £24,000 was to stand as part of the said sum of £30,000, to be raised under the deed, and that the term to be created by virtue of the deed, should be subject only to so much of the said £30,000 as the said mortgage and the interest already accrued thereon should not exhaust; and [175] out of what should not be so exhausted, the plaintiff was to be paid his costs of the suit, to be taxed by the Master, and such other costs as by the decree were directed.*

The appellant, apprehending himself greatly aggrieved by that part of the decree which directed the mortgage of £24,000, to stand as part of the sum of £30,000, to be raised under the deed; and that the term to be created by the deed should be subject only to so much of the £30,000 as the mortgage and the interest then accrued thereon should not exhaust, and that out of what should not be so exhausted, the plaintiff should be paid his costs of the suit, to be taxed by the Master, and such other costs as by the decree were directed, appealed therefrom: and on his behalf it was insisted (R. P. Arden, C. Ambler, J. Scott), that the bill being brought to have the articles performed and carried into execution, according to the true meaning of the

parties; the question was singly, whether £30,000 should be raised over and above the mortgages and incumbrances which affected the Oxfordshire and Berkshire estates at the time of entering into the articles? or, whether the £24,000 mortgage was to be taken as part of such £30,000; in which case £6000 only would remain to be raised? Now, upon the plain and natural import of the words of the articles, independent of any external evidence, an entire sum of £30,000 was directed to be raised at all events, without the least regard or reference to any former incumbrance which was not mentioned, or even most distantly alluded to in the articles, as it must inevitably have been had any such incumbrance been meant to make any part of the sum of £30,000, the whole of which must have been intended for the appellant's use; for if it had been in contemplation to raise £6000 only for his benefit, the power in the articles would have been confined to that sum, especially as it could not answer any purpose to make a provision for the payment of the mortgage of £24,000, which had been already raised, and effectually charged upon the Oxfordshire and Berkshire estates. What farther supported this construction was, that the purpose for which this sum was to be raised was most fair and honourable, being to relieve and pay a father's debts, who had been the means of settling his daughter very advantageously, and providing very largely for her and her family. That if the construction of the articles was not clear in the appellant's favour, it was at least *doubtful*, and then evidence, even by parol, was admissible, and would on a complete perfect deed of conveyance be admitted to explain a doubt: in case of a bill to carry articles into execution, it is never refused to *explain* or even to *contradict* the words of the deed, as being contrary to the intention of the parties, if offered on the part of the defendant. *Mistake* likewise is a head of relief in equity, and parol evidence is always admitted to prove it. But the evidence was so plain as to leave no doubt of the intention; nobody disputed it but Lady Shelburne and the infant. Mr. Paterson, who was Lady Shelburne's agent, in whom she alone placed confidence in this affair, and to whose conduct and discretion she committed [176] herself entirely, proved, that he was made acquainted with the mortgages and incumbrances affecting the estates, and that after several meetings, at which he was present, it was finally agreed, that £30,000 should be charged on the estates for the appellant's use, over and above those other incumbrances. The infant must be bound by the act of the parties contracting; although it was not positively proved that Lady Shelburne herself was made acquainted with the mortgages and incumbrances on the Oxfordshire estate, there was ground however, from Mr. Paterson's evidence, to suppose she was informed of them as well as of the terms proposed by the appellant; but if she was not, Mr. Paterson her agent certainly was, which would affect her, as she trusted wholly to him, and executed the articles prepared by him. That there was no pretence that Mr. Paterson meant to deceive Lady Shelburne: no evidence, nor even a suggestion of it in the bill; and his character, which was well known not only in the profession, but to the world in general, would not admit even a suspicion of it. If his evidence was not so minute as might be wished, it was owing to his great age, and decline of memory, which served him to remember the great outlines, but not every minute particular of the transaction. And Mr. Dagge's evidence proved the mistake or omission in wording the articles beyond a doubt. If the words, or the purport of what he advised, had been inserted, and which Mr. Paterson approved and agreed ought to be inserted, there could have been no room for any ingenuity to attempt the perversion of the sense of the articles, and consequently no colour or foundation for the present suit.

The respondents, Mr. Fitzmaurice and his wife Lady Mary, submitted (J. Madocks, W. Manley) their interests to the judgment of the house, and to the affirmance or variation of the decree, as should appear most consonant to the justice of the case.

There was also a cross appeal brought by the respondent the infant, and in addition to the foregoing arguments it was insisted (J. Mansfield, R. Hollist), that the stipulation in the articles being that the £30,000 should be raised towards payment of the then debts and incumbrances of Lord Inchiquin; and the incumbrance of £3000 having been brought on the estate by the present respondent, as well as the incumbrance of £24,000, there was the same propriety in discharging it out of the £30,000. It was of no moment to say that in this case the respondent, instead of receiving £30,000 out of the estates under the articles, would in fact, according to the construction put on the articles on the part of the present appellant, receive only

£3000; for he by the articles covenanted that the estates should be settled, subject only to the raising of £30,000 towards his debts and incumbrances, and having already incumbered them to the extent of £27,000, the £30,000 ought to be applied, in the first instance, in relieving them from that charge.

But on the behalf of the respondent John Hamilton Fitzmaurice the infant, it was contended (J. Mansfield, R. Hollist), that no notice was taken in the [177] marriage articles of the estates in Oxfordshire and Berkshire being subject to the mortgage for £24,000, or any other incumbrance. On the contrary, the estates were there treated of as not being subject to any debt of the appellants. That the articles themselves were clear and express, that the sum of £30,000 only was to be raised towards the discharge of the then present debts and incumbrances of the appellant; and it was not to be disputed by the appellant, that both the sum of £24,000, raised by the mortgage, and the further sum of £3000, mentioned in his answer, were raised for his use, and were and ought to be considered as his debts.

But it was objected on the part of the appellant, that in the course of the treaty for the marriage, and before the execution of the articles, the respondent Thomas Fitzmaurice, and also Mr. Paterson, who acted as Lady Shelburne's agent in preparing the articles, knew that the estates in Oxfordshire and Berkshire were subject to these two mortgages; that it was the intention and understanding of the parties that the £30,000, provided by the articles, should be over and above the money then due on mortgage of the estates; that this was particularly agreed to by the respondent Thomas Fitzmaurice, and was sufficiently made out by the evidence given on the part of the appellant. To this it was answered, that it was not pretended that Lady Shelburne herself had any notice whatever of the estates in question being in mortgage, or subject to any incumbrance; or that she ever agreed that the estates should be subject to the raising of more than £30,000 in all. She was the party contracting on behalf of the respondent Thomas Fitzmaurice, and the issue of the proposed marriage, for a settlement to be made on his part; and nothing short of her actual knowledge of the incumbrances, and her agreement that the £30,000 to be raised should be exclusive of them, could or ought to affect the stipulation in the articles. Mr. Paterson was represented as her agent; but he was her agent only for the purpose of communicating her intentions to the other parties, and receiving proposals from them; and had no authority to bind her by any contract which he should enter into or conclude. If he had been entrusted with any such authority, he would have executed the articles himself, and there would have been no necessity for his executing them; but as he had no such authority, they were properly laid before her for her approbation, and executed by her. Being so executed, the articles must stand for themselves; nothing could be taken from or added to them; and what Mr. Paterson might say or agree to, during the treaty which preceded the final conclusion of the business by the execution of the articles, was totally immaterial. Besides, it did not appear that Lady Mary Fitzmaurice was a party, or privy to the supposed agreement, for charging the estates with the £30,000, beyond the subsisting incumbrances. And that the claim to have the £30,000 raised beyond the incumbrances subsisting on the estates at the date of the articles, was in itself preposterous. It was proved of the cause on [178] the part of the respondent the infant, that the clear annual value of the estates in Buckinghamshire (exclusive of the mansion houses called Clief House and Taplow Court) was in 1779, when improvements had been made, of £1089 13s. 4d. per annum; and that the clear annual value of the estates in Oxfordshire and Berkshire was from Lady-day 1776. to Lady-day 1777, £1306 and 8d. from Lady-day 1777, to Lady-day 1778, £1316 15s. 4½d.—and from Lady-day 1778 to Lady-day 1779, £1372 7s. 7½d. but this was exclusive of the interest of £36 borrowed on the latter estates on the inclosure; and the income therefore of all the estates, out of which Lady Orkney and Inchiquin was to have a rent charge of £10 a year, would have been deficient by more than £600 a year to answer the interest of the money to be charged on them.

To this cross appeal it was said (R. P. Arden, C. Ambler), on behalf of the appellant in the original appeal, that if there was any concealment from, or misrepresentation to Lady Shelburne, there was not the least colour or pretence to charge, or to suspect, that Lord Inchiquin was guilty of it. The only persons Lord Inchiquin treated with, as to the terms of the settlement, were Mr. Fitzmaurice and Mr. Pat-

son, who were the only agents who appeared to transact the business on the part of Lady Shelburne; to them his Lordship acted fairly and openly, informing them minutely of the several sums the estates to be settled were charged with; and among others, of the mortgage of £3000 to Mr. Grimston, and that he wanted £30,000 more to extricate himself from his difficulties. In order to raise the further sum of £30,000, Lord Inchiquin proposed to Mr. Fitzmaurice to sell the Oxfordshire estate, which he was informed he could sell at £45,000 at the least; and after paying the above-mentioned charges upon it, to apply the remainder of the purchase-money in part discharge of the remaining debts and annuities as far as it would go, and then to raise the remainder of the £30,000 on the Taplow and Cliefden estates; but Mr. Fitzmaurice declared he would rather the whole was raised on all the estates; for that he might probably be able himself, in certain events, to pay off the whole sum raised, and wanted to be raised, and to retain or keep the estates in the family, which he wished to do, or at least to have it in his power so to do; which suggestion of Mr. Fitzmaurice was the reason of the articles being drawn up in the way they now stand. That the event alluded to by Mr. Fitzmaurice had happened. He was enabled from the large estate he succeeded to on the death of Lady Shelburne, his mother, to discharge the sum wanted; and if he deceived Lady Shelburne, by concealment from, or misrepresentation to her, he ought to indemnify the Orkney estate from any bad consequences of such concealment or misrepresentation.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED that the decree therein complained of, should be amended by inserting after the word *exhaust*, the following words, and that the residue of the said £30,000 shall be applied to the [179] discharge of the mortgage for £3000, mentioned in the answer of the appellant the Earl of Inchiquin, and also of the interest due on the said sums of £24,000 and £3000, and let the master for that purpose inquire what is due on the said mortgages respectively, and whether the Earl of Inchiquin has introduced any other incumbrance on the estate in question, and if he shall find any such, let the rest of the said sum of £30,000 be applied in the discharge thereof; and after the words in like manner to insert the following words, and if after paying the costs of this suit, any part of the said £30,000 shall remain unexhausted, let the same be paid to the said Earl of Inchiquin; and it was further ordered and adjudged that with these amendments the said decree should be affirmed. (MS. Jour. *sub anno* 1785, p. 494.)

## MORTGAGES.

CASE 1.—PHILIP TRAHERNE and another,—*Appellants*; RICHARD SADLEIR and others,—*Respondents* [4th December 1705].

[Mew's Dig. viii. 1077. See *Williams v. Bosanquet*, 1819, 1 Br. and B. 238.]

A mortgagee of a leasehold estate, getting possession by ejectment, is liable to the lessor for all arrears of the reserved rent; and where, to exonerate himself, he prevails with the lessor to distrain upon the goods of the lessee, which are already taken in execution by a judgment creditor; he shall pay to such creditor, so much as he has been obliged to pay to the lessor, with damages and costs.

DECREE of the Court of Chancery REVERSED.

The point of this case is thus stated in *Powell's Law of Mortgages*. "If the mortgagee enters into possession, he becomes liable to all covenants that run with the land; for he takes it *cum onere*, and enjoying the profits, he must submit to the losses."

On the 1st of July 1703, a warrant upon an execution, at the suit of Josias Ent Esq. and Catherine his wife, was delivered up to the appellant Philip Traherne, junior, as bailiff of the half-hundred of Clavering, in the county of Essex; to levy £1200 besides costs, on the goods of one Richard Bains, returnable in Michaelmas term

following; and, by virtue of this warrant, Traherne seized the corn growing on Bains's farm, called Berden Priory, and some other goods, which were appraised at £566 6s. 10d.

The respondent Richard, having a mortgage of this farm, brought his ejectment, and obtained judgment; and, on the 20th of August 1703, before the corn so seized, was carried into the barn; the other respondents, as attornies for Richard, brought Traherne junior, a warrant upon the judgment in ejectment, from the sheriff of Essex, to deliver possession of the farm to them, for the use of the respondent Richard.

[180] In consequence of this, Traherne was about to hire barns elsewhere, in order to house the corn; but John Sadleir and Beckley, considering that the farm would suffer, if the straw was not spent upon it; they, on the 27th of the same month, agreed with Traherne, "that he should have the use of the barns to lay and thresh the corn in, till Lady-day following; and, for this, all the straw was to be spent on the farm." Accordingly, possession was delivered in pursuance of the warrant, and all the corn was carried into the barns.

Traherne junior, used his utmost diligence in threshing out the corn, in order to pay the execution-money; but, the season being wet, and the corn having run much into straw, more time than usual was taken up in threshing it; and, in fact, not more than half of it was threshed, at the return of the warrant.

The farm was held by lease, under Christ's Hospital, at the yearly rent of £150, of which, there were two years in arrear, at Michaelmas 1703; and, for the payment of this rent, the respondent Richard was liable, as being in possession under his ejectment; but in order to get rid of this obligation, he informed the hospital of the seizure which had been made of the corn; and, that a great quantity of it was still in the barns upon the premises, and therefore prevailed with the hospital to make a distress upon it, for the rent so in arrear.

The distress was accordingly made, and the corn looked up in the barns; but young Traherne, looking upon this as a contrivance of Sadleir's, procured a warrant from the high sheriff, to oppose such distress; and, in consequence of this warrant, he, and the other appellant, his father, broke open the locks, which had been put upon the barn-doors; and afterwards, went on in threshing the corn.

The hospital, declining to trouble themselves any farther in this business, and considering Sadleir as their tenant, demanded payment of the rent from him, and he accordingly paid the same; but, upon giving security, to indemnify the hospital, he got leave to use their name, in an action against the appellants, for rescuing the distress: and, having brought the action, it was tried at the assizes for the county of Essex; and a verdict obtained against the appellants, for £108 as the value of the goods distrained.

The appellants, whose defence upon the trial was of an equitable nature, thereupon exhibited their bill in the Court of Chancery, against the respondents and the hospital; praying, that the respondent Richard might be decreed to pay the hospital the money recovered by the verdict; or otherwise to indemnify the appellant from the same. But, when the cause came on to be heard before the lord keeper Wright, on the 18th of May 1705, his lordship was pleased to order, that the bill should stand dismissed, with 40s. costs, as to the hospital; and, as to the other defendants, with costs to be taxed.

From this decree, as to the present respondents, the plaintiffs appealed; insisting (R. Turner), that the two years rent, due to the hospital [181] at Michaelmas 1703, was properly and only due from the respondent Richard Sadleir, he being their tenant from July 1701. That it was implied in the agreement, that Traherne junior, having the use of the barns till Lady-day 1704, and the respondent Richard, receiving the benefit of the straw; Traherne should not be molested during that time, either by Sadleir himself, or by any other person, by his order, or by means of his neglecting to pay the rent. That the distress, and action of *rescous*, though formally the acts of the hospital, were, in substance, the acts of the respondent Richard, and redounded solely to his benefit; in regard, the money thereby recovered would go towards lessening the rent, which he was bound to pay. And therefore, and as the whole of Sadleir's proceedings were in fraud of his own agreement, it was hoped, he would be decreed either to pay the hospital the £108, and the costs of suit; or else to save the appellants harmless from the same, and also pay them their costs.



On the other side it was contended, (C. Phipps, S. Cowper), that the hospital ought to have the full benefit of the verdict, and that the appellants were not entitled to any relief; there being no proof in the cause, that the respondents had committed any breach of their agreement, or were guilty of any fraud in the premises.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the said decree of dismissal should be reversed; and that the respondent Richard Sadleir should pay to the appellants what they had paid, or were further to pay to the hospital, as landlord; and also, the appellants damages and costs, both at law and in equity; and that such damages and costs should be taxed and ascertained by a master of the Court of Chancery. (Jour. vol. 18. p. 41.)

CASE 2.—CATHERINE TOOKE,—*Appellant*; Bishop of ELY and others,—*Respondents* [9th January 1705].

[Mew's Dig. ix. 1734.]

After a decree of foreclosure had been made absolute, and the mortgagee for many years in possession, he made his will, and thereby disposed of the mortgage debt, in these words: *And if Mr. S.'s debt be well paid, as I doubt not but it will, I order my executor to pay the sum of £4800 (which was the exact amount of the debt) amongst the children of my nephew.* Held, that this devise did not open the foreclosure, and that the testator's calling it a debt, did not alter the nature of his estate in the premises.

Order and decree of Lord Keeper Wright affirmed.

See Powell on Mortgages, vol. II. chap. 7. as to the exercise of the jurisdiction of Courts of Equity in opening foreclosures; with respect to which it seems, that no general rule can be laid down either as relates to the time which shall be considered as a bar, or to the particular circumstances which will entitle a suitor to this interposition of the court: for cases of this sort embrace such a variety of considerations, and are frequently so complicated in their nature, that each depends in a great degree upon its own combined circumstances, and may be considered rather as an instance of [182] the fact that the courts will interfere to open a foreclosure, than as a general rule, as to the circumstances in which relief will be given.

Thus in the case of *Burgh v. Langton*, post, Ca. 10, a decree of foreclosure was opened after 16 years, where the bill was against a mortgagee, who had obtained his security, part by original mortgage, and part by assignment, procured under colour of being a friend to the mortgagor; but in truth with a view to get him into his power; that the mortgagee might, upon his own terms, purchase his estate, which was worth three times as much as the money that had been advanced thereupon. But in the case of *Lante v. Crispe*, post Ca. 7, where the mortgagee in 1711 entered into possession, upon a foreclosure made absolute by consent, and considering himself as having an absolute estate in the mortgaged premises by virtue of the decree, proceeded to make improvements thereon by pulling down buildings that were ruinous; the mortgagor, 6 years after, moved the court for further time to redeem; and it was so ordered upon terms: This and several similar orders granted thereupon were reversed by the House of Lords upon the grounds stated in the note to that case; as also on the ground that the mortgagee had been two years in possession before he began alterations on the estate, when he might look upon it as his own, having such a title as would satisfy a purchaser; and that the money reported due to him amounted to as much as the clear rent at 58 years' purchase, exclusive of subsequent interest and costs. So, in the case of *Wichalse* (executor) v. *Short*, in this work, title Evidence, Ca. 6, neither overvalue in the estate, or even a parol agreement to redeem, were held by Lord Cowper or Lord Harcourt, to be sufficient reasons to open a foreclosure after 20 years; and their decree was affirmed on appeal. In the present case the mortgagee's calling it a debt,

to a collateral purpose only, was held not to alter the nature of his estate. And in *Jones v. Kenrick*, post, Ca. 14, a decree of foreclosure was refused to be set aside after 20 years, for matter of form only; even although the estate became of considerably more value than the money lent thereon; and a demurrer to such bill was held good.

Viner, vol. 15. p. 467. note to ca. 1. 2 Eq. Ca. Ab. 608. ca. 1.

In the years 1674, 1675, 1677, and 1678, Charles Stuteville Esq. made several mortgages of his estate in the county of Suffolk, to Sir Francis North, for securing several sums of money, amounting in the whole to £2300; and, in 1682, Sir Francis North, in consideration of £2386 5s. paid to him by the Lady Glenham, assigned over all his securities upon this estate to her, and her trustees.

Lady Glenham having another demand upon Mr. Stuteville, of £800, in Easter term 1682, exhibited her bill against him in the Court of Chancery; praying, that he might either pay her both these debts, with interest and costs, or be foreclosed of his equity of redemption; and this cause being heard in Easter term 1683, the defendant was decreed to pay both debts, with interest and costs, by a limited time; and, in default thereof, that he should be foreclosed: but, he neglecting so to do, the foreclosure was afterwards made absolute, and the decree inrolled.

In May 1684, Lady Glenham assigned this decree, and all her interest therein, to Sir William Dolben, one of the justices of the Court of King's Bench; who, being kept out of possession, did, in 1693, bring several ejectments, and thereby recovered part of the premises; the residue being held by Mrs. Judith Stuteville, the mother of Charles, as having an estate for life, prior to the mortgages.

Soon afterwards, Mr. Justice Dolben died, having made his will, and thereof constituted the respondent, Sir Gilbert, sole executor and residuary legatee; but in this will was the following clause: [183] *And if Mr. Stutevilles debt be well paid, as I doubt not but it will, I order my executor, Gilbert Dolben, to pay the sum of £4800 amongst the children of my nephew John Dolben.* And it seems, that upon calculation, this sum of £4800 exactly agreed with the money decreed to be paid, with the interest thereof from the time of the decree to the date of the testator's will.

Upon the death of Mrs. Judith Stuteville, the respondent, Sir Gilbert, brought an ejectment, and recovered the lands held by her; so that he was now in possession of the whole estate.

In July 1694, Charles Stuteville exhibited his bill in Chancery against Sir Gilbert Dolben, praying, that he might be at liberty to redeem, on payment of the mortgage money and interest; but to this bill the defendant pleaded the former decree of foreclosure, and insisted that the plaintiff ought not to be let into a redemption.

On the 10th of July 1695, this cause came on to be heard before the Lord Chancellor Somers, when the defendant's plea was allowed; but his Lordship was pleased to recommend an accommodation between the parties, and accordingly it was ordered, *by consent*, that the defendant should be at liberty to redeem, upon payment of principal, interest, and costs, to be computed by the Master. The defendant, however, not complying with this order, nor being willing to abide by the judgment of the Court on the plea, moved for leave to amend his bill; and this the Court thought proper to grant, on condition of his giving his own recognizance, not to disturb Sir Gilbert Dolben, or his tenants, nor commit waste; but if he refused to comply with this condition in a month, then his bill was to be dismissed with costs, without further motion. And Mr. Stuteville, not complying with this order, his bill was dismissed accordingly.

Mr. Stuteville, still apprehending he had a right to redeem, by deed, dated the 24th of May 1700, settled the premises upon trustees, in trust to sell, and pay Sir Gilbert Dolben, and all his other creditors; and then, in trust for himself, his heirs, executors, administrators, and assigns. He also made his will; and thereby devised all his estate, real, and personal, and his equity of redemption in the premises, unto the appellant, her heirs, executors, administrators, and assigns; and soon afterwards died.

In December 1702, eighteen years after the decree of foreclosure, Sir Gilbert Dolben assigned over all his estate and interest in the premises, to the Lord Bishop of Ely, in consideration of £8000; who afterwards purchased of the representatives of

Mrs. Judith Stuteville, a debt of £5800 due to her for the arrears of her jointure; and for which she had obtained a decree, whereby the whole estate stood charged with this debt.

In June 1703, the appellant exhibited her bill in the Court of Chancery against both the respondents, praying a redemption of the premises, on the foot of Lady Glenham's decree; and that she might have a re-conveyance, and an account of the rents and profits.

[184] To this bill the defendant Sir Gilbert pleaded the decree of foreclosure; the Bishop likewise pleaded that decree, and his several purchases from Sir Gilbert, and the representatives of Mrs. Stuteville; and, upon arguing these pleas before the Lord Keeper Wright, on the 21st of July 1704, they were allowed.

From this order the plaintiff appealed, insisting (C. Phipps, N. Lechmere) principally, that, by Mr. Justice Dolben's will and the subsequent proceedings, the foreclosure was opened; and that nothing had been since done to bar the appellant of her equity of redemption.

On the other side it was contended (E. Jennings), that Sir William Dolben's calling it a *debt* in his will, to a collateral purpose only, could not alter the nature of the estate he had in the premises; and, if he had called it a fee-simple estate, when it was only a term of years, that would not have made it a fee-simple estate. That the Bishop of Ely was a purchaser of the estate at a very great price, under a decree which had been signed and inrolled above 20 years, and been twice allowed as a good plea in bar of the redemption.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree and order therein complained of, affirmed. (Jour. vol. 18. p. 61.)

CASE 3.—WILLIAM ENSWORTH and others,—*Appellants*; MARY GRIFFITHS and others,—*Respondents* [12th February 1706].

[Mew's Dig. ix. 1682. Followed in *Gossip v. Wright*, 1863, 9 Jur. n.s. 592.]

The mortgagor of an estate releases the equity of redemption to the mortgagee, for a valuable consideration; the mortgagee, at the same time, gives the mortgagor a note, that if he should, within a year, pay a certain sum, being the original mortgage-money, and the consideration for the release of the equity, he (the mortgagee) would sell and convey to him the premises. Held, that this was an original agreement between the parties, and did not operate as a defeasance of the release, or raise any new equity to the mortgagor; and that the money not being paid, the party was not entitled to any relief.

DECREE of the Court of Exchequer AFFIRMED.

A distinction hath been made, by the Court of Chancery, between contracts originally founded upon lending and borrowing money, with an agreement for a purchase in a certain event; and cases, where *after a mortgage* a new agreement hath been entered into and executed by the parties for an absolute purchase; although there be a subsequent declaration, that the mortgagor may have his estate upon payment of interest, principal, and costs; or where a release of the equity of redemption is given, with a collateral agreement to re-convey upon repayment of the purchase-money; and in the latter cases it hath been determined that no re-purchase shall be allowed, unless upon *strict performance* of the conditions stipulated. See Powell on Mortgages, vol. I. cap. 6: and 1 Vern. 268: Talb. 61.

Viner, vol. 15. p. 468. ca. 8. 2 Eq. Ca. Ab. 505. ca. 6.

John Lloyd, being seised of certain lands in the county of Montgomery, by indentures of lease and release of the 13th and 14th of January 1680, mortgaged the same in fee to Walter [185] Griffiths; subject to redemption on payment of £400 and interest, on the 14th of January 1686.

Neither principal-money or any interest being paid at the time limited, Griffiths soon afterwards brought an ejectment; and having obtained judgment, he, on the 1st of February 1686, entered into possession of the mortgaged premises.

The mortgagor being in distressed circumstances, and unable to satisfy this mortgage, on the 17th of May 1687, in consideration of £350 paid by Griffiths, executed a release of the equity of redemption to him; and Griffiths, *at the same time*, gave Lloyd a note or memorandum, promising, that if Lloyd should, within a year, pay to him £750 and all charges of repairs for that time, he (Griffiths) would *sell and convey* to him the premises. But this money not being paid, Griffiths continued in the peaceable possession of the premises, till the time of his death; and cut down timber, and exercised other acts of absolute ownership thereon.

In February 1703, the said John Lloyd died; but apprehending that he was still entitled to the equity of redemption of this estate, under the above note, he made his will, and thereby devised the estate to the appellant Katherine, his then wife, for her life; with remainder in tail to the appellant Edward Lloyd, his son.

In Hilary term 1704, the appellants exhibited their bill in the Court of Exchequer against the respondents, as claiming under the said Walter Griffiths, for a redemption of the premises, and an account of the rents and profits, and of the money arising from the sale of timber. The respondents by their answer, insisted on the mortgage and release, and that their testator being thereby an absolute purchaser of the premises for a valuable consideration, the plaintiffs were not entitled to redeem the same.

On the 11th of April 1705, the cause was heard, when the Court were pleased to dismiss the bill; and afterwards upon a re-hearing, they confirmed the former decree.

From both which decrees the plaintiffs appealed, insisting (J. Grove) that the release of the equity was obtained from Lloyd, to purchase his liberty when starved in a prison; and that he had no advice thereon, but was forced to submit to such terms as Griffiths thought proper to impose on him. That the note to re-convey the premises on payment of £750, which was the very sum mentioned in the release, being given by Griffiths, *at the same time* that the release was executed by Lloyd, operated as defeasance of that release; and raised a *new equity* to Lloyd, which was never afterwards discharged. That the respondents themselves had proved the value of the estate to be £45 per ann. which, at twenty years purchase, was £900; and therefore the appellants were advised, that it was not material for them to enter into any evidence of the value, although it was in fact worth £80 per ann. and £1600 to a purchaser as that, and also the value of the timber felled by Griffiths, which was worth about £400, was [186] matter of account before the Deputy Remembrancer, and proper to be proved after the hearing. But be the value ever so small, it could be no damage to the respondents to have their mortgage-money and interest paid them, on accounting for the rents and profits; and, as to the lapse of time in payment, it was a common ground of relief in a Court of Equity.

On the other side it was contended (W. Turner), that Walter Griffiths was a purchaser of the premises in question, at a fair value; for, that by the proofs in the case it appeared that the yearly value thereof, after deducting the chief-rent and taxes, was not above £31 per ann.; and that all the timber thereon at the time of his entry, was not worth above £200, and not more than above £50 worth of it had been cut by him, so that £750 was rather more than the estate was really worth; as lands in that part of Wales were not worth more than 15 years purchase. That there was not the least proof of any ill practices being used by Griffiths, in obtaining the release from Lloyd, and as to the note given *at the same time*, it was an *original agreement* between the parties, that Griffiths should *sell and convey* the premises, upon the terms there mentioned; but not that Lloyd should be at liberty to *redeem* the same. And that both the parties lived 16 or 17 years after this transaction, yet Lloyd never set up that he pretended to have any right of redemption; it was therefore hoped, that as the respondents and their testator had been in possession of the estate for so great a length of time, and had paid for the estate more than it was worth, they should be permitted to enjoy the same without any farther trouble.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed; and that the decree of dismission and the confirmation thereof should be affirmed. (Jour. vol. 18. p. 234.)

[187] CASE 4.—HENRY CONWAY and others,—*Appellants*; PHILADELPHIA SHRIMPTON and another,—*Respondents* [19th January 1710].

[Mew's Dig. ix. 289. But see now 37 and 38 Vict. c. 57, s. 7.]

A mortgage, after 40 years possession in the mortgagee, was held to be redeemable, upon the foot of a stated account, and an agreement for turning interest into principal.

DECREE of Lord Chancellor Cowper AFFIRMED.

The equity of redemption of a mortgage estate, was conveyed to A. in trust for the payment of debts, and the surplus to B. A. agrees with the mortgagee to turn the interest in arrear into principal. B. is bound by this agreement, though no party to it.

Mortgages are held not to be within the words of the statute of limitations, and no positive time has been fixed on, which shall be an absolute bar to redemption: because Courts of Equity have considered that a mortgagee cannot be injured if he receives his principal, interest, and costs; though a mortgagor may, if he be obliged to part with his estate for less than its value. But the making up of accounts, after long periods of time, being very difficult, and attended with great hardship on the mortgagee, it hath been thought reasonable to establish, on an equity in analogy to this statute, a period at which *prima facie* the right of redemption shall be presumed to be deserted by the mortgagor; unless he be capable of producing circumstances to account for his neglect, such as imprisonment, infancy, coverture, or being beyond sea; not having absconded, which is an avoiding or retarding of justice. And, to preserve an uniformity between the proceedings in courts of law and equity, twenty years after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time, hath been fixed upon as the period, beyond which a right of redemption shall not be favoured. See Powell on Mortgages, c. 10: and 1 Eq. Ab. 315, c. 5: Sel. Ca. Ch. 9, 10, 56: 3 P. Wms. 288: 1 Ch. Rep. 184. 206: 3 Atk. 313, there cited. But if there be fraud in the transaction, as if a mortgage be made by an absolute deed without a defeasance, no length of time will be a bar. Talb. 63: 1 Vez. 160. And an account settled between the mortgagor and mortgagee within the time limited as above, although there be no bill filed, will preserve the mortgagor's right of redemption. 2 Atk. 333.

But there is a species of contract which partakes of the nature of a mortgage, inasmuch as there is a debt due, and an estate as a security for the repayment; but differs from it in the circumstances that the rents and profits are to be received without account till the principal money is paid off, and that there is no remedy to enforce the payment. This is called a Welch Mortgage, and implies a perpetual power of redemption subsisting for ever; and the mortgagee cannot compel a redemption on a foreclosure. See Pre. Ch. 423: 1 P. Wms. 291: 2 Vern. 701. So where there is an express agreement that the mortgagee shall hold the premises until he be satisfied, time is held to be no bar to the redemption; and this was determined even in a case where it appeared by the plaintiff's own shewing that sixty years were elapsed. 2 Vern. 701. But if after an account taken in Chancery, it appears, that the mortgage was satisfied by perception of profits twenty years before, and that the mortgagee has continued in possession from that time, the limitation according to the above analogy will run. 2 Atk. 360. And in the case of *Hartpole v. Walsh*, (*post*, Ca. 17,) where H. in consideration of £600 lent him by W. conveyed estates to him in fee, subject to a proviso, "that the conveyance should be void whenever H. his heirs, executors, administrators, or assigns, should on any last day of June or December pay unto W. or his heirs the sum of £600:" And it was agreed by the indenture that W. and his heirs should receive the yearly rent of the premises in lieu of his interest, with a view to which, possession was delivered to him: and afterwards H. in consideration of £2300 paid by W. granted and conveyed the premises comprised in the former mortgage, together with others, to him, his heirs and assigns; and covenanted that whenever W. should give to him, his heirs or assigns, eighteen months notice by letter in writing, requiring payment of the £2300, H. his heirs or assigns,

should pay the same with interest within eighteen months after such request; and W. was in like manner let into possession of the last mentioned premises; a bill for redemption brought after a period of one hundred years were elapsed was dismissed: and that decree for dismissal affirmed in the House of Lords. The ground of which decree as to the premises first mortgaged, appears to have been that the comprising them in the latter mortgage put it in the power of the mortgagee, or his representatives, to ascertain and limit the time of redemption, by demanding the mortgage money; which demand it was admitted had been made by W.—See Powell, cap. 10.

[188] In the present case of *Conway v. Shrimpton*, the mortgage was decreed to be redeemed, upon the foot of an account stated previous to the mortgagee's entering on the premises, notwithstanding he had been in possession forty years; the husband of the heir of the mortgagee having entered into an agreement, with the heir of the mortgagor, (about seven years before the bill for redemption came to an hearing,) for the purchase of the equity of redemption. For although, for reasons sufficiently evident in the case, the Court refused to decree a specific performance of that agreement, yet it seems to have been considered as an admission by the mortgagee, that at that time he conceived the mortgagor had a right to redeem; which occurring within seven years of the time of exhibiting the bill, brought this case within the reasoning of that of *White v. Pigeon*, Toth. 232; where a bill was demurred to because it was to be relieved against a mortgage after forty-one years; yet on a promise being proved that the mortgagor should be at liberty to redeem after twenty-seven years, the demurrer was disallowed; because though forty-one years had passed since the mortgage, yet only fourteen had elapsed after the time agreed for redemption. See Powell, *ubi supra*.

Upon the same principle a redemption was decreed in the case of *Palmer v. Jackson*, (post, Ca. 19,) even under the circumstances there stated; for the non-redemption for thirty-eight years of the time elapsed being accounted for, by having been occupied in different suits brought by the contending parties, a period of seventeen years only had run out between the time of settling that dispute, and the exhibiting the bill to redeem.

Viner, vol. 5. p. 505. ca. 5: vol. 15. p. 468, ca. 9: vol. 21. p. 512. ca. 6:

2 Eq. Ca. Ab. 596. ca. 10: 738. ca. 2.

By indentures of lease and release of the 10th and 11th of December 1664, Sir Kenelme Digby mortgaged part of the manor and lands of Stokedry, in the county of Rutland, to Philip Earl of Leicester, for securing £4000, with interest at £6 per cent.; and, by other indentures of lease and release, of the 12th and 13th of December 1664, he mortgaged the residue of the same estate, to the trustees of Lord Lumley, for securing the like sum of £4000, and interest after the same rate.

Sir Kenelme afterwards, by certain conveyances, and by his will, vested the equity of redemption of the mortgaged premises in, or in trust for, Charles Cornwallis Esq. to the intent that he should, by the rents and profits, or by sale, pay himself what was due to him from Sir Kenelme, on an account stated between them on the 16th of November 1664, and what he should for the future lay out for him, together with the charges of the trust; and that when he should be so reimbursed, he should apply the residue in payment of Sir Kenelme's debts, by mortgage or otherwise, and of the legacies given by his will; and the surplus thereof, if any, was to be to the use of trustees, to preserve the contingent remainders, under a proviso, that they should not convert the profits thereof to their own use, nor permit John Digby, Sir Kenelme's son, to receive the same; but should permit the said Charles Cornwallis to manage such surplus, and receive the profits thereof, for the use of the said John Digby for life, to whom Mr. Cornwallis and his heirs were to be accountable: remainder to the heirs of the body of John, in tail male; and for default of such issue, to the second, third, fourth, and other sons of Sir Kenelme, successively in tail: with remainder to his own right heirs.

In July 1665, Sir Kenelme Digby died; whereupon Mr. Cornwallis entered on the premises; and in Trinity term 1667, John Digby the son, being then of full age, filed his bill in Chancery against Mr. Cornwallis and the mortgagees; offering to pay what [189] was due to them, and praying, that the mortgaged premises might be conveyed to him.

To this bill the mortgagees answered, that they were ready to receive their money,

and convey the premises to whomsoever the equity of redemption belonged; but Mr. Digby not proceeding any further in the cause, Mr. Cornwallis and the trustees, in Michaelmas term 1669, exhibited their bill against the mortgagees, for a redemption of the premises; to which they put in the same answer as in the other suit.

There being a large arrear of interest due on these mortgages, and the mortgagees having been made parties to two several suits, in which different persons claimed to be entitled to the equity of redemption; they, on the 11th January 1669, moved the Court, that they might be at liberty to accept their money from Mr. Cornwallis, who had offered to pay the same; and to convey the premises to him, or as he should appoint, subject to the same equity of redemption, as they were then subject to; which was ordered accordingly, unless cause should be shewn to the contrary by Mr. Digby, at the then next general seal. And upon his counsel shewing cause, on the 17th of the same month, it was ordered, that he should have time to pay off what was due to the mortgagees, until the latter end of the then next Hilary term; and upon such payment, the mortgagees were to convey the premises to the six clerks of the Court, not towards the cause, to be disposed of as the Court at the hearing should direct; but, in case Mr. Digby should fail in paying the money at that time, the mortgagees were to be at liberty to take their money, and convey the premises, as they should be advised.

Mr. Digby not paying the money by the time limited, and the mortgagees, who had previously obtained judgments in ejectment, being about to sue out writs of *habere facias possessionem*; Mr. Cornwallis, who was still in possession of the premises, under the conveyances and will of Sir Kenelme Digby, applied to the mortgagees for a little forbearance; and the more readily to induce them to comply with such request, he proposed to state an account forthwith, of what was due to them for principal and interest, and to make the whole balance carry the same rate of interest, as the original mortgage-money: and, in consequence of this proposal, certain articles were on the 8th of March 1669, entered into between Mr. Cornwallis and the mortgagees, whereby it was agreed, that £4668 10s. 6d. was due to the Lord Lumley, and £4676 16s. 6d. was due to the Earl of Leicester, for principal, interest, and costs, on the account stated to the 15th of January preceding; that both these sums should be made principal, and carry an interest of £6 per cent. from that time; and that Mr. Cornwallis would discharge the whole on the 16th day of June 1670. But Mr. Cornwallis not being able to perform this latter part of his agreement, the mortgagees were, in July 1670, let into possession of the premises, comprised in their said mortgages respectively.

[190] On the 2d of July 1672, Mr. Digby's cause was heard; when, at the request of his own counsel, it was ordered, that the mortgaged premises should be forthwith sold; and that, in the first place, the money due to the mortgagees respectively, should be paid, with interest and costs; then, what was due to Cornwallis, and the other debts and legacies of Sir Kenelme; and that the overplus, if any, should be paid by Mr. Cornwallis to the plaintiff John Digby, or his assigns.

Notwithstanding this decree, the estate remained unsold, although both Cornwallis and Digby lived several years afterwards; and the Lord Lumley wanting his money, the Earl of Leicester paid him off, and took an assignment of his mortgage.

In 1689, John Digby died, leaving two daughters; namely, Mary, who intermarried with Sir John Conway, and by him had issue the appellant Henry Conway; and Charlotta, who intermarried with Richard Mostyn Esq. and had issue by him, the other appellants Bridgett Lytton and Charlotta Mostyn.

The Earl of Leicester afterwards died, having first by his will and otherwise vested the mortgaged premises in the respondent Philadelphia and her heirs; and, upon her marriage with John Shrimpton Esq. they were conveyed to the Earls of Sunderland and Romney, in trust for Philadelphia, during the coverture, for her own separate use, and wherewith Mr. Shrimpton was to have no intermeddling power; and after her death, in trust for Mr. Shrimpton for life; and then to the issue of their two bodies.

In 1702, the appellants, as the co-heirs at law of John Digby, their mothers being dead, were about bringing a bill, for the redemption of the mortgaged premises, against Shrimpton and his wife; whereupon Mr. Shrimpton inadvertently, and without considering the tenor of his marriage-settlement, entered into an agreement

with the appellant's agents, whereby he was to give £2750 for the equity of redemption of the premises, and release certain other demands upon the appellants, to the amount of £500 more; and to assist them in obtaining an act of parliament to enable them to make a good title and conveyance.

A bill was accordingly brought in for that purpose; but Mr. Shrimpton being made sensible of his error, made such an opposition as prevented it from being passed; whereupon, in Hilary term 1705, the appellants exhibited their bill in Chancery against Mr. Shrimpton and his wife; praying, either a specific performance of the above agreement, or, that they might be at liberty to redeem the mortgages. The defendants, by their answer to this bill insisted, that after such a length of possession, as from July 1670, almost *forty* years, the plaintiffs ought not to be let into a redemption; it being impracticable to account for the profits for so many years past; and, as to the agreement, they insisted that it ought not to be performed in a Court of Equity; because it was unreasonable, not mutual, and void by the statute of frauds and perjuries; as not being signed by the appellants, or any person by them lawfully authorised.

[191] On the 13th of December 1709, this cause (after having been revived upon the death of Mr. Shrimpton) was heard at the Rolls; when his Honour dismissed the bill, as to the performance of the agreement; and decreed, that the plaintiffs should be at liberty to redeem, upon payment of the two principal sums of £4000 and £4000 originally lent, with interest for those sums, and costs; and that the defendants should account for the profits, for the time that they, or those under whom they claimed, had been in possession.

But the defendants, being dissatisfied with this decree, appealed to the Lord Chancellor Cowper; and the cause being heard on the 29th of April 1710, his Lordship was pleased to affirm the dismissal of the bill by the Master of the Rolls, as to the agreement; and decreed, that the plaintiffs should redeem on the foot of the accounts stated, on the 15th of January 1669; and on payment of the said two sums of £466<sup>8</sup> 10s. 6d. and £4676 16s. 6d. making together £9345 7s. with interest from the said 15th of January 1669, and costs.

From this decree the plaintiffs appealed (E. Northey, J. Pratt); and, as to the agreement for the purchase of the equity of redemption, it was said that it evidently appeared, by letters under Mr. Shrimpton's own hand, and other proofs in the cause, that there was a solemn fair treaty, continued for a year together, before the agreement was signed, without the least fraud or circumvention on the part of the appellants; that Shrimpton, all the while knew the appellants to be infants, and that the equity of redemption was in them, and for that reason, he agreed to give his assistance in procuring an act of parliament for vesting it in trustees; and, if a person of full age would, on valuable considerations, contract with infants, knowing them to be so, it was hoped, that as such contract would be good at law, and the party liable to answer damages there for the breach of it, so in equity he should specifically perform it; for otherwise, infants, instead of being favoured, as they always are, would be in a worse condition than persons of full age.

As to the agreement by Cornwallis, of January 1669, for making the interest principal; it was said, that Sir Kenelm Digby died within seven months after he had made the mortgages, and consequently there could be but half a year's interest then due; that Cornwallis, by entering on the premises, kept John Digby the heir out of possession, and he ought at least to have kept down the interest; that he had no manner of power or capacity, either as grantee or devisee, to charge the estate with a shilling more than was strictly due; and if he let the interest run in arrear, John Digby could not prevent it, and therefore neither he or his heirs ought to suffer by it, to the degree of paying interest upon interest, at £6 per cent. and even the like rate of interest for the mortgagee's costs; besides, the arrear of interest was, in some measure, the fault of the mortgagees themselves; who might have entered on the premises, or brought a bill to foreclose; but [192] which, to this day, they had never done. That John Digby was no party, nor even privy or consenting to this agreement, though he was then of full age, and though he, and not Cornwallis, was the only person to be affected by it; and it would be highly unreasonable, if two third persons should, without his privity, state such an account, and make such an agreement for him, as he must, at all events, be bound by, whether right or wrong. That it could



not be pretended, Cornwallis did the least service to Mr. Digby by this agreement; for he made it on the 8th of March 1669, and then confessed judgment in ejectment, with a stay of execution only to the 16th of June following, and agreed not to receive the Lady-day's rent in the mean time; and, that the mortgagee's interest and costs should be made principal, and carry interest from the 15th of January then last; and in July following, he voluntarily delivered them possession; so that it was really making their interest and costs principal, from a day seven weeks past, and letting them into possession at the same time; as they were to have, and in fact received, all the rent which became due from that day. That this was a transaction so injurious to Mr. Digby, so voluntary in Cornwallis, there not appearing the least necessity for it, and so clandestine in the mortgagees, who well knew that Cornwallis was only a trustee, and that Digby was the proper person for them to reckon with; that though it could not at so great a distance of time be proved, yet it was highly to be suspected, that there was an improper understanding between them; or else, why did not Cornwallis, instead of acting in this manner, give the mortgagees actual possession on the 8th of March, which was all they could have asked of him? And if it should once be allowed, that trustees might secretly, and without necessity, state such accounts, and heap interest upon interest, it would be of dangerous consequence to many heirs, on whom these kind of accounts might be multiplied, and their estates presently consumed; for, by the same reason, it might be done once, it might be done annually; and it was contrary both to law and equity, that any man should be bound or injured by the act of another, without his authority.

On the other side it was insisted (T. Powys, S. Cowper), that a redemption ought not to be granted, after such a length of possession; or if it was, that it ought to be on the foot of the accounts stated in January 1669; and that the agreement, for turning interest into principal, ought to stand. That under the conveyances and will of Sir Kenelm Digby, Mr. Cornwallis had the equity of redemption wholly vested in himself, or in the trustees subject to his controul, upon a special trust and confidence; and might have sold or otherwise disposed of the estate as he pleased, being only accountable to Mr. Digby for the surplus; and certainly any prudent and reasonable act done by Cornwallis, just and equitable in its nature, and not only necessary, but beneficial to the estate at the time, would have bound Mr. Digby, and consequently ought to bind the appellants, as standing in his place. That the stating the [193] mortgagees' accounts, and making their interest principal, was not a prejudice, but an advantage to the estate; for it prevented the great expence of sheriff's poundage, and other fees incident to the taking possession, and also the charge of assigning the mortgages, which would otherwise have happened; and it could not be disputed, that if the mortgagees had assigned to other persons, the whole sums paid by the assignees would have carried interest from the time of payment. That the whole sum due for interest and costs, on the 15th of January 1669, was liquidated at £1345 7s.; and it would be very unreasonable, that this sum should not carry interest according to the agreement; when, if the money had been paid as it ought, it would have produced interest in another place. And as to Mr. Shrimpton's agreement, it was insisted, that he was drawn in by surprise, and at a tavern, to make it; that it was unreasonable in its nature, being to give £3250 for the equity of redemption of an estate, not sufficient to pay the mortgage money due thereon by £2000; that Mr. Shrimpton had no power to enter into any agreement, touching his wife's estate; but if he had, yet he had not left assets for the performance of it; and therefore it was hoped, that there was no ground for carrying an agreement thus circumstanced, into a specific execution.

AND accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 19. p. 197.)

CASE 5.—WILLIAM WILSON,—*Appellant* ; JAMES TOOKER,—*Respondent*  
[19th June 1714].

[Mew's Dig. ix. 1777.]

Exchequer annuities were assigned by way of mortgage, for securing £5000 and interest. The money not being paid, the mortgagor (after repeated notice to the executor of the mortgagor, and demand of his money) sold the annuities on the Exchange, at the market price. Held, that this was a good sale, and that there was no necessity of previously foreclosing the equity of redemption.

DECREE of the English Chancery REVERSED.

See *Lockwood v. Ewer*, 2 Atk. 303 ; which was the case of a mortgage of East-India stock.

1 Wms. 261. Viner, vol. 15. p. 476. ca. 7. 2 Eq. C. Ab. 597. ca. 14. 608. ca. 3.

In 1708, Edward Earl of Jersey, pursuant to an act of parliament, 6 Ann. paid into the receipt of the Exchequer, £6400, whereby he became entitled to an annuity of £400 per ann. for 99 years, commencing from the 25th of March 1708 ; and had four several orders delivered to him, for the payment of £100 each, dated the 23d of December 1708, and numbered 545, 546, 547, and 548.

[194] On the 2d of May 1709, the Earl assigned all his interest in these four annuity orders, for the residue of the said term, to Thomas Thynne, Esq. who having borrowed of the appellant £5000, did on the 7th of July following, by deed poll assign to him the said four orders, for the remainder of the said term ; but by an indenture of defeasance, dated the same day, the appellant covenanted, that upon being paid the said £5000, and interest, on the 8th day of January then next, he would assign and transfer the said annuity orders, and all his interest therein, and all benefit and advantage arising thereby, unto the said Thomas Thynne, his executors, etc. for all the remainder of the term then to come, free from incumbrances : and by this deed Mr. Thynne covenanted to pay the money at the time limited.

In April 1710 Mr. Thynne died, without having paid any part of this £5000 ; and the respondent having taken out letters of administration, with the will annexed, the appellant frequently in the course of two years afterwards, applied to him for payment of the principal-money and interest ; intimating that unless the same was paid, he should be under the necessity, according to the constant practice in similar cases, of selling the annuity orders on the Exchange, and accounting with him for the surplus, if any, after satisfaction of his own demand.

These applications proving ineffectual, and the annuities beginning to sink in their value, the appellant, by a letter dated the 24th of March 1711, gave notice to the respondent, that he should proceed to sell them at the Exchange, on Wednesday the 2d day of April then next ; and desired him to attend at that time, to see that they were sold for the highest price the market would then yield. But when the day came, the respondent earnestly desired that the sale might be postponed to the Monday following ; and underneath an attested copy of the appellant's letter of notice, wrote the following words :—*Mr. Wilson, I desire you would suspend the sale of the annuities till Monday next, and you'll very much oblige your very humble servant,*

James Tooker.

The money not being paid, nor any further delay requested, the annuities were on the 7th of April 1712, sold by an eminent broker on the Exchange, for the highest price which they were then worth ; and the appellant having rendered a fair account of the produce, there appeared a balance due to him, in respect of his principal-money and interest, of £170 7s ; and for which he brought an action upon the covenant.

But the value of these annuities afterwards rising, the respondent, instead of paying the balance, brought his bill in Chancery against the appellant to redeem : upon a suggestion, that the transaction was in the nature of a mortgage of land, and that the equity of redemption had not been foreclosed, as it ought to have been previous to the sale.

To this bill the defendant, by his answer, insisted, that government securities were in the nature of pawns, and might be sold without a foreclosure, as in the case of land; that it had been [195] the constant practice so to do, and that the sale being in this case deferred to the time which the plaintiff himself had desired, and no further delay asked for, and the annuities being sold for the most that they were then worth, he ought to be concluded by such sale.

On the 2d of July 1713, the cause was heard before the Lord Chancellor Harcourt; who was pleased to declare that he conceived annuities issuing out of the Exchequer, to be very different in their nature from common stocks, whose value depended upon imagination, rather than the real intrinsic worth of them; but that Exchequer annuities were a certain security, carried a constant interest, and ought to be considered of the same nature as land, and a mortgage thereof as a mortgage of land: and therefore decreed, that the defendant should procure annuities of the like value on the same fund, to be assigned to the plaintiff, upon his paying the principal-money and interest due on the mortgage; and that the defendant should account before a Master, for the annual income of the annuities, but should not be allowed his costs to that time.

From this decree the defendant appealed; and on his behalf it was argued (S. Cowper, N. Lechmere), that annuities in the Exchequer could not be said to differ materially from other stocks, the Parliament having provided a constant interest for all government securities, as well as for these annuities; there was indeed some difference between them respecting the principal-money, but this difference was much to the advantage of the stocks; for there, the principal was to be re-paid entirely, whereas the principal of the annuities wore out by time, and consequently decreased in value; and in this case, the funds appropriated for payment of these annuities, being chiefly the remnants or surplusages of other funds, had proved so deficient, and were so uncertain, that the Exchequer annuities had been more fluctuating in value, and had sunk more from their original price, than any other government security whatever. That if the present decree should stand, great inconveniences must arise to merchants and other traders, whose estates often consisting chiefly of annuities and other government securities, it had been much to their advantage that on any sudden emergency they could readily borrow money for a short time, near to the full value of such securities; but this would be impracticable for the future, because no person would lend, if after the money became payable, the security must be foreclosed, like a mortgage of land: besides, under the sanction of this decree, many persons might be induced to bring bills in Chancery, to redeem their annuities and other Government securities, which had been previously sold for the full value, at the time of such sale; and by this means, an infinite number of suits might be occasioned. That it has always been the known and constant practice, in the case of mortgages of such securities, where the money has been neglected to be paid at the time stipulated, to proceed to a sale on giving eight or ten days notice; yet these annuities were not [196] sold till above two years after the money became payable; and after all reasonable application had been used in the mean time, to obtain satisfaction of what was due without selling. And notwithstanding they were fallen in value below what was due to the appellant, yet the sale was deferred to the day that the respondent himself had appointed; beyond which, it was not even pretended that he ever desired any further delay; nor was there the least proof or suggestion, that they were not sold for the most they were then worth. That these annuities were personal assets, and being as such liable to the testator's debts, it was the respondent's duty, as his administrator, to have sold the same for the payment thereof, in case they had been in his own hands; and if so, surely the appellant to whom they were pledged, ought not to suffer for having done what in justice and equity the respondent himself ought to have done, for payment of the appellant's debt.

The printed case on the part of the respondent appears to be signed as in the margin (J. Jekyll, S. Mead); but it contains not a single reason in support of the decree.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be reversed; and that the appellant should account with the respondent for all sums of money received by the appellant,

either by sale of the annuities, or out of the Exchequer, by virtue thereof; and on payment by the respondent of what should remain due to the appellant on such account, for principal and interest, together with his costs, to be taxed by the Court of Chancery, in such time as that Court should limit; the appellant was enjoined from proceeding against the respondent in the action of covenant or otherwise.\* (Jour. vol. 19. p. 723.)

[197] CASE 6.—ANNA DOROTHEA BIRNE and others,—*Appellants*; GEORGE HARTPOLE and others,—*Respondents* [17th February 1717].

A redemption of a stale mortgage was decreed, after the mortgagee had been in quiet possession for 68 years; but this decree being made upon a *bill of review*, was held to be improper, and therefore the decree was reversed; but without prejudice to the question, whether the estate was redeemable or not, whenever it should be brought into judgment by a proper bill.

DECREE of the Irish Chancery reversed.

See *ante* Case 2 [5 Bro. P. C. 181] and the note there; and *post*, Case 17 [5 Bro. P. C. 267].

Robert Hartpole senior, and George Hartpole, his son and heir-apparent, by indenture of lease dated in May 1619, demised a certain farm and lands in the Queen's County, in Ireland, to one Charles Williams, for 61 years, at the yearly rent of £40. And afterwards the said Robert Hartpole and James Grace, his trustee, by indenture dated the 16th of July 1636, demised the same premises to Sir William Parsons, for 99 years, at a pepper-corn rent; subject to a proviso, that this lease should be void on payment of the £600 unto the said Sir William Parsons, within three weeks after the date thereof: and also to a condition that whensoever the said Robert Hartpole, heirs or assigns, should, after two months warning, pay the said Sir William Parsons or his assigns, on any the 1st day of May or November, the sum of £600 in one payment, together with all arrears of rent, and other sums appearing to be due to him by bond or bill, then the said lease should be void. But by articles made between them the same day, reciting the lease, it was nevertheless agreed, that the said £600 should be paid on the 1st of November 1637, if the said Sir William Parsons, or his assigns, should give warning three months before, of his or their desire to have the same paid.

In 1655, Daniel Birne, the great-grandfather of the appellant Sir John, purchased Sir William Parsons's estate and interest in the premises for £600; and afterwards by indentures of lease and release, dated the 19th and 20th of March 1671, upon marriage of Sir Gregory Birne, his son, this estate (among others) was conveyed to trustees, according to such estate as Daniel Birne then had in the several premises to the use of himself for life, remainder to the use of Sir Gregory Birne for life, remainder to all the sons of Sir Gregory successively in tail male.

Daniel Birne continued to receive the rents and profits of the settled estates until his death, which happened in 1683; when Sir Gregory became entitled, and accordingly entered.

In 1704, William Hartpole, the great-grandson of the mortgagor, brought his bill in the Court of Chancery in Ireland, against the said Sir Gregory Birne, and Daniel his eldest son, for a redemption of this leasehold estate; to which bill Sir Gregory made an answer, and thereby insisted that the plaintiff was not entitled to a redemption after so great a length of time; and Daniel Birne put in a plea.

\* Mr. Peere Williams, in his report of this case, makes Wilson the administrator of Thynne; whereas Wilson was the lender of the money, and Tooker, the administrator of Thynne, the borrower. He also says, *the lender dying suddenly, the defendant, his administrator, sold the annuities at the Exchange by a sworn broker*; but this is clearly a mistake, for Wilson the lender, appears to be the party *secuting the appeal*. That reporter is likewise mistaken in his chronology; he has placed this case among the determinations in Trinity term, 1714, which is exactly one year too late.

answer, pleading the length of time and the statute of limitations, in bar of the account and redemption prayed by the bill; and stating his title to the premises in question, under his father's marriage settlement.

On the 20th of May 1708, the plea came on to be argued, when the benefit of it was reserved to the hearing of the cause.

In August following, the plaintiff and the defendant Sir Gregory entered into an agreement (but without the privity of the other defendant Daniel Birne) with Charles, Thomas, and Joshua Wilcocks, that in consideration of £925 to be paid to each of them, they would assign their respective interests in the premises to those three persons; who long before had notice of Sir Gregory's settlement, and that he had thereby only an estate for life. In consequence of this agreement, exceptions were taken to Sir Gregory's answer, and a further answer put in whereby he was made to submit to an account; and having put in this answer, and delivered up all the deeds to the Wilcocks's, he received the £925.

On the 27th of November 1708, the cause was heard upon the bill and Sir Gregory Birne's further answer, without any regard to the plea of the other defendant Daniel; when it was decreed, that an account should be taken between the plaintiff and the defendant Sir Gregory; and that upon payment of what should appear due to him, he should assign his interest in the premises to the plaintiff, or as he should direct. And thereupon a report was immediately procured, certifying £925 to be due; being the exact sum which the Wilcocks's had before paid Sir Gregory.

The defendant Daniel Birne being informed of these clandestine transactions, immediately filed his bill against all the parties to be relieved, and for an injunction to restrain them from committing of waste. To this bill the several defendants put in answers, admitting the facts charged; and particularly that the Wilcocks's had notice of the marriage-settlement and plea, previous to their entering into the above agreement.

On the 23d of May 1710, this last cause came on to be heard; when the Lord Chancellor declared his opinion, that the plaintiff Daniel was a purchaser for a valuable consideration; and that there having been a quiet enjoyment for so great a length of time, the lands were not redeemable; *but if the defendants could shew that a redemption was admitted after so long an enjoyment, he would hear them*; and, in the mean time, ordered the fraudulent proceedings to be set aside, and that the injunction should be continued, till it should be determined whether it was a redeemable mortgage or not.

Sir Gregory Birne, and several other parties afterwards dying, the cause became abated; but in March 1714, the plaintiff (then Sir Daniel Birne) filed his bill of revivor against their several representatives; and on the 31st of May 1715, the cause was finally heard; when the Court declared that the plaintiff, Sir Daniel Birne's interest in the premises in question, was a mort-[199]-gage for £600; and therefore decreed, that on payment of that sum, with interest from the death of Sir Gregory, the plaintiff should assign all his right and interest to the representatives of the three Wilcocks's\*.

Sir Daniel Birne died soon after this decree; but his widow and personal representative, together with his eldest son and heir at law, appealed from it; contending (R. Raymond, S. Mead), that after an uninterrupted enjoyment of 68 years, a redemption ought not to have been decreed against Sir Daniel Birne, who was a purchaser for a valuable consideration; especially as neither infancy or any other disability was pretended to excuse so long an acquiescence. That the respondents, the Wilcocks's, purchased pending a suit, and with full notice of Sir Daniel Birne's title and plea, which they endeavoured to defeat in a fraudulent and collusive manner; and therefore were not entitled to the favour or aid of a Court of Equity. And that the possession of the premises, which the respondents, by fraud and contrivance, had gained pending a suit, ought to have been restored to the said Sir Daniel Birne, on his father's death; it being contrary to the rules of equity, that a mortgagee in possession, who is sued for a redemption, should be stripped of his possession before payment.

\* It does not appear that any precedent was produced upon this last hearing, to shew that a redemption of so stale a mortgage had ever been decreed. See note to Ca. 2. of this title.

On the other side it was said (N. Lechmere, S. Cowper), that the £600 and interest had been several times offered to be paid to Sir Daniel Birne in his life-time; who died on the 26th of September 1716, leaving the appellant Dame Anna Dorothea, his widow and sole executrix, and the other appellant Sir John, his son and heir; and that the said principal and interest had also been tendered to the said Dame Anna Dorothea, but always refused. That from 1636 to 1655, when Sir William Parsons, the first mortgagee, assigned to Daniel Birne, under whom the appellants claimed, being 19 years, it appeared there was but £600 due, Sir William having assigned the mortgage for that sum: and from 1671, when Daniel Birne assigned the mortgage over to his son Sir Gregory, upon his marriage, whereby Sir Gregory was to have the profits during his life, to August 1708, when he sold it to the respondents, was 37 years; so that 19 years and 37 years, making together 56 years, was answered and accounted for as to the length of time; besides, this was not a mortgage of the inheritance, but only for a term of years. That the original mortgage appeared to be redeemable, on payment of £600 without interest, (the mortgagee being in possession of the mortgaged premises,) upon two months notice to be given by the mortgagor, and three months notice by the mortgagee, at any time, without accounting for the rents and profits by the mortgagee, and without accounting for the interest by the mortgagor; which answered the objection against redeeming so ancient a mortgage, by reason of accounting for the rents and profits for so long a time. That the appellants had no injury done them by the decree, as they were thereby to have the [200] £600 with interest from Sir Gregory's death, together with their costs; whereas the respondents were great sufferers by the decree, inasmuch as they were thereby obliged to pay over again to the appellants the said £600 with interest from Sir Gregory's death, besides the £1850 which they had before paid, as a full and valuable consideration for the mortgaged premises.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of the said Court of Chancery, whereby a redemption of the premises in question was decreed for the defendants, on the bill of revivor preferred by Sir Daniel Birne, Bart. deceased, the appellant Sir John's father, should be reversed; it being improper to decree a redemption for the defendants on such bill: and instead thereof, it was further ORDERED and ADJUDGED, that the collusive proceedings and decree thereupon made, complained of in the bills brought by the appellant, Sir John's said late father, should be set aside; and that possession of the estate in question should be forthwith delivered to the appellants, which the said Court of Chancery was to see performed accordingly; and the profits thereof were to be accounted for by such person or persons as received the same, or their representatives, from the death of Sir Gregory Birne, father of the said Sir Daniel, when the appellants title to the said estate commenced; and that the writings concerning the appellants title to the estate in question, in the custody of the respondents or any of them, or in their or either of their power, should be delivered by the respondents respectively to the appellants: but this was to be without prejudice to the question, whether the said estate of the appellants was redeemable or not, whenever it should be brought into judgment by a proper suit or bill: and the appellants being thus relieved, were to have their costs paid them by the respondents, to be taxed by a Master in the said Court of Chancery. (Jour. vol. 20. p. 612.)

CASE 7.—MATHEW LANT,—*Appellant*; ALICE CRISPE and another,—*Respondents* [18th January 1719].

[Mew's Dig. ix. 1665 (Vin. vol. 15. 467, 469).]

It is not consistent with the rules and practice of Courts of Equity, or warranted by precedents, to enlarge the time for redemption of a mortgage, after the mortgagor's acquiescence for six years, under a foreclosure by his own consent; and especially, after an alteration has been made in the estate, either in pulling down the buildings, or enlarging them, or otherwise.

Orders of the Court of Exchequer REVERSED. See *ante*, note to case 2.

Viner, vol. 15. p. 467. ca. 16. 469. ca. 13. 2 Eq. Ca. Ab. 599. ca. 21.

By indenture dated the 15th of October 1693, William Crispe, deceased, father

of the respondent William, and husband of the respondent Alice, mortgaged a parcel of land in Leighton, in the county of Huntingdon, of the value of £10 per ann. to one [201] Mary Cranford for 1000 years, redeemable on payment of £100 and interest.

This mortgage became afterwards legally vested in the appellant, as a security for £250, and interest; and the interest being greatly in arrear, the appellant, in Michaelmas term 1708, filed his bill against the respondents in the Court of Exchequer, praying either payment of his principal money and interest, or a foreclosure of the equity of redemption; and, upon hearing the cause on the 24th of February 1709, it was decreed, that on the defendants paying what was due to the plaintiff for principal, interest and costs, they should redeem the said mortgaged premises; but in default thereof, should stand foreclosed of their equity of redemption: and it was referred to the Deputy Remembrancer, to compute what was due on the mortgage, and to tax the plaintiff his costs.

The Deputy Remembrancer having taken this account, by his report of the 24th of March 1709, certified that there would be due to the plaintiff for principal, interest, and costs, on the 22d of May 1710, £345. And the cause being heard upon this report on the 4th of May 1710, the defendants were ordered, on the second day of the then next Michaelmas term, to pay the plaintiff the said sum of £345, with subsequent interest and costs from the said 22d of May; but in default of such payment, the defendants should be foreclosed of their equity of redemption.

Subsequent to this decree, the plaintiff brought his ejectment, in order to get into possession of the mortgaged premises; whereupon the defendants, on the 23d of June 1710, applied to the Court, and obtained an order by consent, that upon their giving judgment in the ejectment, the time for redemption should be enlarged, to the first day of the then next Hilary term, *and no longer*.

But, instead of complying with the terms of this order, the defendants, on the 23d of January 1710, moved the Court for further time to redeem; when the Court thought fit to make another order, that, upon their paying the plaintiff £100 in manner therein mentioned, the time to redeem should be enlarged to the last day of Trinity term 1711. *But, in case of failure of payment of the remainder of the money due upon the said decree, with further interest and costs, on the last day of the said Trinity term, the defendants were to stand absolutely foreclosed.*

Pursuant to this last order, the defendants paid the £100, but no more; and, on the 27th of June 1710, they again applied for further time to redeem, when the Court indulged them with a fortnight longer; but ordered, *that in case the defendants did not pay the monies decreed, with subsequent interest and costs, by that time, they should be absolutely foreclosed.*

Notwithstanding these orders, the defendants still made default; and there being more due to the plaintiff on the mortgage, than the estate was worth, he, about Michaelmas 1711, entered into possession, and considered himself as having an *abso*-[202]-*lute estate* in the mortgaged premises, by virtue of the decree, and the said several orders; and accordingly proceeded to make improvements thereon, by pulling down some buildings which were in a ruinous condition.

After the plaintiff had been six years in possession, without any kind of interruption from the defendants, they, on the 27th of November 1717, thought proper to move the Court, for further time to redeem; when an order was made, that upon the defendants paying the plaintiff £50 more on or before the first day of the then next Hilary term, the time for redemption should be enlarged, till the setting down of causes after that term. And, in the mean time, the Deputy Remembrancer was to take an account of the rents and profits of the mortgaged premises, ever since the plaintiff entered into possession; *but if the defendants should not redeem by the time aforesaid, the said £50 with the £100 formerly deposited, were to be forfeited.*

The defendants, on the 23d of January 1717, tendered this £50 to the plaintiff, which he refused to accept; and on an affidavit of such tender and refusal, it was ordered, that the former order of the 27th of November should stand, and that the £50 should be brought into Court, was according done.

On the 11th of February 1717, upon the defendants motion, the time for redemption was further enlarged to the first day of the then next Easter term; and a commission was granted for the examination of witnesses, touching the account. And, on the 30th of April 1718, the time was again enlarged to the end of the then next Trinity term; and, in the mean time, the Deputy was to carry on the account.

On the 26th of January 1718, the Deputy made his report, and thereby certified, that there was due to the plaintiff £377 9s. 7d. over and above the £100 which he had received, and the rents and profits of the estate; but, as to the matter of pulling down the buildings, he could not, by reason of the variety of evidence, determine any thing.

The cause being set down upon this report, was heard on the 19th of February 1718, when the Court directed an issue at law, to try whether, and how much, the estate was damnified, by pulling down the houses.

But from the order of the 27th of November 1717, and the several subsequent orders, the plaintiff appealed, contending (C. Phipps, S. Mead), that it was not consistent with the rules or practice of Courts of Equity, or warranted by precedents, to enlarge the time for redemption of a mortgage after the mortgagor's acquiescence for six years, under a foreclosure *by his own consent*; and especially, after an alteration had been made in the estate, either by pulling down the buildings, or enlarging them, or otherwise. That the appellant had been two years in possession, when he pulled down the buildings upon this estate, which he might reasonably look upon as his own, having such a title as would have satisfied a purchaser; and therefore it might well be presumed, that the ap-[203]-pellant thought the pulling down the buildings, would be a means to increase the clear rents, and so it manifestly appeared by the proofs in the cause. That the directing of the issue, tended to punish the appellant as a wrong doer upon an estate, which, under the several decrees and orders of foreclosure, was absolutely his own; and that there could not be the least probability of a redemption in this case, because the money reported due to the appellant, amounted to as much as the clear rent of estate, at fifty-eight years purchase; exclusive of subsequent interest and costs, in case the issue should be tried, and the cause come on to be heard again, after such trial.

On the other side it was insisted (E. Northey), that the appellant's acquiescing under the order of the 27th of November 1717, joining in commission and examining witnesses, and not opposing the subsequent orders for enlarging the time, amounted to an admission, that those orders were just, and that the estate in question was still redeemable.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the said order of the 27th of November 1717, and all the subsequent orders and proceedings, complained of in the said appeal, should be reversed. (Jour. vol. 21. p. 200.)

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CASE 8.—JOHN BATH,—*Appellant*; ROBERT CONLY and another,—*Respondents* [28th March 1720].

The proviso for redemption in a mortgage, was upon payment of the principal money in silver; a payment of this money in silver and brass, is no discharge of the mortgage.

This does not appear to be the immediate point of the case; which seems governed by its own private circumstances, and to afford no precedent.

DECREES of the Irish Chancery AFFIRMED.

Viner, vol. 16. p. 270. ca. 10.

The appellant having borrowed £250 of Luke Conly, the father of the respondents, for securing the repayment thereof, with interest at £10 per cent. per ann. (which was the common rate of interest in Ireland at that time) did by indentures of lease and release, dated the 18th and 19th of June 1683, and by fine, grant and convey unto the said Luke Conly, and his heirs, two houses in Shop-Street, in the town of Drogheda; one of them in the tenure of Richard Jackson, Alderman, and the other of Patrick Dromgoole; subject to a proviso of redemption, on payment of the sum of £250, *every pound weighing four ounces troy weight*, in one entire sum, on the 19th of June 1668; and the clear sum of £25 yearly, in the mean time, as the legal interest of the said £250.

[204] Some time afterwards, the appellant borrowed of the said Luke Conly the



further sum of £100; and for securing the same, and also for further securing the said mortgage-money, amounting in the whole to £350, the appellant acknowledged a statute-staple, in the penalty of £700; and by an indenture of defeasance, dated the 9th of July 1684, reciting the said mortgage for £250, it was agreed, that the said statute-staple should be void, on payment of the said sum of £350 at the days and times in the said indenture of release mentioned, with the interest thereof, at £10 per cent. per ann. And it was particularly agreed, that the interest of the £100 secured by the said statute only, should constantly be paid out of the rents of the house in the possession of the said Patrick Dromgoole. And the same was accordingly so paid down to the time of Luke Conly's death.

But the appellant neglecting to pay the interest of the £250 secured by the mortgage, and such interest being greatly in arrear, Conly, in December 1693, exhibited his bill in the Court of Chancery in Ireland, against the appellant, in order that he might either redeem the said mortgaged premises, or stand foreclosed: but by this bill no demand was made of the £100 lent in 1684, it being secured by the statute-staple, and not included in the mortgage-deed.

In the month of January following, and before the appellant had put in any answer to the said bill, Luke Conly fell sick; and being on his death-bed, was prevailed upon by the appellant and one Henry Hughes, to remit and forgive the appellant, part of the said £250 mortgage-money. And accordingly, on the 27th of January 1693, Conly made his will, and thereby devised the said mortgage to his eldest son Richard, and his other debts and personal estate to the respondents, his younger sons, at the foot of such will, he inserted the words following, viz. "*Memorandum, I have this day agreed with Mr. John Bath, for the mortgage I have on Alderman Jackson's house, paying me for the same but a hundred pounds sterling.*"

At the time of making this will, Richard Conly, the testator's eldest son, was abroad in foreign parts; and it being apprehended, that some inconveniencies might rise to the family, from proving the same; the testator was prevailed upon, on the same day, to make another will, whereby he devised all his real and personal estate to his wife Elinor, and appointed her sole executrix thereof; but it was, nevertheless, so declared intention of the testator that his said first will should be observed and fulfilled.

After the testator's death, the said Elinor, his widow and executrix, proved the said last will; and in pursuance of an agreement made by her, for performing and fulfilling the said first will, she, by indenture, dated the 3d of August 1699, granted, conveyed, and assigned, unto one Christopher Peppard, his heirs, executors, and administrators, all messuages, houses, and mortgages in fee; and also all lands, judgments, statutes, debts, goods, [205] chattels, and real or personal estate, so devised her by the said testator's said last will, in trust and to the intent, that his said first will might be performed. In this deed notice was taken, that the testator, by his said last will, had remitted and forgiven the appellant £150 to be deducted out of the said £50. And to the execution of this deed, the appellant subscribed his name as a witness, after the same had been read in his presence.

In 1712, the said Richard Conly, the testator's eldest son, died abroad intestate, whereupon the respondents took out letters of administration to him; and upon the death of Elinor their mother, which happened soon afterwards, they took out administration *de bonis non*, to the testator; whereby they became entitled to the £200 remaining due from the appellant, and secured on the said statute-staple; but not being able to obtain the same amicably, they sued forth extents on the said statute, for recovering satisfaction of their said demand.

Whereupon the appellant, on the 11th of January 1717, exhibited his bill in the Court of Chancery in Ireland, against the respondents, to restrain their said proceedings at law; suggesting, that he had in 1684, executed other deeds of mortgage to the said Luke Conly, for securing the said £350; and that by the memorandum at the foot of the said Luke Conly's first will, there only remained £100 due, for that had in 1689, paid him £250 in silver and brass money, in discharge of the mortgage of 1683, but had not taken any receipt for the same.

The respondents, having by their answer to this bill denied that there ever was a new mortgage, or that any money was paid in discharge of the said mortgage of 1683; on the 22d of July following, filed their cross bill against the appellant, for a

discovery of this pretended new mortgage; and that he might set forth what deeds, securities, or papers, he had in his custody, relative to the said £350.

To this cross bill the appellant put in an answer, and thereby admitted the original mortgage in 1683, for £250, and, that in 1684, he borrowed the further sum of £100 more, and entered into the said statute-staple, as well to secure the payment of the £250 as of the said £100. He also admitted, that at the time of entering into the said statute-staple it was agreed, that the interest of the £100 so lent in 1684, should be paid yearly out of the rents of the house in the possession of the said Dromgoole; but he denied having any deeds in his hands relating to the said £350 other than a counterpart of the mortgage for £250 and the defeasance to the said statute-staple: he insisted, however, that he had paid Luke Conly £250 in brass money, in 1688; but that, being advised to have satisfaction acknowledged on the said statute, he did not take any receipt for such payment.

On the 19th of February 1717, this cross cause was heard before the Lords Commissioners, when the matter in dispute appearing to be, whether there was due from the appellant to the said Luke Conly in 1693, £100 only, or £200, their Lordships were [206] pleased to declare their opinion, that £200 was then due from him; but if the appellant would try it at the peril of costs, the Court would make an order for that purpose; and the appellant's counsel having agreed to this proposal, it was accordingly ordered, that the parties should proceed to a trial at law on the following issue, viz. "Whether, after the agreement on the foot of Luke Conly's will in the pleadings mentioned, there remained £100 or £200 due to the said Conly, on the statute-staple and mortgage in the pleadings mentioned; to be tried by a jury of the county of the city of Dublin, at the peril of full costs, in the Court of Common Pleas, and the Sheriffs to bring in the grand pannel, and the Master to strike the jury."

Notwithstanding the appellant's counsel had agreed to try this issue, yet on the 30th of April 1718, he applied for, and obtained an order to re-hear the cause; and on the third of May following, he obtained another order, that he might be at liberty, at the re-hearing, to produce witnesses *viva voce*, to prove an instrument in writing, alleged to bear date the 27th January 1693, and to be made between Luke Conly and John Bath.

As the appellant had, by his answer, denied having any deeds in his hands relating to the £350 other than a counterpart of the mortgage for £250 and the defeasance to the statute-staple; the respondents, on the 7th of the same month, obtained an order, that the appellant should lodge the said instrument with Mr. Dobson, his clerk in Court, and that the respondents might be at liberty to view the same, in the said Mr. Dobson's hands. The respondents having accordingly viewed this instrument, which purported to be an agreement between the said Luke Conly and the appellant, that only £100 remained due of the said £350, and it appearing to them to be a forgery, they on the 10th of May, obtained an order for liberty to produce witnesses *viva voce*, to disprove the said instrument.

On the 24th of May 1718, the cause came on to be re-heard, when the counsel for the respondents insisted upon the production of the said instrument; but the appellant being apprehensive that the forgery had been detected, had previously caused the same to be taken out of Mr. Dobson's custody, by Jane, the wife of Nicholas Bath, the appellant's son; and the respondents thereupon producing several affidavits, shewing that the appellant and the said Jane, had procured one Fitzgerald to forge the said writing; the Lord Chancellor was pleased to order that the cause should stand in the paper, and that the said Nicholas Bath and Jane his wife should attend the Court, on Monday then next, being the 26th of May.

But these persons having absconded, and Mr. Dobson, on the said 26th of May, declaring that he delivered the said writing to the said Jane; his Lordship ordered, that an attachment should issue against her.

On the 27th of the same month, the cause was further re-heard, when the Chancellor was pleased to order and decree, that the [207] order made on the first hearing by the Lords Commissioners should be affirmed; and that the said issue should be tried, with liberty both for the appellant and respondents to make use of the depositions of such of the witnesses taken in the cause, as by death, or other lawful impediment, could not attend the trial; and that the appellant should try the issue in the then next Trinity term, or, in default thereof, the issue should be taken as found against him.

The appellant neglecting to try this issue, an order was made on the 3d of July 1718, that the same should be taken as found against him : and it was further ordered, that it should be referred to the Master, to state the account between the appellant and respondents ; and that in such account, the appellant should be charged with £200 principal money, to be due upon the said statute and mortgage, on the 27th of January 1693, with interest for the same from that time.

Pursuant to this order, warrants were served upon the appellant's agents to attend the Master on the said reference ; but no person attending, another order was made on the 24th of the same month, that the appellant should attend the Master in ten days, or in default thereof, the Master was to proceed *ex parte*.

The appellant still neglecting to attend, though served with further warrants for that purpose, the Master, on the 1st of November 1718, made his report *ex parte* ; and thereby certified, that there was due to the respondents, for principal and interest, £459 12s. 8d. And on the 10th of December following, this report was absolutely confirmed.

After all these proceedings, the appellant thought proper to appeal from the whole of them ; insisting (T. Lutwyche, R. Raymond), that by the statute-staple in 1684, the first £250 as well as the £100 then lent, were secured together, and a defeasance executed for the same, to be void on the appellant's payment of the whole £350 and interest, at the time therein mentioned ; and accordingly, the interest of the whole was paid till 1689, when £250 was paid in part of the principal, as aforesaid ; after which, Luke Conly received only the interest of the remaining £100 till his death in 1693. That Conly, when taken ill in January 1693, being sensible that he had not given the appellant any discharge for the £250 paid in 1689, did by the memorandum under his will declare, that only £100 was due on the said mortgage ; and which, it was hoped, would not be otherwise deemed than as part of the £350 united and secured together as one mortgage, by the said statute-staple ; for if the fact had not been so, or if Conly had meant otherwise, he would certainly have declared such meaning. That the interest of the said £100 had been paid ever since Luke Conly's death ; and no demand was made by the respondents, of any other principal-money or interest, till some short time before the appellant's bill. As to the objection, that Conly, some little time before his death, exhibited his bill against the appellant, to be paid the £250 first advanced ; and that one Hughes, a priest, [208] prevailed on him to insert the said memorandum under his will, and remit £150 to the appellant, of the said first £250 ; it was answered, that for above three years after the said £250 was paid, Conly received the interest of the remaining £100 and never demanded more of any principal or interest ; being minded, however, to be paid his money due, he did, about the beginning of 1693, exhibit his bill, and thereby (as usual) charged the whole money lent, leaving the discharge on the appellant's part ; but he was so conscious of his injustice therein, that he dropt the same and required no answer, and afterwards declared, as aforesaid, that only £100 was remaining due. And as to the insinuation about Hughes the priest, nothing was proved concerning the same but by one Thomas, whose evidence was falsified.

On the other side it was said (C. Phipps, S. Mead), that it evidently appeared throughout the whole cause, that there never was any other deed of mortgage for the £250 but that in 1683, and by the memorandum at the foot of Luke Conly's will, it was plainly expressed, that £100 did then remain due on the said mortgage, over and above the £100 secured by the said statute-staple only. That the appellant attempted to prove, that in February 1689, he paid Conly £250 in the base coin, which was issued in Ireland by King James II. in the time of the late war there ; but, that failing in this proof, the whole of his evidence being only hear-say, he attempted to set up a forged writing to supply the defect of such evidence. That if such payment had been made in brass money, the mortgage could not thereby be discharged, the proviso being special for payment of the money in silver ; and where brass money had been paid in Ireland, in discharge of debts contracted before that base coin was made current, the Courts of Equity there had only allowed, what such brass money might have been exchanged for in silver at the time of payment, which, in February 1689, was very inconsiderable. That the respondents had proved in the cause, that Luke Conly, at the instance of Hughes, did remit and forgive the appellant £150 only ; and

by the bill which he filed in 1693, it might also be reasonably inferred, that he was not then paid. That the appellant had met with all reasonable indulgence in the Court of Chancery, and might have tried the issue, and attended the Master on taking the account, but for his own default; and as it manifestly appeared, that on the 27th of January 1693, the appellant remained indebted in £100 on the mortgage, and also in £100 on the statute-staple, it was apprehended, that he was not entitled to have any issue directed to try the *quantum* of such debt.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the several decretal orders, report, and confirmation thereof, complained of in the said appeal, affirmed: and it was further ORDERED, that the appellant should pay to the respondents, the sum of £100 for their costs in respect of the said appeal. (Jour. vol. 21. p. 282.)

[209] CASE 9.—RICHARD STONE and others,—*Appellants*; WALTER BYRNE,—*Respondent* [1st February 1722].

[Mews' Dig. i. 335, 401. See 37 and 38 Vict. c. 57, s. 7.]

A mortgage in possession for upwards of 70 years, shall not be redeemed, nor shall such possession be disturbed in a Court of Equity; so long as it remains in quietness, without applying for a redemption, being deemed equal to, and taken as, an implied waiver, or release of the right to redeem.

Where an order is erroneous, a person ought not to be prosecuted for a contempt in disobeying it. 2 Eq. Ab. 222. ca. 5.

An agent being prosecuted for a contempt in disobeying an order of which he had no notice, may join in an appeal from that order, though no party to the cause in which the order was made. See *post*, title Party [5 Bro. P. 495].

DECREE of the Irish Court of Exchequer REVERSED.

It does not appear that the general rule was questioned; but how far the case was exempted by its particular circumstances. See *ante*, Ca. 2, and note there.

Viner, vol. 5. p. 452. ca. 14; vol. 15. p. 55. ca. 37. 2 Eq. Ca. Ab. 576. ca. 3.

Francis Woolverton, an Irish papist, having before the rebellion, which broke in Ireland in 1641, mortgaged certain estates in the county of Wicklow, to Lady Adrian Vivian, or some person under whom she derived, for £200, which was at the full value; and being afterwards attainted of high treason, his right of redemption was, by the acts of *settlement* and *explanation*, vested in King Charles II. and to be part of the satisfaction of the officers, who served the Crown before the 25th June 1649.

The Commissioners for executing these acts, caused this equity of redemption to be put up to sale; and in the year 1668, Sir Hans Hamilton purchased the same, and other lands, in trust for Alexander Adaire, and other officers, subject to the mortgage which the Commissioners allowed; and subject also to a quit-rent of £5 9s 8d ann. payable to his Majesty and his heirs, when the mortgage should be redeemed; and on the 18th of June 1669, King Charles II. confirmed this purchase by his letters patent.

These lands lying contiguous to some which belonged to Sir Richard Reynell, he, in the year 1674, purchased the Lady Vivian's interest therein; and intending to build upon and improve the same, Sir Richard, in July 1677, exhibited his bill to the Court of Chancery in Ireland, against Sir Hans Hamilton and one Daniel Byrne, to whom Sir Hans had assigned all his interest in the lands, in order to compel redemption of the mortgage; and Byrne put in his answer; but no further proceedings were had in the cause.

Sir Richard Reynell having improved the mortgaged premises, sold the same in 1688, with other lands, to Abraham Yarner Esq. who entered and enjoyed accordingly till his death; without any claim or interruption, either from Sir Hans Hamilton, Byrne, or any other person.

In 1693, Yarner made his will, and thereby devised all his estate to his only

Abraham, and the heirs of his body ; and for want of such issue, to his three daughters, namely, the ap-[210]-pellants Mary and Katherine, and Jane, the mother of the appellant James, who afterwards died, leaving him her eldest son and heir.

Upon the testator's death, Abraham the son entered and enjoyed the premises till July 1703 ; when he dying without issue, the appellants Mary, Katherine, and James, became entitled, and accordingly enjoyed without any interruption, for several years.

But in July 1711, when, by various improvements, and the general rise of lands in Ireland, this mortgaged estate was greatly increased in value ; the respondent exhibited his bill in the Court of Exchequer in Ireland, against all the appellants, except Yeates ; alleging, that one Roger Jones had purchased the right of Adaire, and the other *cestui que trusts*, to the equity of redemption of these lands ; and that Sir Hans Hamilton and Jones had, in 1674, conveyed the same to Daniel Byrne ; who, in 1680, on the marriage of his son John Byrne, settled this equity of redemption on him for life, with remainder to his sons in tail ; and that in 1681, John died, leaving the plaintiff, his only son and heir, an infant of one year old ; and therefore praying a redemption of the premises, and an account of the rents and profits.

To this bill, the defendants put in several answers and pleas ; and by their pleas, insisted on the length of time since the mortgage, which by the plaintiff's own shewing, was upwards of seventy years, in bar of the redemption prayed. And on arguing these pleas, the Court reserved the benefit of them, till the hearing of the cause.

On the 17th of February 1719, the cause came on to be heard ; when the Court decreed, that the plaintiff should redeem the mortgage, on paying the defendants the principal and interest due thereon ; and that it should be in their election, to enter into the account from the beginning, or from the time of filing the bill ; and time was given for making such election, till the first day of the then next term.

But upon the defendants application for a re-hearing, the cause was again heard on the 1st of June 1720 ; when it was decreed, that the plaintiff should redeem, on paying the defendants what should appear due to them, for principal, interest, and costs ; and that the profits of the lands should be set against the interest of the mortgage, to the time of Sir Richard Reynell's conveyance, in 1668, to Mr. Yarnier ; and that the account, as to the interest and profits, should be stated by the Remembrancer from that time.

Soon after this decree, the plaintiff, upon motion, obtained an order, that the premises should be let to the best bidder for one year ; and having set up a bidder, in trust for himself, he, by that means, got into possession. And there being, at this time, an arrear of rent due to the defendants, the appellant Yeates was employed to make a distress for the same, which was accordingly done ; whereupon the plaintiff moved the Court against Yeates for a contempt, and he was actually committed.

[211] From both these decrees, and the subsequent orders, the defendants and Yeates (who was still in custody) appealed ; and on their behalf it was insisted (T. Lutwyche, S. Mead), that in the first place, the pleas ought to have been allowed, because the mortgage manifestly appeared to have been made at least seventy years before the filing of the bill ; which was a longer time than was allowed for bringing a writ of right, the last and highest action in the law. That the respondent ought not to have been let into a redemption of the premises, but his bill should have been dismissed with costs ; as well because he shewed no conveyance from Adaire, and the other *cestui que trusts*, and consequently had no title ; as because it was not agreeable to justice and equity, that a possession of more than seventy years, under a legal title, should be disturbed in a Court of Equity. That so long an acquiescence, without applying for a redemption, ought to be deemed equal to, and taken as an implied waiver, or release of the right to redeem ; and the rather, where, as in this case, the yearly profits of the premises did not, for more than fifty years, amount to the interest of the mortgage-money ; nor was it reasonable, under such circumstances, and at so great a distance of time, that any account should be directed, it being impossible that a just account could be taken. But if after this length of time, and under these circumstances, the respondent could be admitted to redeem, it was conceived that the account ought to be taken from the beginning ; it being evident, by the circumstances of Ireland, that for about twenty years after the rebellion in 1641, the said lands

could yield but very little, if any thing, and after that time, the rents were far short of the interest of the mortgage-money: so that if this was the justice of the case, and those who once had the equity of redemption, had, by their own laches, rendered it impracticable to have such an account taken; it afforded a very good reason, why a Court of Equity should not admit a redemption. That as to the respondent's minority for some part of the time, it could not have any influence in the case; since it was more than forty years after the mortgage, before it is pretended, that the premises were conveyed to his grandfather Daniel Byrne; and since his father John Byrne never made any claim thereto, during his life; nor did the respondent himself file his bill, till about ten years after he came of age. That the order for letting the lands, was gained by surprise, on the last day of Trinity term 1720, and ought not to have been made in the case of a mortgagee; especially, where the mortgaged premises, together with other lands, were in lease to tenants for a term of years. And that there was no ground for the commitment of the appellant Yeates, for the pretended contempt; because it appeared by his examination, upon the interrogatories exhibited touching that contempt, that he was only an agent for the appellant Stone, and had no notice of the order for letting the lands to the best bidder.

On the other side it was insisted (R. Raymond, P. Yorke), that the right of redemption continued in the Crown, from the 23d of October 1641, until [212] June 1669; when the same was granted to Sir Hans Hamilton; so that in this case the equity of redemption was to be considered, as if the mortgage had been originally created in 1669; and in July 1677, Sir Richard Reynell, under whom the appellants claimed, exhibited a bill of foreclosure against Daniel Byrne, the respondent's grandfather, and thereby admitted, that the mortgage was then redeemable, and that Byrne was well entitled to redeem it; nor did he think it necessary to make Adaire, or any other of the *cestui que trusts*, parties to that suit. That in 1681, this equity of redemption descended to the respondent, who was then but a year old, and did not attain his full age till the year 1701; so that, on the whole matter, the acquiescence so much insisted on by the appellants, was reduced to fourteen years. That if a redemption was not allowed in this case, the Crown would be prejudiced; because an annual quit-rent of £5 9s. 8d. was to become due and payable to his Majesty and his successors, out of the premises, whensoever the same should be redeemed; and which, if the appellants retained the lands, could never arise. That the appellants had no reason to complain of the method of accounting, as they had sufficient time allowed them by the Court of Exchequer, to make their election, whether the account should be taken from the beginning, or from the year 1688, when they, or their father Abraham Yarner, became interested in the mortgage; or from the time of exhibiting the bill, which they refused to do. That it did not appear in the cause, that any arrears of interest were due in 1688, when Sir Richard Reynell assigned the mortgage to Yarner; and when the appellants were permitted to take exceptions to the inrolled decree, on the re-hearing of the cause, they did not pretend to object to that part of it, which directed the account to be taken from 1688; but insisted, that they ought only to account for what they had actually received, and not for what they might have received, without wilful default; so that they thereby seemed to agree, that the account should be taken from 1688, provided, they were to answer only for what they had actually received out of the lands. As to the objection, that the respondent had produced no conveyance from Adaire, and the other *cestui que trusts*, it was well known, that, in pursuance of the act of *settlement*, patents were frequently passed in Ireland to one person, in trust for whole regiments, troops, and companies, the proportion of land allotted to subaltern officers and private soldiers, not being sufficient to bear the expence of a distinct patent; and that the conveyance of the patentee, had always been deemed a sufficient title in Courts of Judicature there, without shewing a conveyance from the *cestui que trusts*; which, considering the great number of persons concerned in one grant, would, at so great a distance of time, be very difficult, if not impossible; nor could it be supposed, that Sir Hans Hamilton who was a person of great honour, and one of the Privy Council of Ireland, would have been guilty of so gross a breach of trust, as to join in an assignment of the equity of re-[213]-demption to Daniel Byrne, wherein Roger Jones was recited to have purchased the interest of the *cestui que trusts*, if he had not been thoroughly satisfied, that this fact was true. And as to so much of the appeal as concerned the appellant Yeates, it was conceived

to be improper and unprecedented; being brought by a third person, who was no party in the cause, complaining of an order made against him, merely for a contempt of the Court; and yet the tenant, whose goods were distrained, and who prosecuted that contempt, was made no party to the appeal: but if the appeal should be thought proper on this point, yet, it was apparent, that Yeates was guilty of contempt, in taking a distress on a tenant, who was in a possession under an order of the Court, and directed to pay his rent into Court; and therefore it was conceived, that the orders complained of, were very justly founded.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decrees of the 17th of February 1719, and 1st of June 1720, and the subsequent orders complained of, should be reversed; and that the respondent's bill in the Court of Exchequer should be dismissed, without prejudice to the right of the Crown, if any; and that the security given by the appellant William Yeates, if any, should be forthwith delivered up to him to be cancelled; and that he should be discharged from the contempt complained of. (Jour. vol. 2. p. 76.)

CASE 10.—WILLIAM BURGH,—*Appellant*; COLTHURST LANGTON,—*Respondent* [17th April 1724].

[Mew's Dig. ix. 1735 (*Burgh v. Lanton*) xiv. 1719.]

A decree of foreclosure was opened after sixteen years, on account of the equity of redemption being worth much more than was due upon the mortgage.

DECREE of the Court of Exchequer AFFIRMED.—See *ante*, note to case 2 [5 Bro. P. C. 181].

Viner, vol. 15. p. 476. ca. 2. 2 Eq. ca. ab. 609. ca. 5.

John Langton, Esq. the respondent's grandfather, in the year 1677, purchased from Sir Charles Lloyd, for a valuable consideration, the lands called Shanacoun, Brury, Garrouse, Lisnecona, Garrane, Ballyfokeen, Ballyoran, and Ballinwillin, containing together about 2000 acres, part of which, (viz.) the five first denominations, Sir Charles had, in 1671, demised to William and Augustin Martin for 50 years, at the yearly rent of £204 7s. 6d. which lease expired in the year 1721. But Mr. Langton, not being provided with the whole purchase-money, he mortgaged the premises to Robert Bridges for £2200.

The said Robert Bridges afterwards pressing for his money, Langton, in the year 1683, borrowed £1000 from Peter Betts-[214]-worth and Vincent Gookin, who were trustees for one Dorothy Clayton, afterwards the wife of James Waller, and, as a security, conveyed the lands of Shannacoun, Garrouse, and Brury, to the said trustees; and about the same time, he also borrowed £1200 from Joseph Damer, on the lands of Garrane, Lisnecona, Ballyfokeen, Ballynoran, and Ballinwillin, which were conveyed to Mr. Damer accordingly, subject to a condition of redemption: and both these sums being paid to Bridges, in discharge of his mortgage, he joined with Langton in the new securities.

The money remained upon these mortgages till 1697, when Langton was hard pressed by the mortgagees, who had before that time obtained a decree to foreclose; he therefore applied to the said James Waller, who by marriage with the said Dorothy Clayton, was entitled to the £1000 lent by her trustees, to continue his money; but which Waller refused to do on the foot of the subsisting mortgage, because it had been of some standing, and might in time prove very troublesome in accounting: but as accounts were then settled, Waller offered to take an absolute conveyance of the lands in his mortgage, and re-convey the same to Langton, as a fee-farm for ever, subject to such yearly sum for rent, as the interest of the money due should amount to; and accordingly, the money due to Waller being about £1700, Langton and Bettsworth, as the surviving trustee, conveyed the mortgaged premises to Waller, by deed dated the 8th of June 1697; and Waller, by deed dated the 10th of the same month, re-conveyed the same to Langton, subject to the yearly rent of £170; that sum being the interest of the £1700 at £10 per cent. At the same time,

it was agreed by Waller, that he would release the said £170 rent, when Langton paid the £1700 and interest; and it was to have been so defeasanced by two different deeds, and was so insisted on by Langton, because he might redeem it at different times, with more ease than by paying the whole at one entire payment; therefore he was to have about four years, viz. till May 1701, to redeem the said £70 per ann. and insisted on a much longer time for the £100 per ann. And a defeasance to that purpose, dated the 9th of the same month of June, was executed by Waller, as to £70 per ann. part of the £170; but not as to the remaining £100.

The said John Langton, in the same month of June, having occasion for £200, applied to Waller for it; who not being in cash, procured one Hugh Hutchinson to lend the same; and to secure the repayment, Langton, by deed dated the 28th of June 1697, conveyed the premises charged with the said fee-farm rent, to the said Hutchinson, subject thereto, and subject to redemption, if Langton paid the £200 and interest, in four years from the May preceding, viz. in May 1701; being the same time that the £70 per ann. was redeemable by the said defeasance, which was deposited in Hutchinson's hands.

The mortgage to Waller being thus settled, it remained only to discharge Damer's incumbrance; and for that purpose, Lang-[215]-ton, in December 1697, raised £2500 by conveying the lands of Garrane, Lisnecona, Ballyfokeen, Ballynoran, and Ballinwillin, which were in the mortgage to Damer to Henry Pettie, Esq. afterwards Earl of Shelburn, for that sum; and taking back a re-conveyance of the said lands at the fee-farm rent of £225 per ann.

In the year 1700, the said John Langton died; whereupon all the premises, subject to the above incumbrances, and to several debts on bonds and judgments, descended to John Langton, his son and heir, the respondent's father; but in 1701 Hutchinson brought a bill to foreclose, against the said John Langton, the son; and about this time applied to Waller to redeem; but he making some difficulty, Langton, in order to prevent a suit, offered £2000, which was considerably more than due; Waller, however, insisted on £2050, and that Hutchinson should be paid, which was at length agreed to; but Waller making some further difficulties, the whole by bond in £3000 penalty, submitted to the determination of Alan Broderick, afterwards Lord Viscount Middleton, and Lord Chancellor of Ireland; in order which, Waller and Langton stated their cases, but so differently, that no award made: however, Mr. Broderick gave his opinion on Waller's case, that he ought to accept the £2050; and he agreed so to do accordingly, but died before the agreement was executed.

In the years 1701, or 1702, the appellant first intermeddled with Langton's affairs; and he being then in treaty with one Freeman, who, as assignee to Martin, the original lessees under Sir Charles Lloyd, or being otherwise entitled, had possession of the premises in Martins' lease; and Langton having also been in treaty as before, with the said James Waller deceased, and afterwards with his widow, to redeem the fee-farm rent of £170; the appellant, in June 1702, hearing of the treaties and transactions, sent a letter to Langton, expressing his surprise to that Freeman and Langton were like to break off; and taking notice of the treaty with Freeman, desired information thereof, in these words: viz. "And whether or no, and upon what terms Mr. Freeman will agree; if your money should be otherwise employed, I believe a reasonable sum may be had at usual interest and security of that lease, and your consent for the purchase of it: I will not make proposals for remainders at a time that lands are falling, but if I have encouragement, I think to view them myself, and to meet you on the place, or at Limerick, if I settle with my Lord." In the same letter the appellant also proposed to discharge Waller's incumbrance, as follows; viz. "In the mean time, pray let me know what you can pay off Mrs. Waller, if not at present, consider whether you can get her to assign her deeds, by which you may engage some other person to leave you a time for redemption, upon securing to him such interest and principal as she has advanced thereon; I don't know but I may get one [216] to do it, though at present I can't promise it, the times are such, and ready money so very scarce."

Langton, having by this time agreed with Freeman for his interest in the lease for £480, went to Dublin to raise the money, on the encouragement of the above letter; but the appellant would not lend it on the lease, as proposed in



letter, but turned it into a proposal for buying that part of the estate, subject to the Lord Shelburn's fee-farm rent; and an agreement was accordingly entered into between Langton and the appellant in July 1702, for that part of the lands, for which he was to give twelve or fourteen years purchase, at 6s. per acre, subject to the said fee-farm rent; and by the same agreement, the appellant was to meet Langton upon the lands, in about a month afterwards, to pay Freeman the £480, and put Langton into possession; which meeting was accordingly had, but Freeman not attending. nothing was done.

Soon afterwards, Langton was arrested in Limerick, for a debt of £40, and having no way to be released from a gaol, but by the appellant's proceeding in the said purchase, and the appellant insisting he would not give so much as was formerly agreed on, Langton, for his immediate relief, was induced to abate considerably: and accordingly, on the 26th of August 1702, articles were entered into anew and executed in prison, at 5s. 8d. per acre; upon which Langton was discharged from his confinement. But though by these articles, the appellant was to pay Freeman the £480 immediately, on Freeman's assigning, and to pay other sums for other purposes in the articles mentioned, and the money to be deposited in the Bishop of Limerick's hands for so doing; yet Freeman, by many trifling and evasive excuses, delaying to execute such assignment, the said articles were no further carried into execution, nor any deposit made. These articles also, according to the appellant's said letter, contained a covenant from the appellant, to advance the money to redeem Waller's fee-farm rent, at £9 per cent.; and take an assignment of the same from Waller's representatives, subject to redemption in seven years.

In March 1703, there was £148 14s. 7d. due on account of the £225 per ann. which the appellant had purchased from Lord Shelburne; and the appellant, by adding to that the £40 advanced to take Langton out of prison, and the interest of it to that time, which made it £50 14s. 7d. some bills of costs, a bond of £26 9s. and some money then paid, swelled up an account to £300; for which sum, he prevailed with Langton to convey, by deed dated the 21st of March 1703, all the lands subject to the £225 fee-farm rent, to Ann Parnall, the appellant's mother in law, in trust for him; subject to redemption, upon payment of £330 on the 22d of March 1704, being £10 per cent. for rent not due, according to the custom of paying one half year within another, and which, together with in-[217]-terest-money, due a very little time after, was made principal, though the interest was reduced to £8 per cent.

The bill exhibited by Hutchinson in 1701, to foreclose, having been carried on against Langton, a foreclosure was decreed on the 13th of July 1704, unless Langton should pay £291 3s. and costs, before the 1st of November 1705: and this being another part of the estate which the appellant had in view, and Waller absolutely refusing to suffer a redemption, or convey the fee-farm unless Hutchinson was first paid off; an agreement was made with Hutchinson for his interest: and accordingly, Hutchinson, in March 1704, assigned all his right in the estate conveyed to him by Langton, and in the said decree, to Thomas Burgh, the appellant's brother, in trust for the appellant, in consideration of £331 4s. 4d. This being done, nothing remained but Waller's fee-farm rent of £170 which the appellant had been treating for during these other transactions, and tendered the money to Waller in behalf of Langton; who being jealous of the appellant's proceedings, and therefore having desired Mrs. Waller to do nothing in prejudice to his title, the appellant, on the 10th of May 1705, sent a letter to Langton to the effect following: viz. "I suffer very much in my treaty with Mrs. Waller, by reason of your letter to her, to stop proceedings with me, in which, she apprehends, she may have trouble from you afterwards; I think it for your service that business should be taken up, and yet you stop it, and to my loss too, having kept money by me, wherefore I desire you will declare to her your consent, since your equity will thereby be the better established, if she changes hands."

Soon after this, viz. in Michaelmas term 1705, the appellant exhibited a bill in the Exchequer, in the name of the said Ann Parnall his trustee, to foreclose Langton, for not paying the £300 for which the lands subject to the £225 fee-farm rent were made a security: and this suit, together with that in Hutchinson's name, were now carried on with such effect, that the foreclosure in Hutchinson's cause was made absolute on the 14th of November 1706.

The appellant having prevailed with Mrs. Waller, to agree to convey her fee-farm

rent of £170 per ann. to him, in case he filed a bill against her for that purpose; he, in February 1706, exhibited such a bill in the Court of Chancery: setting forth Langton's transactions with Waller, and his own in trust for Langton; and praying, that she might convey in consideration of £2050, according to the agreement made by her deceased husband and her, to which she submitted: and in pursuance of a decree thereupon made, she conveyed to the appellant for the consideration aforesaid, on the 11th of September 1707.

The appellant having thus made himself master of all the estate, but Parnall's interest; after some indulgence given by the Court to Langton, though to no purpose, from his inability at that time, and other misfortunes, an absolute foreclosure was decreed against Langton, at the suit of Parnall, on the 6th of December 1708.

For some years afterwards, Langton laboured under great distress and difficulties; but having, in the year 1719, married a gentlewoman of some fortune, he was thereby enabled to call the appellant to account; and accordingly, on the 26th of January 1719, the day before Hutchinson's decree of foreclosure was inrolled, Langton exhibited his bill in the Court of Exchequer in Ireland, against the appellant and others, setting forth his hardships and the several proceedings before mentioned, and insisting, that the said fee-farm rents were in the nature of mortgages; and therefore praying to redeem, and to be let into an account, notwithstanding the said foreclosures, at the suit of Hutchinson and Parnall.

In August 1720, and before any further progress was made in this suit, Langton died, leaving the respondent his son and heir: who, in April 1721, revived the cause, and thereupon the appellant put in his plea and answer; setting forth the several foreclosures obtained, and the conveyances of the fee-farm rents, which he pleaded in bar to the respondent's demands. And this plea being argued on the 17th of December 1721, the benefit thereof was reserved to the hearing, with liberty to except to the answer: and exceptions being accordingly taken, the appellant answered over, denying several of the facts before insisted on, or allowed by him in some of the pleadings before mentioned, and traversed generally; the other defendants also answered, and disclaimed any right.

On the 6th, 7th, 16th, 18th, 19th, and 23d of February 1722, the cause was heard before the Lord Chief Baron Hale and the other Barons; on which last day, it was ordered, adjudged, and decreed, that the foreclosure obtained by the appellant, in the name of his trustee Ann Parnall, of the lands of Garrane, Lisnecona, Ballyfokeen, Ballynoran, and Ballinwillin, should be opened, and that the respondent should be admitted to a redemption, on payment of principal, interest, and costs, due on the said mortgage; and the appellant was thereupon to re-convey to the respondent and his heirs, subject to the fee-farm rent of £225 reserved by Lord Shelburn, and assigned to the appellant: but the respondent's bill, as to the said fee-farm rent, was dismissed. And it was also decreed, that the respondent should, in like manner, be let into a redemption of Brury, Garrouse, and Shannacloun, being the lands in Hutchinson's mortgage, on paying principal, interest, and costs due thereon; and also of the £170 rent-charge, conveyed to the appellant by Waller, on payment of all arrears of the said rent due, and interest for the same, and all the money paid Mrs. Waller; and the appellant was thereupon to convey to the respondent, who was to pay the appellant his costs of this suit. And the Court dissolved an injunction obtained by the respondent, in order that the appellant might enjoy his pledge, till his money should be paid.

[219] From this decree the appellant appealed; insisting (C. Wear, T. Lutwyche), that the rent of £170 per ann. was granted for a good and valuable consideration; and that £100 part of it, was not subject to any redemption whatsoever. That the several decrees of foreclosure, were made so long ago as the years 1706 and 1708, after a long litigation, and several considerable indulgences of time granted, before they were made absolute. That the several purchases of the rents, and benefit of the foreclosures, were fairly made and obtained, without the least fraud or circumvention so much as pretended by the respondent; and the mortgaged premises, at the respective times of the foreclosures, were not of greater value than the money due upon them. But should it be objected on the part of the respondent, that the lands in question were now of much greater value, than what would be sufficient to pay off the appellant all the money by him advanced, with interest; it was answered, that the prices paid

by the appellant for the rents and the mortgages, were the full values thereof, at the respective times of their being purchased, and when the decrees of foreclosure were made; and till the year 1721, when Martins' lease expired, the profits of the whole lands did not, in any one year, amount to so much as would clear the yearly fee-farm rents and quit-rents, to which they were subject, so that nothing was left to answer the mortgage-money or interest: it appeared also by the minutes of the Court, that in each cause, before the foreclosures were made absolute, it was ordered, that the mortgaged interest should be sold; but this Langton obstructed, well knowing, that it would not raise sufficient to pay the money due: besides, it was in proof, that in 1708, the lands not included in Martins' lease, could not be let for more than 4s. 4d. or 5s. an acre; so that the estate, even with the contingency of that lease falling in, was not, during all that time, worth the money due to the appellant and the other incumbancers. Should it be also objected, that from the appellant's letter of May 1705, when he was in treaty with Mrs. Waller for the £170 per ann. it appeared, that all that was done by him, was in trust for, and for the benefit of Langton; it was answered, that the clause in that letter could not be meant by the appellant, or ought to be otherwise understood, than as to the redemption of the £70 per annum, and the equity of redemption of Hutchinson's and Parnall's mortgages, which were not then foreclosed. And should it be farther objected, that in the bill exhibited against Mrs. Waller, for procuring a decree to indemnify her in selling the £170 per ann. the appellant founded his whole equity to that bargain, on a treaty and agreement for sale, made by Langton with James Waller, in his life time, and that therefore the purchase made by the appellant, was in trust for Langton; it was answered, that the suggestions and inferences of bills were left to the management of counsel, and ought not to conclude the parties in point of right: that the decree intended, being for Mrs. Waller's benefit, the proceedings were framed in such manner as her counsel advised: [220] besides, the fact pretended was utterly false, and the respondent had not attempted to make the least proof of any agreement between his father and James Waller, for purchasing back the £170 rent; nor, in truth, was the respondent's father a party to that bill: and therefore it was hoped, that the decree would be reversed, and the respondent's bill dismissed with costs.

To this it was answered (P. Yorke, C. Talbot) on the other side, that as to Waller's fee-farm rent of £170 and Hutchinson's mortgage (which must both be on the same foot, since, without redemption thereof, Waller refused to assign) there was a trust plainly and fully admitted by the appellant, and proved from his first setting out in Langton's affairs; by his letter in 1702; by his covenant in the articles with Langton at Limerick in the same year, to raise Waller's money, pursuant to that letter; by his letter in 1705; by his answer to Langton's bill in the same year; by his bill against Mrs. Waller, to oblige her to convey to him; and by the recitals in the conveyance, pursuant to the decree made on that bill: and he must have bought Hutchinson's mortgage, either as Langton's friend, or to make himself master of the estate, and thereby have him in his power: the former was what the respondent contended for, the latter was not a proper motive. And as to Parnall's mortgage of 1703, besides the hardship on Langton, by turning rent not five months due into principal, and obliging him to pay for that and other sums, the interest whereof, though but a little time due, was also made principal, £10 per cent. when, in four days after that mortgage was made, an act passed for reducing interest to £8 per cent.; the great overvalue of the lands in this, as well as Hutchinson's mortgage, was to be considered, no account having yet been taken of that matter, in order to a sale of the estate, for the purpose of rendering to Langton the over-value. That the foreclosure aimed at by the appellant, should he prevail, would secure to him the estate in question, for a third part of the value; while the redemption decreed, and from which he had appealed, gave him all the money he had paid, with £10 per cent. interest for the whole time, besides his costs. The one would wholly ruin a numerous family, the other would pay the appellant all that was due to him, with the advantage of a very high interest.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of affirmed. (Jour. vol. 22. p. 323.)

[221] CASE 11.—THOMAS Lord HOWARD of EFFINGHAM, and Lady ELIZABETH his wife,—*Appellants*; Sir JOHN NAPIER and others,—*Respondents (à contra)* [19th February 1724].

[See now the Real Estates Charges Acts, 1854, 1867, 1877.]

A Court of Equity will do its utmost to fix the burthen of the payment of a mortgage, where in *conscience* it ought to fall; on all the circumstances of the case.

Thus in the present instance, where Sir John Napier's estate was in mortgage, and he died, leaving Sir Theophilus his heir, who, upon his intermarriage with Lady Effingham, settled a jointure upon her, and covenanted to pay his father's debts, and then died possessed of a considerable personal estate, which came to his wife, having disposed of a real estate, which was settled by an act of parliament, in trust, to pay his father's debts: the heir at law brought his bill against the wife, to have the personal estate of her husband, upon his covenant, applied to discharge the father's mortgage; and it was so decreed. But the reason assigned was, because the heir had disposed of the estate so settled in trust; and then it was but just and equitable, that his personal estate should be applied to exonerate the mortgaged estate, descended to the heir at law, because he was answerable for the trust estate, settled for that purpose. And it appears that this part of the Decree was ultimately REVERSED by the judgment of the House of Lords; which in many respects varied the Decree of the Court of Chancery, under the private circumstances of the case, which in fact scarcely forms a precedent.

See the case of *Lawson v. Lawson*, ante iii, 424, tit. Devise, Ca. 58, where L. being seised in fee, *by descent*, of an estate at C. and other real estates, both freehold and copyhold, by his will devised the estate at C. which was subject to a mortgage for £1500 contracted by his ancestor, and also another estate, to be sold; and charged the same, and also his personal estate. (except £300 due on bond, which was originally part of his wife's fortune, and specifically bequeathed to her by the will,) with his debts and legacies, and devised the residue of his real estate, in trust, for his brother B. in strict settlement, subject to a charge of £100 a year to his wife, upon the copyhold estate, and made his wife executrix. The question was, whether under this will the personal estate of the testator should be applied in exoneration of the real, towards the discharge of the £1500, and it was held by Lord Thurlow that it should not; but that the same should come out of the estate originally liable to it. And this Decree was affirmed in the House of Lords.

See further as to the general rules regulating the funds out of which mortgages are to be redeemed, *Powell on Mortgages*, vol. 2. cap. 4.

Viner, vol. 20. p. 102. note to ca. 7. *Powell on Mortgages*, vol. 2. cap. 4. p. 201. cites Fitzgib. 142, 144; by the name of *Napper v. Lady Effingham*.

Sir John Napier, grandfather of the respondent Sir John, was in his life-time, and at his death seised of an estate in Yorkshire of about £1550 per ann. for his life; with remainder to his first and other sons, by Dame Elizabeth his wife, in tail male successively; subject to a rent charge of £1000 per ann. for her life, for her jointure, commencing from his death; and he was also seised in fee of the manor of Luton-Hoe, and other manors and lands in the counties of Bedford and Hertford. of £2500 per ann. subject to great mortgages and incumbrances; part of which estates, of about £500 per ann. were settled by him on his younger sons, Archibald and Edward Napier, and their issue male.

On the 2d of March 1710, a commission of lunacy issued against Sir John Napier the grandfather, and he was thereupon [222] found a lunatic, and so continued till his death, which happened in 1711; leaving Dame Elizabeth his widow, and four children, namely, Theophilus, Archibald, Edward, and Frances. And soon after his death, the whole family were engaged in several suits and controversies, touching their respective claims to his real and personal estates.

Sir Theophilus, the eldest son, having given a judgment of £8000 penalty to his

sister Frances, for securing her portion of £4000 given her by her father's will, and mortgaged his estate in Yorkshire for £2000, intermarried in March 1713, with the appellant Lady Effingham; but receiving no portion with her, no settlement was made upon the marriage; so that she became dowable at law of all his estates.

By indentures of lease and release, dated the 24th and 25th of December 1714, reciting the marriage and the lady's right of dower, and that Sir Theophilus wanting monies to pay his debts, had sold or intended to sell some, and to mortgage other parts of his estate, and that to enable him thereto she had joined in levying fines, and thereby barred herself of her dower; and that, in consideration thereof, he had agreed to make a jointure on her, if she survived, and a provision for their issue male; and also reciting that Sir Theophilus had agreed to settle the Yorkshire estate, of about £1600 per ann. as after expressed; and that such estate was subject to the £1000 per ann. rent-charge, and also mortgaged to Lord Trevor for £6000 and interest, and charged with £4500 and interest to the said Frances Napier, and that Sir Theophilus had agreed, that the said debts should be paid out of the Bedfordshire estate; he, in consideration of the premises, settled the Yorkshire estate to the use of such person or persons, and for such estates and uses, as he and his Lady should, by deed, jointly appoint; and for want of such appointment, to the use of them two, for their lives, and the life of the survivor of them, and in bar of her dower; remainder to the heirs male of their two bodies; remainder to Sir Theophilus, and his heirs and assigns for ever: with a power of revocation by Sir Theophilus and his lady, and a covenant from him to discharge the said debts out of the Bedfordshire estate; and that the Yorkshire estate should only be charged with the rent-charge of £1000 per ann. and be enjoyed by his said wife clear of all other incumbrances.

On the 28th of December 1715, Sir Theophilus made his will; and thereby devised to his lady and her heirs, the inheritance of his estate in Yorkshire, and also £400 per ann. out of his Bedfordshire estate; and gave her all other his lands and estates in the counties of Bedford and Hertford, for life, without impeachment of waste; remainder to his nephew, the respondent Sir John and his heirs; subject to a proviso that he should not disturb the lady in the enjoyment of the lands devised to her; and having charged all the premises with the payment of his debts, he made his lady sole executrix and residuary legatee of all his personal estate.

[223] The several suits and controversies subsisting in the family, touching the real and personal estates of Sir John Napier the grandfather, were afterwards referred to the Lord Trevor; who having made proposals of accommodation, the same were reduced into articles, dated the 21st of December 1717, between Lady Napier, the grandmother, of the first part, Sir Theophilus of the second part, and the said Archibald and Edward Napier, the respondent Sir John Napier, and Elizabeth his sister, son and daughter of Archibald, of the third part; whereby it was, among other things, agreed, that the manor of Luton, and several other manors and lands in the counties of Bedford and Hertford, should be settled on Sir Theophilus for his life, without impeachment of waste, provided he left on the premises, at his death, £3000 worth of timber; remainder to his first and other sons in tail male; remainder to Archibald Napier for his life, and to his first and other sons in tail male; with like remainder to Edward Napier, and his first and other sons in tail male; remainder to Sir Theophilus's right heirs: with a power to Sir Theophilus, and each succeeding tenant for life, to make a jointure of any part of the premises, except the mansion-house and park; or by way of rent-charge, subject to taxes on all the premises, not exceeding £300 per ann. and that the premises should also be charged with £1000 to be paid to the said Elizabeth Napier, the sister, on her marriage, and £40 per ann. for her maintenance. It was also agreed that the particular estates therein mentioned, of about £500 per ann. should be settled on the said Archibald and Edward Napier, for their lives; with remainders to their first and other sons in tail male, with remainders over; and with particular powers of charging the same: and that all the rest of Sir John Napier the grandfather's estate, both freehold and leasehold, in the counties of Bedford and Hertford, should be vested in trustees, in trust, to be sold for payment of his debts mentioned in a schedule annexed to the articles; amounting in the whole, for principal monies, to £12,569, besides a great arrear of interest; subject to a proviso, that if Sir Theophilus, or his heirs, should

pay the same in eighteen months then next, then the trust estates should be settled or conveyed to Sir Theophilus, his heirs and executors, respectively; but in case Sir Theophilus, or his heirs, should make default in such payment, then the trustees and their heirs should sell so much of the trust estates as should be sufficient to pay such debts; and convey the surplus thereof to Sir Theophilus, his heirs and executors, respectively; and that the person in possession of the mansion-house should keep it in repair, and not dispark the park.

The respondent Sir John and his sister being infants, and consequently not bound by these articles, unless confirmed by the authority of parliament; an act was therefore, 4th Geo. I. obtained, whereby the articles were established; and that the same might be the better performed, it was, *inter alia*, enacted, that all the manors, lands, hereditaments, and leasehold estates, late of the said Sir Joan Napier, the grandfather, in the counties of [224] Bedford and Hertford, should, from and after the 24th of June 1717, be vested in certain trustees therein named, their heirs, executors, and administrators, freed and discharged of all uses and estates, which might be claimed under any settlement or will executed by the said Sir John Napier, the grandfather, upon trust, with all convenient speed, to settle or convey the manors and lands, by the articles agreed to be settled, to and for the uses and estates therein mentioned; and that the said trustees should, after the 25th of June 1719, sell and dispose of all or any part of the residue of the said estates, both freehold and leasehold, not by the articles agreed to be settled; and, out of the monies arising by such sale, pay the said Sir John Napier, the grandfather's debts, as well those in the schedule to the articles, as also all other his just debts; and pay and apply the overplus of the monies, if any, to Sir Theophilus, his heirs, executors, and administrators; and convey and assure such part of the said freehold and leasehold estates, as should not be by them sold for the purposes aforesaid, to Sir Theophilus, his heirs and executors: and it was further enacted, that if Sir Theophilus, his heirs, executors, or administrators, should, before the 24th of June 1719, pay all the said debts; then the trustees were to convey the residue of the said freehold and leasehold premises to Sir Theophilus, his heirs, executors, or administrators, respectively, for their own use and benefit.

Sir Theophilus, in order to make a provision and jointure for Dame Elizabeth his wife, by deed poll, dated the 26th of March 1718, in consideration of his marriage with her, and in pursuance of the power given him by the said articles and act, did grant to her, in case she survived him, an annuity of £300 per ann. subject to taxes, payable quarterly out of the settled estates, for her life, for her jointure, with power of distress.

By indenture tripartite, dated the 16th of July 1718, reciting, *inter alia*, the former settlement of the Yorkshire estate on Sir Theophilus's Lady, for her jointure; and reciting also the said act, and Sir Theophilus's intentions to sell the Yorkshire estate, but that it could not be sold without his Lady's joining therein; and that he was desirous the lands in Bedfordshire should be settled on his Lady, as a compensation of parting with her said jointure, but that such lands were vested in trustees for payment of debts, as aforesaid, and that he could not make a good title thereto till the debts were paid and the lands conveyed to him; Sir Theophilus therefore, in consideration of the premises, and in order to make his Lady an equivalent or compensation for her said jointure, which was valued at £1500 per ann. granted and assigned the farms and lands therein particularly mentioned, to trustees and their heirs to the use of himself for life, without impeachment of waste; remainder to the trustees and their heirs, upon trust to convey the same to such person, and for such estates and uses, as his Lady, by her will or deed in writing, notwithstanding her coverture, should direct and appoint; and for want thereof, to her right heirs. With a power, that if Sir Theophilus should have [225] more than one son, or any daughter by her, to charge such premises with £4000 for them, to be paid immediately after his Lady's death, and not otherwise; and a covenant from Sir Theophilus, that he would, with all convenient speed, pay all Sir John Napier's debts, and procure the lands charged therewith to be conveyed by the trustees in the said act, to Sir Theophilus and his heirs, and do any other acts of assurance, and that the premises should be held free from incumbrances: and, as a security for his Lady's enjoying the said premises, he entered into a recognizance of £15,000 penalty, conditioned for that purpose.

Soon after this settlement Sir Theophilus sold the Yorkshire estate to the Marquis of Carmarthen for £40,000, and thereout paid the greatest part of the debts mentioned in the schedule to the articles, and in the act, and left £13,000 of the purchase money in the Marquis's hands, on a mortgage at interest, to secure him against the rent-charge of £1000 per ann. to Lady Napier, the grandmother, for her life; and £1900 other part of the purchase money, was placed by Sir Theophilus in the hands of Mr. Ellingham, his steward.

Some short time afterwards, Archibald Napier died, leaving the respondent Sir John, his son and heir, and Elizabeth his daughter. And on the 5th of May 1719, Sir Theophilus died without issue, leaving Dame Elizabeth, his relict, and the respondent Sir John, his nephew and heir at law; who, by virtue of the articles and act of parliament, became tenant in tail of the estates in the counties of Bedford and Hertford, of about £1000 per ann. charged with the £300 per ann. settled in jointure on the widow, and with the £1000 for his sister Elizabeth's portion, and £40 per ann. for her maintenance; and the respondent also, as heir at law of Sir Theophilus, became intitled to the surplus of the trust estates, vested by the act in the trustees, after the debts were paid.

The day after Sir Theophilus's death, his Lady, being his sole executrix and residuary legatee, proved his will; and, by virtue thereof, possessed all his ready money, goods, and arrears of rent, and other personal estate of great value; and likewise received the £1900 remaining in Mr. Ellingham's hands, besides the £13,000 and interest due on the Marquis of Carmarthen's mortgage, being computed in the whole to amount to about £20,000.

In June 1719, the respondent Sir John exhibited his bill in the Court of Chancery, against Lady Effingham, as the relict of Sir Theophilus Napier, and against Edward Napier and the trustees, praying an account of Sir Theophilus's personal estate, and to have satisfaction for a defect of reparations of the mansion-house, the same being left by Sir Theophilus, at his death, greatly out of repair: the bill also complained of the several settlements made by Sir Theophilus in favour of his Lady, except the £300 per ann. jointure, made pursuant to the act; and prayed, that those settlements might be set aside, and that the mortgages and [226] other securities, paid off by Sir Theophilus, might be assigned to attend and protect the several reversions thereon; and that the trustees in the act of parliament might convey the trust estates, according to the articles and act. Whereupon Lady Effingham exhibited her cross bill against the respondent Sir John Napier, and the trustees and others, to have the trust estates not settled on her, sold for payment of the remaining debts of Sir John Napier the grandfather, and to be repaid the monies advanced by Sir Theophilus, in discharging the mortgages upon the trust estate, as belonging to her as executrix; and to have a conveyance made to her and her heirs, of the estate settled on her by the deed of July 1718.

To both these bills the several defendants put in their answers, and witnesses were afterwards examined; but pending these proceedings, the old Lady Napier the grandmother died, whereby her jointure of £1000 per ann. determined.

On the 12th of December 1721, both causes were heard before the Lord Chancellor Macclesfield, who decreed, that so much of the trust estate, as was not comprised in the settlement of the 16th of July 1718, should go and be applied according to the act; and as to such settlement, his Lordship declared, that no fraud or circumvention appeared to set it aside, or to prevent the Court from carrying it into execution; and therefore dismissed so much of the respondent Sir John Napier's bill, as sought to set aside that settlement; and declared it plainly appeared, that Sir Theophilus's intention was thereby to settle lands of the value of £500 per ann. on the Lady Effingham and her heirs; and it being alleged, that the lands therein comprised, exclusive of the manor of Shitlington, were upwards of £500 per ann. that the manor itself was £180 per ann. and that there was reason to believe Sir Theophilus did not know the value of it, or was not apprised that it was included in the settlement, it being then inserted between two small farms, and so likely to pass unobserved, and not taken notice of by him; it was referred to the Master, to enquire into the annual value of the said manor, and state the same, with all circumstances relating to the inserting it in the settlement, and also to state the annual value of the other lands therein comprised; and decreed the trustees to convey such other lands to the Lady Effingham and her heirs, as the Master should direct, *when*

the debts should be paid out of Sir Theophilus's personal estate; but as to any conveyance of the manor of Shitlington, his Lordship reserved the consideration thereof, till after the Master's report. As to the debts paid off by Sir Theophilus, and the mortgage terms by which the same were secured being assigned to him, and whether they ought to have attended the inheritance of the lands, or whether the Lady Effingham, as his executrix, ought to have the benefit thereof as part of his personal estate; his Lordship declared, that the mortgage terms which had been assigned by Sir Theophilus, were, in his executrix, a trust for the persons who were respectively entitled to the inheritance of the [227] several lands therein comprised, for the protection of such inheritance; and decreed, that such of those terms which concerned the lands belonging to the heir at law, should be assigned to trustees, to attend the inheritance of those lands; and that such of the mortgage terms, as comprised the lands in the settlement of the 16th of July 1718, should be assigned to such trustees, to protect the inheritance thereof. And as to the debts which affected the other estate, his Lordship declared the leasehold estate, as assets of Sir John Napier the grandfather, was liable to the payment thereof; and therefore dismissed so much of the Lady Effingham's cross bill, as sought to make the said leasehold estate, and the mortgage terms, part of Sir Theophilus's personal estate; and decreed, that Sir John Napier's debts, remaining unpaid, should be first satisfied out of the said leasehold estate; and, that as any mortgage terms should be afterwards discharged, the same should be assigned to protect the inheritance of the lands therein comprised; and when the whole trust estate should be discharged of the debts which it was subject to, then the trustees were to assign so much thereof as was not comprised in the settlement, to the respondent Sir John Napier, the heir at law. And directions were given touching the repairs of the mansion-house, which by the articles and act, Sir Theophilus was to do; and for taking the receiver's accounts of the trust estate, timber and wood monies, and appointing another receiver; but no costs were given on either side.

On this hearing it appeared, by the instructions taken by Mr. Bennett from Sir Theophilus, for drawing the settlement of July 1718, and which were produced in court, that there was an interlineation made therein, for limiting the inheritance of the lands to the Lady Effingham, and written in a different ink; and Mr. Bennett being present in court, owned such interlineation to have been made by him, after Sir Theophilus's death.

Soon after pronouncing the decree, and before any report was made, the Master. Mr. Hiccocks, surrendered his office, and was succeeded by the said Mr. Bennett, by whom the settlement of July 1718, was drawn; who, on the 22nd of January 1723, made a special report, and thereby *inter alia* stated, that Sir Theophilus owned his Lady's kindness to him, in her joining in the sale of the Yorkshire estate, being about £1500 or £1600 per ann. settled on her in jointure, and desired to recompense her for it; and thereupon directed the drawing the settlement of July 1718, to secure her and her heirs at least £500 per ann. as an equivalent or satisfaction for parting with her said jointure: that a rental of lands was prepared by him, and sent inclosed in a letter to Mr. Bennett, wherein Sir Theophilus said he had sent a particular of the lands to be put into his wife's settlement, which amounted to £500 per ann. and desired a statute for £15,000 might be prepared for securing the same. As to the yearly value of the manor of Shitlington, the report stated the depositions of several witnesses, taken on the respondent Sir John's behalf, [228] some of which proved the fines and quit-rents, and other profits of the manor, to amount to £180 per ann. and others less; and some proved the copyholds in hand, belonging to the manor, to be £1100 per ann. and the fines at the will of the Lord; and the manor to be worth between £4000 and £5000 to be sold; but concluded nothing certain as to what the true value of the manor was, or had been. And as to the yearly value of the lands in the settlement of July 1718, exclusive of the manor of Shitlington, the Master certified, that the same were of the yearly values in the said settlement mentioned, save some small under-valuations, and also some over-valuations particularly mentioned in his report; and that one parcel, called Hanscomb Laywood, valued in the rental and settlement at £13 per ann. was, together with the manor of Shitlington, liable to a fee-farm rent of £78 7s. 2½d.

The confirmation of this report, and some of the subsequent proceedings having been irregular, as to Sir John Napier the infant, he, by petition to the Lord Chan-



cellor, complained of such irregularity; and on the 4th of June 1724, the matter of this petition came on to be heard, when the several instances of irregularity being proved by affidavits, and it also appearing, that the estates comprised in the settlement of July 1718, were of greater value than £500 per ann. exclusive of the manor of Shitlington, and that the said manor and profits thereof could be let for £200 per ann. certain; his Lordship did not think proper to send it back to the Master to review his report, or to give judgment thereon, as the same then was; but ordered, that the order for confirming the report should be discharged, with liberty for the respondent Sir John to bring a new or supplemental bill, as counsel should advise, to be relieved touching the said manor of Shitlington; and in the mean time, the trustees were to hold courts for such manor, and the Master to appoint a receiver of the quit-rents and fines thereof, and the same were to be applied to pay such debts as affected that estate, and the surplus to be put out at interest on securities, subject to further order; and the Master was to state the debts of Sir John the grandfather yet unpaid, and the appellants were to deliver to the respondent Sir John Napier, a *fac simile* copy of the rental of the lands which Sir Theophilus intended to be settled on his Lady, and of his letter to Mr. Bennett, and of the indorsements thereon, containing instructions for drawing the said settlement.

From the whole of this order, and from so much of the decree as directed an enquiry into the value of the manor of Shitlington, or any of the other lands comprised in the settlement of July 1718; and as declared, that the mortgage terms which had been assigned to Sir Theophilus, were a trust in his executrix, for the persons entitled to the inheritance of the lands therein comprised; and as dismissed so much of the cross bill, as sought to make those terms part of the personal estate of Sir Theophilus Napier; and as postponed the conveyance to Lady Effingham, [229] till the debts of Sir John Napier should be paid out of Sir Theophilus's personal estate; and as declared the leasehold estates, as assets of Sir John Napier, to be liable to the payment of the debts which affected the other estates; and as dismissed so much of the cross bill, as sought to make those leasehold estates part of the personal estate of Sir Theophilus Napier; Lord and Lady Effingham appealed.

Sir John Napier the infant, also appealed from so much of the decree, as declared that no fraud or circumvention appeared in the settlement of July 1718, sufficient to set it aside, or prevent the court from carrying it into execution; and as dismissed so much of the original bill, as related to that settlement.

And in support of the original appeal, it was said (P. Yorke, C. Wearg), that upon the Lady Effingham's agreeing to part with her settlement of the Yorkshire estate, Sir Theophilus promised her an equivalent for it; and as that estate was upwards of £1500 per ann. any conveyance of lands in fee, in lieu thereof, could not be less than £500 per ann. But considering that the lands comprised in the settlement of July 1718, were chargeable with £4000 for the portions of daughters or younger children, it was but just that they should be of greater yearly value than £500; for otherwise, if the contingency happened, and £4000 were to be raised thereout, it was very plain that Lady Effingham would not have had such an equivalent as was intended for her. That Sir Theophilus Napier being entitled, according to the act of parliament, to a conveyance of all the trust estate in question; he had a power of disposing thereof as he thought proper; and he having directed the settlement of July 1718, to be prepared, and the same being prepared and executed after great deliberation, and without any circumstance or colour of fraud or circumvention, it was hoped, that the cross appeal would be dismissed, and that the respondents the trustees, in whom the legal estate was vested, would be decreed to convey to Lady Effingham, as well the manor of Shitlington, as all other the premises contained in that deed, and that she should hold and enjoy the same accordingly; especially as it now appeared, after so great examination, which had occasioned much delay and expence, that the respondent Sir John Napier had not the least probability of being able to impeach the deed; not so much as an affidavit of any circumstances of fraud having been hitherto produced as to the mortgage terms paid off by Sir Theophilus Napier, and of which assignments were taken to, or in trust for him, his executors and administrators, it was hoped, that the Lady Effingham, as his executrix, was entitled to the benefit thereof; because those assignments were taken after Sir Theophilus had made his will, whereof he constituted his wife sole executrix and residuary legatee; so that when he took

them in his own name, he well knew they would of course vest in her : and it was conceived to be much more unreasonable, that the respondent Sir John Napier should have the benefit of these terms, when there was not the least proof that Sir Theo-[230]philus ever intended it : but on the contrary, that he intended his wife to have the full benefit thereof. That the covenant in the settlement of July 1718, whereby Sir Theophilus agreed with his wife's trustees to pay Sir John Napier's debts, was intended only that she might enjoy the estate thereby conveyed for her benefit, clear of any of the debts of Sir John Napier ; and therefore ought not to be extended beyond that intention, so as to exempt the trust estate from the payment of those debts, according to the act of parliament, or to make Sir Theophilus, or his personal estate, pay the same, unless the residue of the trust estate was deficient ; especially as the respondent Sir John sought to set aside that very deed, under which, upon this part of the case, he claimed this advantage. And forasmuch as the leasehold estate, formerly Sir John Napier's, was by the act, after discharge of the debts, vested in Sir Theophilus, his executors and administrators, to which Lady Effingham, as his executrix, was entitled, as well as to his other personal estate ; it was conceived that this leasehold estate ought only to be liable, in respect of its value, to a proportion of the debts charged on the trust estate in general, and that no direction ought to have been given for a sale of it ; and the rather, because Lady Effingham had been at the charge of renewing the lease, and by her answer to the original bill, had admitted assets of Sir Theophilus, sufficient to answer any demand of the respondent : and as to the costs of the suits, it was insisted, that there did not appear any sufficient reason, why the appellant Lady Effingham had forfeited, or was not entitled to her costs ; and that therefore she ought to receive the same, either from the respondent Sir John Napier, or at least out of the trust estate.

To all this it was answered (T. Lutwyche, W. Peere Williams), on the part of the respondent Sir John, that as to the enquiry directed by the decrees, it was highly reasonable ; and that the circumstances of inserting the manor of Shitlington in the rental, and also in the conveyance of the lands to be settled on Lady Effingham, between two small farms of £9 and £4 per ann. each, and there being lands sufficient to answer £500 per ann. exclusive of the manor, which was of considerable yearly value, were conceived to be sufficient grounds for the court to direct such an enquiry ; especially as it was the case of an infant, whose inheritance was to be bound, and where the defence of his title appeared to have been greatly neglected and mismanaged. That the appellants acquiesced in this enquiry, until it came out that the estates comprised in the settlement of July 1718, notwithstanding what was stated by the report, amounted to more than £500 per ann. exclusive of the manor of Shitlington, which was worth £200 per ann. And as to the order of the 4th of June, when it clearly appeared to the court, that the infant's interest had been neglected, and that the report was defective and prejudicial to him ; there was certainly good reason as well to discharge the order confirming the report, as for giving him liberty to prefer a new or supplemental bill, wherein every thing material on his part, might be regularly put in issue. That [231] as to the mortgage terms paid off by Sir Theophilus in his life time, they were raised for a particular purpose, namely, to secure the monies lent thereon ; and that purpose being answered by payment of the monies, the terms, of course, became in equity, attendant on the inheritance : and if this were otherwise, the monies stated in Lady Effingham's answer to have been paid by Sir Theophilus on account of these mortgages, would exhaust the whole trust estate ; and then Sir Theophilus's father dying seised in fee of the equity of redemption of the mortgaged premises, such equity was assets by descent in the hands of Sir Theophilus : and he being entitled to the fee and inheritance of the trust estate, when he paid off the mortgages, he thereby disincumbered his own estate, and his executrix ought not to have the benefit thereof. As to that part of the decree which directed the leasehold estate of Sir John Napier, the grandfather, to be first applied towards the payment of his debts, it was just and reasonable ; because it is the constant rule of equity, that the personal estate of the debtor shall be first applied in payment of his debts, in case of the real estate ; equity always preferring the heir to the executor or administrator. And as to costs, it was insisted that there was no reason why the appellants should have any ; they having insisted on many things which were determined against them, and others being reserved for an enquiry ; and especially in a case where it appeared that the Lady had so large a share of the family estate.

And in support of the cross appeal, it was contended that Sir Theophilus at the time of making the settlement of July 1718, not having the legal estate in those lands, could not pass a legal estate to his Lady; and consequently she had no means to come at the same, but by a Court of Equity. That this settlement was founded upon recitals of her being entitled to much larger dower, and a more valuable jointure, than in fact she was; and upon the face of it, as well as from the other circumstances of the case, appeared to be unreasonable, and to contain extraordinary clauses: besides, the words for limiting the inheritance being interlined after the death of Sir Theophilus, rendered it extremely doubtful whether he intended to pass away such inheritance, and dismember the same from his honour and family; but at least, in this as well as any other case, where an infant's inheritance is in dispute during his minority, the usual time ought to be allowed him to shew cause against such decree, on his coming of age.

AFTER hearing counsel on these appeals, it was ORDERED and ADJUDGED, that so much of the decree of the 12th of December, 1721, as directed, "that so much of the estate, and the rents and profits thereof, as was not comprised in the settlement made by Sir Theophilus Napier, on the appellant the Lady Effingham, by the deed of settlement of July 1718, should go and be applied according to the act of parliament," should be affirmed: and as to so much of the said decree as ordered the respondent Sir John Napier's bill to stand dismissed, so far [232] as the same sought to set aside the said settlement of the 16th of July 1718, the same was affirmed, with this addition, viz. "unless the said Sir John Napier shall, within six months after he shall attain his age of 21 years, shew cause to the Court of Chancery to the contrary." (See title *Infant*, Ca. 1.) And it was further ORDERED, that the trustees should convey the manor and lands comprised in the said settlement of the 16th of July 1718, to the Lady Effingham and her heirs, as the Master should direct; unless the said Sir John Napier should, within six months after he should attain his age of 21 years, being served with process of the said Court for that purpose, shew cause to the said Court to the contrary. And it was further ORDERED and ADJUDGED, that the possession of the said manor of Shitlington, and the other lands comprised in the said deed of settlement, should be forthwith delivered to the appellants in the original appeal, who were at liberty to hold courts for the said manor in the names of the trustees, in whom the legal estate of the said manor was vested; and such trustees were to do all acts necessary for that purpose, being thereby indemnified for so doing; and that the rents, issues, and profits of the said manor and lands comprised in the said settlement, should be paid to the appellants in the original appeal, and the heirs of the appellant the Lady Effingham, until the said Sir John Napier should attain his age of 21 years, and shew cause to the contrary as aforesaid; subject nevertheless, to the further order and direction of the said Court of Chancery. And as to that part of the said decree, which related to what the Lady Effingham was entitled to by virtue of the said settlement; and the Lord Chancellor's declaration, concerning the intention of Sir Theophilus Napier, as to the value of the lands to be comprised in the said settlement; and the several allegations concerning the manor of Shitlington, and the order of reference thereupon to the Master, to enquire into the clear annual value of the said manor, and to state the same and also the annual value of the said other lands; and that the respondents the trustees should convey the said other lands to the Lady Effingham and her heirs, when the debts should be paid out of the personal estate of Sir Theophilus Napier; and that the consideration of any conveyance of the said manor should be reserved, till after the said Master should have made his report; it was ORDERED and ADJUDGED, that the same should be reversed; and all subsequent proceedings, directions, and orders of the said Court of Chancery, pursuant thereunto, were likewise set aside and reversed: and as to all the rest and residue of the said decree, the same was affirmed; with this further direction, as to that part of the decree which ordered "that the debts remaining unpaid should be first satisfied out of the leasehold estate of Sir John Napier deceased, and the personal estate of the said Sir Theophilus Napier;" that the Lady Effingham should be first allowed, out of the said leasehold estate, and the rents and profits thereof by her received, the fine and [233] necessary charges which she paid or expended, upon her renewing the said lease; and that if the surplus of the money arising by or out of the said leasehold estate, and the profits thereof, should not be sufficient for the payment of the said debts, the residue of the debts remaining unsatisfied,

such place as the said Court of Chancery should direct, the appellants should, at the respondent's charge, reconvey the mortgaged estate to the respondent and his heirs, and deliver up the mortgage-deed; and also upon the respondent's request, and at his charge, give him an attested copy of the articles of agreement in the pleadings mentioned; but [236] in default of payment of the said principal, interest, and costs, according to the direction aforesaid, the respondent should be absolutely foreclosed of all equity of redemption of the mortgaged premises. (Jour. vol. 22. p. 481.)

CASE 13.—JOHN PUTLAND, and others,—*Appellants*; Sir WALTER BURROWS,—*Respondent* [5th April 1725].

[Mews' Dig. ix. 1536.]

Tenant for life, makes a mortgage in fee, pretending to be seised in fee, the mortgagee, not having notice of the settlement, is not bound.

DECREE of the Irish Chancery REVERSED.

The point above stated does not appear to have been determined; as no proof of the settlement under which the mortgagor was alleged to be tenant for life only, was adduced. The decree directed issues to be tried to determine this question; and the reversal of it appears to have been made on the ground stated in *Filkin v. Hill*, this work, title *Issue*, ca. 6, that no issue ought to be directed, to try a matter not fully put in issue in the cause [4 Bro. P. C. 640].

Sir Kildare Burrows being seised in fee of the manor, town, and lands of Castle-town Omy, in Queen's county, and of the town and lands of Grange Mellon and Giltown, in the county of Kildare, in Ireland, with their several sub-denominations and appurtenances, did, together with his wife Dame Elizabeth, by deeds of lease and release, dated the 10th and 11th of June 1700, in consideration of £3000, really and *bona fide* paid to him by Thomas Putland, grandfather of the appellant John, grant and convey all and singular the said lands and premises, to the said Thomas Putland and his heirs; subject to a proviso for redemption, on payment of the said £3000 and interest, at £8 per cent. per ann. by Sir Kildare Burrows, his heirs or assigns, at the end of seven years from the date thereof. In which deed of release, were contained covenants for levying fines and suffering common recoveries, and making further assurances, and other usual covenants; and both deeds were witnessed by Robert Johnstone, afterwards one of the Barons of the Exchequer in Ireland, and brother-in-law to the said Sir Kildare Burrows.

Fines and recoveries were accordingly levied and suffered of the premises, to the uses in the said deed of release mentioned.

The said Thomas Putland being so seised of the said mortgaged premises, did, on the marriage of Thomas Putland his eldest son, the appellant John's father, with the appellant Jane, who was the daughter of John Rotton, in consideration of that marriage, and of a considerable marriage portion received with her, by deeds of lease and release, dated the 10th and 11th of August 1708, grant and convey the said premises *inter alia*, to John Rotton and Ed-[237]-ward Ryly, and their heirs, to the use of the said Thomas Putland the son for life; remainder to his first and every other son on the body of the said Jane to be begotten, and the heirs male of their bodies, with other remainders over: but subject to a proviso, that if the mortgage-money should be paid, the same should be laid out by the trustees in the purchase of lands, to be settled to the same uses.

Sir Kildare Burrows afterwards paid several sums of money, in part of the interest of the said mortgage, and continued in the possession of the mortgaged premises till his death, which happened in March 1708, leaving the respondent Sir Walter his son and heir; who, after his father's death, likewise paid some money, at several times, in part of the interest of the mortgage; but there being a very considerable arrear due, Thomas Putland the son, on the 15th of January 1710, exhibited his bill in the Court of Chancery in Ireland, against the respondent Sir Walter, Dame Elizabeth his mother, and also against John Lyons, who claimed the lands of Grange Mellon, part of the mortgaged premises, by virtue of two leases, under the yearly rent of £140 per ann.; and prayed, that

the money due upon the mortgage might be paid, or that the equity of redemption of the respondent Sir Walter might be foreclosed.

Sir Walter, who was then a minor, and the said John Lyons, answered the bill jointly; and the respondent Sir Walter, by his guardian, admitted that his father had borrowed money from the appellant's grandfather, and had executed such mortgage as in the bill stated, and that the estate was come to him; but insisted, that his father had made some settlement of the premises upon him, and did not know whether the same was subject to the mortgage. And the said John Lyons insisted on his lease of Grange Mellon, part of the said mortgaged premises.

The respondent Sir Walter having attained his age, and Lyons having, pending the suit, assigned over his interest in the premises to Sir John St. Leger, one of the Barons of the Exchequer; the appellant John's father, on the 22d of January 1716, exhibited a supplemental bill against the respondent and Baron St. Leger, for a discovery of what pretended settlements were made of the premises by the respondent's father, and when, to whom, and on what condition the same were made; and insisted, that if he had made any settlement on the respondent his son and heir, the same was voluntary, and could not affect the mortgage, or the then plaintiff's title thereto, he being a purchaser for a valuable consideration, without notice of any settlement; and he likewise insisted, that whatever settlements were made, the same were barred by the fines levied, and the recoveries suffered upon the execution of the mortgage; and therefore prayed, that the respondent might either redeem, or be foreclosed.

The respondent, on the 19th of August 1718, put in his answer to this bill; and thereby insisted, that the mortgaged premises [238] were, by some deed prior to the mortgage, for a valuable consideration, settled upon him in remainder; and that his father had no power to make such mortgage, nor was the respondent in any manner liable to the payment of the money so borrowed, he being, by such settlement, only tenant for life of the mortgaged premises; but whether the several uses by the said settlement limited, were barred by the fines and recoveries, he submitted to the Court. The Baron also put in his answer to the bill, insisting on the assignment of the leases to him from Lyons.

The appellant's father having replied, issue was joined in the cause, and rules for publication passed, but no witnesses were examined for the respondent, either to prove the pretended settlement, or any copy or notice thereof, though he applied for, and obtained a commission to examine his witnesses; the then plaintiff, however, proved the execution of the mortgage, and the settlement made upon his marriage; and on the 21st and 22d of February 1718, the cause was heard before the Lords Commissioners for hearing and determining causes in the absence of the Lord Chancellor; when it was decreed, that the then plaintiff Thomas Putland, and the respondent Sir Walter Burrows, should go to an account before the Master, and that Baron St. Leger should account for the rent of such part of the mortgaged premises as were held by him, and all parties were to have just allowances; and after the Master's report, the Court would consider whether the appellant's father ought not to have his costs, and would make such further order as should be just.

Pursuant to this decree, several proceedings were had before the Master upon the accounts thereby directed: and when the Master was ready to make his report, the respondent petitioned the Lord Chancellor, setting forth, that he was informed his father Sir Kildare Burrows had, upon his marriage, entered into articles for settling the mortgaged premises, whereby he was to be only tenant for life; that after the marriage took effect, a settlement was made pursuant to the said articles; that subsequent to that settlement, his father had borrowed £3000 from Thomas Putland, for which he mortgaged the premises to him; that Thomas Putland his son, had brought his bill, against the respondent to redeem, or be foreclosed; and that though the respondent had by his answer insisted, that his father had no power to mortgage the premises, yet not being able to prove it, a decree was pronounced against him: but being now informed, that the said Thomas Putland had notice of the said articles and settlement, before the money was lent; and that he did not doubt to prove the execution of the said articles and settlement, he therefore prayed, that the cause might be reheard: which was ordered accordingly.

At the same time the respondent filed a bill of discovery against the said Thomas Putland, the appellant John's father; stating, that upon his father's marriage with

the respondent's mother, [239] articles were entered into, whereby the mortgaged premises were to be settled upon the respondent's father for life; remainder, as to part, to the respondent's mother for life; remainder to the first and every other son of that marriage in tail male, with several other remainders over; and that pursuant to the said articles, after the marriage took effect, a settlement was made accordingly. That Thomas Putland, who lent the respondent's father £3000 upon a mortgage of the said premises, and his agents, had notice of the said articles and settlement, before any money was lent; and that the same were delivered to the mortgagee, to be by him cancelled. That Thomas Sisson, who was agent for the mortgagee, in an answer to a bill exhibited against him, during the respondent's infancy, had admitted notice of such articles, and that he had seen the same; that John Rotton had copies thereof delivered to him, and full notice of the same, before the intermarriage of his daughter with the appellant John's father; that the said Thomas Putland the son, and the trustees in his marriage-settlement, had, before the marriage, notice of the said articles and settlement; and therefore prayed, that the defendants might discover the same, and that the said answer might be made use of at the rehearing of the original cause.

To this bill the said Thomas Putland put in his plea and answers; and by his answer denied that he, at any time before his marriage, or that the said John Rotton, or any trustee in his marriage-settlement, to his knowledge or belief, had any notice or intimation of the articles made on the marriage of the respondent's father, or of any settlement made pursuant to such articles; nor did he ever hear, or believe, there were any articles entered into, whereby the respondent's father was to be tenant for life of the premises, with remainder over to his first and every other son: but insisted, that if Sir Kildare Burrows had made any settlement, limiting the premises, after his death, to the respondent in tail, the same was voluntary, and could not affect the mortgagee, who was a purchaser without notice, for a valuable consideration, and had a good right thereto, both at law and in equity. He also denied the charges in the bill from Sisson's answer, for that Sisson swore, the articles contained no limitation to the issue of the marriage, and were made after marriage. And as to so much of the bill as prayed a discovery of any articles or settlements, or copies thereof, or any deeds relating to the mortgaged premises, and to bring the same into Court; he pleaded his marriage settlement, and that he was a purchaser for a valuable consideration, without notice to him, or any person acting for him, on his said marriage.

This plea was argued on the 12th and 13th of July 1720; and it being insisted, that though the defendant denied any manner of notice or intimation to him, or his trustees, or that they saw the said articles, yet it being charged, that the defendant's wife's father had a copy of the articles delivered to him before [240] the marriage of the defendant, the defendant should have denied that fact; it was therefore ordered, that the defendant should amend his said answer and plea: but the respondent having petitioned for, and obtained a rehearing of the said order, the same was reheard on the 11th of November 1720, and the plea over-ruled. The respondent, however, never proceeded farther in that suit, nor insisted upon a farther answer from the appellant's father, though he lived near five months after the plea was over-ruled.

Before any further proceedings were had in the cause, the said defendant Thomas Putland died, on the 31st of March 1721, leaving the appellant John, his son and heir by the appellant Jane; but before his death, he made his will, and thereof appointed the appellants Jane and Dr. Helsham executors, who proved the same.

The appellants the executors, being entitled to all the arrears of interest of the mortgage, due at the death of their testator, and the appellant John to the principal money thereby secured, by virtue of the settlement upon his father's marriage; they, in April 1722, filed their bill of revivor against the respondent, and also against Baron St. Leger, the Bishop of Clogher, who was executor of John Rotton deceased, and Mary Ryly the executrix, and James Ryly the son and heir of Edward Ryly, who was the surviving trustee of Putland's marriage-settlement; praying, that the proceedings might be revived, and that the appellants, as being entitled to the mortgage money and interest, might have the benefit of the said decree in 1718, and to have an account of the mortgage money and the interest thereof; that the arrears of interest due in the lifetime of the said Thomas Putland, might be paid to the appel-

lants Jane and Richard; that the principal money might be laid out at interest, to the uses of the said settlement; and that the trustees might either act in the trusts thereof, or assign the same as the Court should direct.

The respondent answered, and insisted on the marriage articles made upon his father Sir Kildare Burrows' marriage with Sir Walter's mother Elizabeth, dated the 15th of February 1690, and upon a settlement dated the 16th and 17th of February, 1693, and that Sir Kildare had no power to make such mortgage.

The appellants replied, to avoid the answers being taken for true, but gave notice that no witnesses would be examined on their part, in regard to all that was insisted on in the respondent's answer to the last bill, had been in issue in the former pleadings, before the decree.

But the respondent examined Robert Johnstone, who was a subscribing witness to the mortgage deed, and also one Robert Dixon, as to the execution of the articles and settlement; who only swore, that they had heard that some articles were entered into before Sir Kildare's marriage, but neither of them ever saw them; [241] and that Sir Kildare told Johnstone, they were not executed till after his marriage, though they bore date before.

Publication having passed, this cause came to a hearing on the 2d and 4th of December 1724; and although objections were made by the appellants counsel to the reading the depositions taken on behalf of the defendant in that cause, because they were examined to a matter which was in issue before the decree; and although no proof had been made, or even attempted to be made, of notice to the said Thomas Putland, or any other person acting on his behalf, before the settlement of the premises in question upon his marriage; yet the following issues were directed to be tried by a jury of the county of Kildare; viz. Whether any, and what deed of settlement was executed by Sir Kildare Burrows in 1693, of the lands in the mortgage in the pleadings mentioned, or any of them, in pursuance of any and what articles, or for any other and what consideration, and what were the uses of such settlement; and if any such deed or articles were executed, to whom the same, or either of them, were come? And whether Thomas Putland sen. Thomas Putland jun. or the trustees in the settlement made on the said Putland junior's marriage, or any person or persons that transacted the marriage of the said Putland jun. with the daughter of John Rotton deceased, or any and which of them, had notice of such articles or settlement, at the time of the said marriage, or at any other time, and when?

From this last decree, and also from the order for rehearing the cause, the appellants appealed; insisting (C. Wearg, T. Lutwyche), that it was admitted, that the appellant John's grandfather really and *bona fide* lent the respondent's father £3000 at £8 per cent. interest, which was £2 per cent. less than the then common interest in Ireland; that for securing the repayment thereof, the mortgage in question was executed; and that this sum, with a great arrear of interest, remained unpaid. The appellant therefore, as an honest creditor without notice, was entitled to all the assistance of a Court of Equity, to compel payment of the money so lent; and the same ought to have been decreed accordingly. That the mortgaged premises were, before the intermarriage of the appellant John's father with the appellant Jane, and in consideration thereof and of a marriage portion, conveyed to trustees, to the use of the appellant's father, for life; with remainder to the first and every other son of that marriage; so that the appellant John's father was a purchaser of the premises in question for a valuable consideration, and therefore ought to have the benefit thereof, in order to recover the money really due: unless it was plainly proved, that the mortgagor had no title to convey, and that the appellant's father had notice thereof before the settlement; for as to the appellant John, it was impossible that he could have notice, he being then unborn. That the respondent by his answer to the original bill brought by the appellant's father, and also to the supplemental bill, insisted that his father was only tenant for life of the mortgaged premises, by settlement for a valuable consideration, [242] and had therefore no power to mortgage the same; but though publication was at his desire frequently enlarged, and a commission granted to examine witnesses, yet no proof of such settlement was made; wherefore a decree passed in favour of the appellant's father, and consequently, there was no reason afterwards, to direct an issue to try whether such articles or settlement were executed. That after publication was passed, the cause heard, a

decree pronounced, and a bill of revivor brought upon the death of one of the parties, it seemed to be a matter of very dangerous consequence, to allow a defendant to adduce evidence to support the facts of his answer, which were substantially the same as what he had formerly insisted upon, and were fully put in issue in the original cause, but to which he had examined no witnesses therein; and it was the more extraordinary in the present case, because the two witnesses since examined by him, namely, Mr. Johnston and Mr. Dixon, were not only his uncles, but intimate acquaintance, from whom he might have had the same discovery in the first cause, and who no doubt might have been then examined, had there not been some private reason for delaying such examination, till after publication was passed; especially, since it appeared by the respondent's own bill, that he was informed of these transactions long before, they being all charged in a bill brought by him against the appellant's grandfather and Sisson, in the year 1709; and though they both answered that bill, and insisted that these two witnesses were privy to the mortgage, and all the transactions relating thereto, yet no farther proceedings were had in that cause, nor any attempt made to examine these witnesses, till after the death both of the appellant's grandfather and father, and of Sisson also, who transacted the mortgage in question. But even these witnesses did not prove the articles insisted upon by the respondent, or that either of them were witnesses thereto, or ever saw the original articles, or any copy of them; but only said, that they had heard articles were executed, and that they were delivered up to the mortgagee and cancelled. That though both the witnesses referred to the answer of Sisson, as the reason of their belief touching the articles, and the delivery thereof to the mortgagee; yet they plainly differed from the answer itself, both as to the nature of the articles, and the delivery of them to the mortgagee; for the articles as Sisson set them forth, were only a provision for the present maintenance of Kildare and his Lady, during the life of Sir Walter his father, and for a jointure for the Lady; but contained no limitation to the issue of the marriage, and were, in fact, executed after the marriage. That it seemed very strange, to leave it to a jury to try the limitations of uses in articles, of which no copy was produced, and neither the original, or any copy proved to be extant, nor even a single witness examined who ever saw them. That the directing an issue, to try whether the appellant John's father had any notice of these articles, was apprehended to be contrary to the usual course of proceedings in a Court of Equity; when the party on whom notice is pretended, [243] expressly upon oath, denies having had any notice, and where not the least proof is made to falsify that answer, nor any attempt made to prove such notice. And it was apprehended, that if the appellant John's father had no notice of the articles, all the other inquiry would be fruitless and to no purpose. It was therefore hoped, that the decree of the 4th of December 1724, would be reversed, and that the respondent should be decreed to redeem the appellants, or be absolutely foreclosed.

On the other side it was contended (P. Yorke, C. Talbot), that the appellants not having thought fit to proceed on the decretal order of February 1718, or to revive the suit in which that order was made; but having exhibited an original bill, and the appellant John claiming under the settlement made upon his father's marriage, the respondent was well entitled to examine witnesses in this last cause; and the rather, because the appellants joined issue, by replying to the respondent's answer, and because no witnesses were examined in the other cause, before the said decretal order; that cause having been brought on to a hearing without the respondent's knowledge or privity, who was then in England; and though a counsel opened his answer at the hearing, it was without his knowledge or direction. That it was apprehended not to be unprecedented, to try the limitations and substance of a deed, of which there is no copy extant; and it seemed to be very just and reasonable to do it in this case, there being strong proof that the articles and settlement came to the hands of the appellant's grandfather, and that he destroyed them. That the loss of estates, was not a necessary consequence of losing deeds; for evidence may be given of them, though no copy be extant. That it is agreeable to the known rules of Equity, to direct issues to be tried concerning matters of fact, where any doubt remains with the Court; and such issues are often directed upon very slender proofs. That if a title thus contested should be given away without trial, because the deeds, or copies of them, were not extant, many marriage settlements might be in danger of being de-



stroyed, by the same practices which had been used in this case; as the needy father of a family, by thus getting deeds into his custody, might, to answer present necessities, agree to cancel or destroy them, and thereby ruin his family: besides, great regard ought to be had to the respondent's being an infant of only eight years old, when the mortgage was made. That the infancy of the appellant John, was conceived not to very considerable in this case, as he was only seeking to reap the benefit of a wrong done by his grandfather; which, however it might affect his estate, as having covenanted to make good the mortgage, upon the settlement thereof on his son's marriage, yet ought never to fall on the respondent's estate. That fair creditors could never be hurt by the order made in this cause; and to shake settlements in general for the sake of dishonest creditors, who, to carve out a good security to themselves, were capable of a combination to suppress or destroy deeds which stood in their way, [244] ought never to be countenanced in any cause, or upon any consideration. That to direct this trial at law would be no injury to the appellants, if in truth there never were any articles or settlement; and if there were, it might be very injurious to the respondent and his family, not to do it. And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the said decree of the 4th of December 1724, should be reversed; and that the former cause and proceedings, wherein Thomas Putland, the appellant John's father, was plaintiff, and the respondent Sir Walter Burrows was defendant, should stand revived, and that the appellants should have the benefit thereof: and it was further ORDERED, that the said Court of Chancery should cause an account to be taken, pursuant to the decree of the 23d of February 1718, of what was due for principal and interest upon the said mortgage; and that the said Court should likewise cause costs to be taxed for the appellants, in the original cause, and on the bill of revivor; and that if the respondent should pay, or cause to be paid, what should be so computed and reported due for principal, interest, and costs, at such time and place as should be appointed by the said Court of Chancery, the appellants should, at the respondent's charge, re-convey the mortgaged premises to such persons as were intitled to a redemption under the mortgage deed; but, in default of payment of the said principal, interest, and costs, at the time and place to be appointed as aforesaid, the respondent should be absolutely foreclosed of all equity of redemption of the said mortgaged premises: and it was further ORDERED, that the said Court of Chancery should give proper directions in pursuance of this judgment. (Jour. vol. 22. p. 483.)

CASE 14.—JASPER JONES & UX.,—*Appellants*; JOHN KENRICK,—*Respondent*  
[13th February 1727].

[Mew's Dig. ix. 1735. See *Campbell v. Holyland*, 1877, 7 Ch. D. 176.]

A decree of foreclosure, after an acquiescence of 20 years, shall not be set aside upon a bill of review for errors in form only, and not of substance; and therefore a demurrer to such a bill is good.

JUDGMENT by agreement. See *ante*, note to Ca. 2 [5 Bro. P. C. 181].

Viner, vol. 15. p. 470. ca. 18: 2 Eq. Ab. 602, ca. 31.

Francis Leigh, the appellant Frances's father, being seised in fee and in possession of an estate in Shropshire, of about the yearly value of £60, and being also seised of the reversion in fee, expectant on the death of Lydia Leigh his mother, of the manors of Puttenham-Bury and Puttenham-Priory, and divers [245] lands in Surry, of the yearly value of £120; in July 1683, mortgaged all the premises to Elizabeth Worster, widow, for two several terms of 1000 years each; and that mortgage having been assigned to Sir Robert Dashwood in 1689, for securing £2300 and interest; he, by indenture dated the 23d of May 1691, in consideration of £550 paid to him, being all the money then remaining due on that mortgage, and of £350 paid to Francis Leigh, making together £900, did, by Francis Leigh's direction, assign over the two mortgage terms of 1000 years each, to Sir William Cranmer;

redeemable by Francis Leigh and his heirs, upon payment of £900 and interest at £5 per cent.

Francis Leigh being also entitled to £1000 East India Stock, and having afterwards occasion for more money, Sir William Cranmer advanced the same; and for securing the re-payment thereof, Francis Leigh on the 24th of May 1691, transferred the stock to him; and by a memorandum in writing it was agreed, that Sir William should receive the dividends, and have power to sell and transfer the stock, with Leigh's approbation, and pay himself the money lent on the security of it, and also the £900 mortgage money and interest; and the surplus was to be paid to Leigh.

The East India company having made calls upon the proprietors of their stock, Sir William Cranmer, on Leigh's behalf, paid several sums pursuant to such calls, whereby there was a considerable addition made to the £1000 stock: and by a writing between them it was agreed, that the £1000 capital, together with the additional stock, should be a security to Sir William for such money as he had paid to the company, and that the mortgaged estates should likewise stand charged with the same. And by indenture dated the 1st of December 1694, between Sir William and Leigh, it was declared that Leigh had paid Sir William £255, and that they had then come to an account for the several sums lent by Sir William, and for all interest due thereon, and for all receipts and payments concerning the same; and that there then remained due to Sir William £1500 principal money only, which was agreed to be continued on the several securities charged therewith, at an advanced interest of £6 per cent.

Sir William Cranmer died in September 1697, having made his will and appointed the respondent sole executor, who thereby became entitled to the money due from Leigh on the above securities; and after the testator's death, took upon him to sell the £1000 capital, and all the additional stock, and thereby and by the dividends received by him and his testator, together with several considerable sums paid by Leigh to the respondent and his testator, the money due on the said securities was very near satisfied. Notwithstanding which, in the year 1705, the respondent taking advantage of the misfortunes of Leigh, who then was and to the time of his death continued a prisoner, entered on the Shropshire estate, and from that time received the profits of it.

[246] Some time in July 1710, Francis Leigh died a prisoner for debt in Newgate; leaving the appellant Frances his only child and heir, then an infant of the age of twelve years. But Leigh by his will, dated the 25th of July 1710, devised all his real and personal estate whatsoever, in England or elsewhere, to the appellant Frances, by the name of his loving daughter Frances Leigh, and made her sole executrix; who by virtue of such will, and as heir to her father, became entitled to the equity of redemption of the mortgaged premises.

On the 4th of September 1711, Lydia Leigh, the appellant Frances's grandmother, died; upon whose death the respondent entered on the estate in Surry, and received the profits thereof; so that in case any thing remained due to him on the mortgage and other securities, over and above the money which he received by sale of the capital and additional East India stock, and the dividends and profits thereof, and the money paid by Leigh in his life-time, the mortgage debt had been fully paid by perception of the rents and profits of the estates.

Upon the death of Francis Leigh, the appellant Frances, his daughter, by reason of her father's misfortunes and troubles, was left destitute of any provision, or means of subsistence; and till her marriage, was maintained by the charity and assistance of her relations; who during her infancy applied several times to the respondent, to account with her touching the premises, and to make her an allowance towards her maintenance: to which the respondent answered, that if the appellant's relations would insure her life, he would make her an allowance, for that there was more than enough to satisfy him; but in case the appellant Frances died before she came of age, he might be a loser by making such allowance; because the estate would then go to the next heir, and therefore he could do nothing till she came of age. and then *he would act like an honest man.*

The appellant Frances attained her age of twenty-one on the 14th of May 1719: and her father having left his affairs in the utmost disorder and confusion, she was not in any condition to commence a suit against the respondent, but by herself and

friends often applied to him to account with her for the rents and profits of the mortgaged premises, and the money raised by sale of the East India stock; and several meetings were thereupon had, when he made some inconsiderable offers for the appellant Frances's right to the estate in question, but refused to come to any account with her.

The appellants intermarried on the 10th of October 1723; whereupon the appellant Jasper, being, in right of his wife, entitled to the equity of redemption of the mortgaged premises, applied again to the respondent to come to a fair account; and he still refusing so to do, the appellants, in Michaelmas term 1723, exhibited their bill in Chancery against the respondent, for an account of the rents and profits of the estates in Shropshire and Surry, and of the money raised by sale of the East India [247] stock, and that they might be let into a redemption of the mortgaged premises.

To this bill the respondent put in a plea and answer; and as to so much of it as sought to compel an account of the rents and profits of the mortgaged estates and the East India stock, and to let the appellants into a redemption thereof, the respondent pleaded, that he, as executor of Sir William Cranmer, did, in Hilary term 1698, exhibit his bill in Chancery against Francis Leigh, praying, that he might either pay the respondent, by a time to be prefixed by the Court, the £1500 and interest, together with his costs, or be foreclosed of his equity of redemption of the premises: that Leigh put in his answer to this bill, and that the cause was heard on the 16th of February 1701, in the presence of the respondent's counsel, none appearing for Leigh; when it was referred to one of the Masters of the Court, to compute what was due to the respondent for principal, interest, and costs, on his mortgage; and that upon Leigh's payment thereof, at such time and place as the Master should appoint, the respondent was to reconvey to him the mortgaged premises; but in default of such payment, Leigh was to be foreclosed of his equity of redemption of the mortgaged premises, and release the same to the respondent; unless he being served with a *subpoena* should shew cause to the contrary: that this order, on hearing, was, by another order of the 8th of June 1702, made absolute: that the Master made his report on the 12th of February 1702, and thereby certified that there was due to the respondent for principal, interest, and costs, on his mortgages and securities, over and above what he had received by sale of the East India stock and the dividends thereof, and other monies in the report mentioned, the sum of £932 13s. 2d. which the Master appointed Leigh to pay the respondent on the 18th of March 1702: that this report was confirmed by an order of the 18th of February 1702, unless cause; and by another order of the 19th of March following, upon the respondent's own petition, it was ordered, that the time for payment of the money certified to be due, should be enlarged till the first day of the then next term; and by a final order and decree of the 23d of July 1703, inrolled, reciting the bill, answer, and the several other proceedings; that Leigh had due notice of the order for confirming the report, and that no cause had been shewn to the contrary; it was therefore ordered and decreed, that the report should be confirmed, and that Leigh should be absolutely foreclosed of his equity of redemption of the mortgaged premises, and should release the same to the respondent.

Upon arguing this plea before the Lord Chancellor Macclesfield, on the 18th of May 1724, his Lordship held it to be insufficient, and over-ruled the same. After which the respondent put in two answers to the bill, and thereby admitted that he got possession of the mortgaged estate in Shropshire, and received the [248] rents thereof from Michaelmas 1705; and that he entered on the estate in Surry in the year 1711.

The cause being at issue and witnesses examined on both sides, was heard before the Lord Chancellor King, on the 4th of June 1725; when his Lordship was pleased to dismiss the bill, but without costs.

The appellants being advised, that the decree of foreclosure set forth in the respondent's plea was erroneous; they did in Easter term 1726, exhibit their bill of review against the respondent, setting forth the several proceedings in the cause brought by him against Francis Leigh, and the decree of foreclosure; that the original decree, and the report grounded thereon, and also the decree of foreclosure were pronounced, made, signed, and inrolled, while Leigh was a prisoner; and that he continued a prisoner to the time of his death: that the rents and profits of the

mortgaged estates received by the respondent, since the respective times of his entering thereon, were more than sufficient to pay his principal, interest, and costs; and that the value of the mortgaged premises to be sold, would amount to more than four times the money reported due to the respondent on his mortgage. And then the appellants assigned the following errors, as appearing in the body of the decree of foreclosure, viz. I. That the Master's report of the 12th of February 1702, certified, that there was due to the respondent on his mortgage, £932 13s. 2d. which he appointed Francis Leigh to pay the respondent on the 18th of March 1702; which report was, by the order of the 18th of February 1702, confirmed, unless cause within eight days after notice; and by the other order of the 19th of March following, the time for paying the money was enlarged to the first day of the then next term, which began on the 14th of April 1703, and the order of the 18th of February 1702 was made absolute on the 23d of July 1703, according to the decree of foreclosure signed and inrolled: so that the report not being absolutely confirmed till the 23d of July 1703, which was above three months after the time appointed for payment of the money reported due to the respondent, and the report being as no report till confirmed, Francis Leigh had no time or opportunity of paying the money; the day appointed for payment thereof being past, before the report was absolutely confirmed: and therefore such decree of foreclosure ought not to have been pronounced, for non-payment of that money which he had no day or opportunity given him to pay. II. That the order of the 23d of July 1703, which confirmed the report according to the decree signed and inrolled, did also absolutely foreclose the said Francis Leigh; whereas by the rules of the Court, he ought to have had some time at least for payment of the money, after the report was absolutely confirmed, and before the decree of foreclosure had been pronounced. III. That it did not appear by the decree of foreclosure, or any of the proceedings in that cause, that any affidavit was made, that the respondent, or any on his [249] behalf, attended at the time and place appointed by the report and order of the 19th of March 1702, to receive the money; or that Leigh, or any other person for him, was not then and there present, and ready to pay or tender the same; for want of which affidavit, the decree was no way warranted, but was irregular and erroneous. IV. That there was, in fact, no such order as in the decree of foreclosure was mentioned to be made on the 23d of June 1703. Therefore, and for other errors appearing on the face of the decree of foreclosure and proceedings, the appellants, by their bill of review, prayed that the said decree might be reviewed and reversed, and that they might be let in to redeem the mortgaged premises.

To this bill the respondent put in a demurrer; and upon arguing the same on the 25th of November 1726, before the Lord Chancellor, his Lordship was pleased to allow it.

The appellants therefore appealed, not only from this order allowing the demurrer, but also from the order of dismissal of the 4th of June 1725; insisting (C. Talbot, T. Lutwyche), that the estates in mortgage were of much greater value than the money due to the respondent, the same being worth to be sold, at least £5000; whereas the money reported due for principal, interest, and costs, was only £932 13s. 2d. And though the Surry estate was then a reversion only, yet the tenant for life being 76 years of age, that estate was then worth to be sold between 2 and £3000; and the Shropshire estate, which was in possession, was, by the respondent's own admission, between £50 and £60 per ann. That the decree and Master's report, and the subsequent proceedings thereon, were all *ex parte*, and undefended by the appellant's father, who was then a prisoner, and so continued to the time of his death. It was further observable, that the Master, instead of giving the appellant's father six months time to pay the money, as in such cases is usual, gave him only 34 days; nor was that time enlarged, save by the respondent himself, because he could not get the report confirmed within the time, and then only 26 days more were given; so that it was almost impossible to comply with the short time appointed to pay the money, even if the proceedings had been regular. That it appeared by the decree of foreclosure itself, that the appellant's father did not suffer these proceedings to go against him *ex parte* out of any obstinacy, for before his misfortunes came upon him, and even pending that very suit, he paid to the respondent £1300 in part of the mortgage money; and before the suit was commenced, he paid as much more as with

that £1300 amounted to £1654 6s. 11d. Notwithstanding all which payments, and the great over-value of the security, the respondent, in a most oppressive manner, proceeded to a foreclosure. That the errors assigned by the bill of review, were conceived to be unanswerable; it appearing in the body of the decree, that the time for payment of the money was elapsed above three months before the report was confirmed; so that the appellant's father had, in fact, no time at all to pay the [250] money. It likewise appeared, that the same order which confirmed the report, did also foreclose; and it did not appear by the decree, that the respondent attended at the time and place appointed by the report to receive the money, or that the appellant's father was not then and there present; and these gross errors appearing upon the face of the decree, were the reason that the respondent's plea to the original bill was over-ruled. But should it be objected, that this decree of foreclosure being signed and inrolled above twenty years ago, it might be attended with dangerous consequences to break into it, though not strictly regular in all its parts; and that it would be hard to travel the respondent into a long account, after an acquiescence of above twenty years: it was answered that the length of time was accounted for by the appellant's father being a prisoner at the time this decree was inrolled, and so continuing till his death; and by the infancy of the appellant Frances, who was but twelve years of age when her father died, and did not attain twenty-one till the year 1719. And all the acquiescence which could in reality be pretended was but four years, the original bill being brought in the year 1723; and even during those four years, there were frequent applications made to the respondent, as well as during the appellant Frances's infancy. Besides, it was in proof, that the respondent himself declared, "he could do nothing till the appellant Frances came of age, and that then *he would act like an honest man.*" That these estates were the chief, if not the only dependance which the appellants had for the support of themselves and their family; and as the respondent could not possibly be injured by receiving his whole principal money, with interest at £6 per cent. it was hoped, that both the said orders would be reversed and set aside; and that the appellants might be let into a redemption of the mortgaged premises.

On the other side it was argued (P. Yorke, J. Hunter), that as to the order of the 4th of June 1725, no objection could be made to it; the decree of foreclosure standing in full force, and not be impeached or reversed by an original bill: and though the Court did not think fit to allow it as a plea, yet the over-ruling that plea could not take away the force of the decree, or prevent the respondent from making use of it by way of defence, at the hearing of that cause. And as to the other order for allowing the demurrer, the particulars assigned by the appellants for errors in the decree of foreclosure were not matters of substance, but merely of form; which, after such a distance of time, were not to be regarded, nor did they affect the merits or justice of the case. For though the report might not be absolutely confirmed, till the time appointed for payment of the money was elapsed; it did not follow from thence, that Leigh had no day or opportunity given him for payment of the money. It was plain, that the report, which ascertained the money due to the respondent, and appointed the time and place for the payment of it, was [251] made on the 12th of February 1702; the time appointed for payment, was on the first day of Easter term following, which was alledged by the appellants to have been on the 14th of April: now Leigh had due notice given him of this report, and of the order for confirming it, unless cause, on the 10th of March 1702, against which he never shewed any cause, and the decree was not made absolute till the 23d of July following; so that he had sufficient time allowed him to pay the money, and it could not with any reason be said, that he had no day or opportunity given him for such payment. That it was not required, either by the rules of the Court, or of justice, that Leigh should have had any farther time allowed him as of course, and without application, for payment of the money, after the report was absolutely confirmed; the day appointed by the report always is, and must in these cases be, the rule for payment of the money, it being by the decree expressly directed to be paid on such day, unless either party thinks fit to apply to the Court to enlarge the time; and which is often done where the defendant thinks it worth his while to redeem, and has any prospect of raising the money: but, from Leigh's not doing so, it was evident that he neither had the money ready, nor thought it worth his while to redeem, or that he was any way

aggrieved by the proceedings. That as the decree was not made absolute till the 23d of July 1703, it was more reasonable to have expected from Leigh, to have shewn to the Court that he attended at the time and place appointed, and was then and there ready to pay the money, but that the respondent was not there to receive it; than from the respondent to have shewn that he attended to receive it, but that Leigh was not there to pay it. He had time enough to do this between the 14th of April and the 23d of July; and therefore it must be presumed, that the respondent was ready to receive it, but that Leigh was not ready to pay it. That as to the formality of the proceedings in the decree of foreclosure, it was apprehended, that if there had been any thing omitted or done to the real prejudice of Leigh, or that he had not sufficient notice of what was doing, or was straitened in time with respect to raising the money, he would and ought to have complained of it, between the 14th of April 1702, and the 23d of July following, or between that time and July 1710, when he died; but he was so far from thinking himself aggrieved by any of the proceedings, or that it was then worth his while to redeem the mortgaged premises, that he never complained by bill or otherwise against the decree, or even prayed to have the mortgaged estate sold. And though he had a cross bill depending against the respondent at the same time, and relating to the same matter, and in Michaelmas term 1704, filed a supplemental bill; yet he permitted the same to be dismissed with costs for want of prosecution, on the 29th of November 1707; having thereby gained what he principally aimed at, viz. the keeping the respondent out of possession of the Shropshire estate till Michaelmas 1706. After all [252] these proceedings, the respondent apprehended that he had a regular and good decree of foreclosure, and accordingly entered upon, enjoyed, and managed the estates as his own property; it would therefore be a very great hardship, if not injustice, to strip the respondent of his estate, and compel him to account, on pretence of slips in form only, and not in substance. As to the insinuation, that the estates were of much greater value than the money reported due to the respondent, it was to be considered, that though the foreclosure was in July 1703, yet he did not get possession of one of these estates till Michaelmas 1706; and that the other estate was a reversion on a life, which did not fall in till Michaelmas 1711; and being a contingency which might happen sooner or later, it was unjust for the appellants to expect any advantage from it; for in case the life had subsisted longer, and the respondent had been kept out of the possession till this time, the appellants were under no obligation to make good to him any deficiency which might have thereby happened. Besides the respondent never was in the possession of a considerable part of the mortgaged premises, particularly of several lands in Byron in the county of Salop, which, before the decree of foreclosure, had been entered upon, and were still held for the non-payment of a rent-charge of £20 per ann. being their full value; nor of a fee-farm rent of £7 13s. 4d. other part of the premises, for the recovery whereof the respondent had expended a considerable sum of money, but without effect. That the price of lands was very much risen within these twenty years; and if an increase in the value of the security should be thought a reason for opening a foreclosure, or add any weight to slight objections in point of form for that purpose, no foreclosure could continue for many years, and the greatest confusion would be introduced in estates depending on those titles. That the respondent acted in this case in the capacity of an executor, and upon the foreclosure, this estate became assets in his hands, liable to the payment of debts and legacies; and he had accordingly, before the appellants first bill was filed, sold part of the Shropshire estate; so that the purchaser thereof, who was no party to this suit, might be greatly affected by it. As to the objection taken on account of Leigh's imprisonment at the time of the decree of foreclosure, and till his death: and that all the proceedings were *ex parte*, and undefended: it was answered, that though Leigh was a prisoner, yet he was a prisoner at large; and it was in proof in the appellants first cause, that he was frequently abroad in the streets of London and in the country, following his business as an attorney or solicitor, and particularly in a cause of great litigation in the year 1708; it was also evident, that he was sufficiently at leisure to defend the respondent's suit, if he had thought fit, by his keeping the respondent out of possession of the Shropshire estate, from July 1703 to Michaelmas 1706; but not intending to redeem, it was for his advantage not to make any defence, as he thereby gained time. Upon the whole it was submitted.

whether after a fore-[253]-closure of about twenty years, of an estate part in possession and part in reversion on a life, and thereby subject to the contingency of such life's falling sooner or later, and when the price of land was considerably risen, it was just or equitable to permit the appellants, after the death of such tenant for life, and especially after the respondent had been so many years in quiet possession, to redeem the estate; although at last by the death of the tenant for life, by the receipt of the rents, and by the accidental increase in value, the estate might exceed the principal and interest due on the mortgage; and if not, whether any omission of the respondent's solicitor or clerk in court, in matters of mere form, should be thought sufficient to involve the respondent in an intricate account of the rents and profits of these estates for such a number of years, after he had reasonably esteemed them as his own.

On the day appointed for hearing this appeal, the counsel on both sides informed the house, that the parties had come to an agreement, which having been reduced into writing and signed, they were desirous should be made the order and judgment of the House: and accordingly the agreement being delivered in and read, it was ORDERED and ADJUDGED, that the appellants should pay to the respondent £1150 in full of all his claims and demands for principal, interest, and costs upon the estates in question; and that thereupon the respondent should reconvey and reassign, as the appellant should direct, the several mortgages and securities, and all his right and title to the several estates, free from all incumbrances done by him, or any claiming under him, except leases at improved rents; and should also deliver possession of the estates to the appellants, except such part thereof as had been sold by him to Mr. Baldwin, which sale the appellants were to confirm at the purchaser's request and expence: and that the money raised by sale of such part of the estate as had been sold, should be accounted and taken as part of the £1150; and that the respondent should receive all the rent and arrears of rent to this time, and the growing rents from this time to be received by the appellants: and if the residue of the £1150 should not be paid to the respondent in a month from this day, then the appellants should pay interest from that time for such residue; and upon payment of the money and executing conveyances, mutual releases should be given. And it was further ORDERED, that this judgment should be transmitted to the Court of Chancery, in order for that Court to cause the same, as occasion might require, to be effectually complied with. (Jour. vol. 23. p. 184.)

[254] CASE 15.—CHARLES SELBY AMHERST,—*Appellant*; WILLIAM ROBINSON LYTTON, and others,—*Respondents* [12th March 1729].

[Mew's Dig. xv. 1200 (*Amhurst v. Litton*).]

Land mortgaged for two several terms of one thousand years, was afterwards settled to A. in tail, remainder to B. in tail, remainder to A. in fee, whereby A. and B. had successively an equity of redemption incident to their estates. A. by his will appointed the mortgage to be paid off, and the terms to be assigned to M. and by the same will devised all his lands (being seised of other lands in fee) to C. and his heirs. A. and B. both died without issue, whereby the estate tail was spent; and upon a question, whether the equity of redemption passed to M. by the will of A. and was thereby severed from the reversion, it was held that it did not; and that M. stood only in the place of the mortgagee, and was liable to be redeemed by C.

A. devised his estate to his son in tail male, remainder to B. for life, remainder to his sons in tail male, on condition that he should change his name, and if he or any son of his refused so to do, then the testator directed the devise to be void, and gave the estate over to D. The son died without issue, B. performed the condition, and died without issue. And upon a question, whether D. should have the estate after the death of B. it was certified by the Judges of K. B. that D. took no estate on the death of B. but that it went to the heir at law of A. See *Fearne Cont. Rem.* 165. (363.)

The point of this case is thus stated in the marginal note to Mosely 218.

"A. tenant in tail of lands in Sussex, and elsewhere, subject to mortgages, remainder to B. for life, remainder to his first and other sons in tail-male, with other like intermediate remainders, reversion in fee to A. and seised of other lands in fee, by his will directs his executor to pay off the mortgages in Sussex, that they shall be kept on foot, and assigned by the mortgagees to his mother, for her sole use and benefit, during the remainder of the several terms: and as for and concerning *all* his manors, lands, etc. which he was then seised of in law or equity, or which he had power to give or charge, etc. he devises them to C. and his heirs. This is not a devise of the absolute terms to the mother, but of the money only; and the equity of redemption passes to C. This DECREE [which was made on a rehearing, and by which Lord Chancellor King reversed his former decree,] was AFFIRMED in Parliament after great debate by 31 Lords against 16."

See also Powell on Mortgages, vol. 1. cap. 10, where the circumstances of the case and the reasons of the decree are very clearly stated.

Viner, vol. 15. p. 460. ca. 20: 2 Eq. Ca. Ab. 602. ca. 33: Fitzgib. 99:  
1 Barn. 217: Mosely 131. 207. 211.

Sir George Strode being seised in fee of the manor of Itchingham, and divers lands and hereditaments in the county of Sussex, of the yearly value of £500 and upwards, part whereof was subject to two several mortgages made by him to Francis Brook, each for a term of 1000 years, for securing £1100 and interest; and other part thereof was subject to another mortgage made by him to Mary Seyliard, for another term of 1000 years, for securing £500 and interest; and Sir George being also seised of other estates in the counties of Worcester, Gloucester, and Hereford, subject to other mortgages, did, by his will, dated the 21st of May 1707, devise all his manors, messuages, lands and hereditaments to his only son Lytton Lytton, and the heirs male of his body; remainder to his godson Strode Bedingfield for life; remainder to his first and other sons in tail male; upon condition, that the said Strode Bedingfield, and his issue male should change his name of Bedingfield to Strode, and take the arms of the Strodes. And in case the said Strode Bedingfield, or any son of his, should refuse or neglect to change his surname from Bedingfield to Strode, then the testator's will was, that the said devise should be void; and in such case, he gave the same to his godson [255] George Darnelly for life, remainder to his first and other sons in tail male; he and they changing their surnames in the same manner as Strode Bedingfield was to do: and in case he and his issue should refuse, then the devise to him and them was to be void; and in such case the testator devised the same to his own right heirs.

The testator soon afterwards died, and his son Lytton Lytton became seised of the mortgaged premises in Sussex as tenant in tail, subject to the said mortgages of £1100 and £500. And he also became seised of the reversion in fee of the same premises as the only son and heir of Sir George his father, subject to the several intermediate remainders before mentioned. And the said Lytton Lytton being also seised of several other real estates of considerable yearly value, and having no issue at the time of executing his will, and entertaining a great kindness for the respondent William Robinson Lytton, who was his near relation, made his will, dated the 16th of April 1710, and thereby gave to his mother Dame Margaret Strode £2000; and after giving several other pecuniary legacies, he directed and appointed, that his executrix should, within six months after his decease, pay off and discharge all mortgages and incumbrances charged upon his estate in Sussex by his father Sir George Strode, viz. one mortgage of £1100 to Mr. Brook, and one other mortgage of £500 to Mrs. Seyliard; and that the said several mortgage leases should be kept on foot; and, upon payment of the money due thereon, should be assigned by the mortgagees to his mother Dame Margaret Strode, for her sole use and benefit, during the remainder of the several terms in the said mortgages contained.

And he gave to his said mother Dame Margaret Strode, a yearly rent-charge of £100 for her life, to be issuing out of all his manors and lands in the counties of Hertford and Bedford; and to his wife Bridget Lytton, a yearly rent-charge of £500



to be issuing out of all his manors and lands in the counties of Hertford and Bedford, for her life. And as for and concerning all and every his manors, messuages, lands, tenements and hereditaments, which he was then seised of in law or equity, or which he had a power to give or charge, he gave and disposed of the same in manner following, viz. if his wife should be with child at the time of his decease, then he gave all his said manors, messuages, lands, tenements and hereditaments, to his cousin the respondent William Robinson Lytton, until such child should be born; and after the birth of such child, if it should prove a son, he devised all his said manors, messuages, lands, tenements and hereditaments, to his said after-born son, and to the heirs male of his body; the remainder to his said cousin, the respondent William Robinson Lytton, and his heirs. And in case of the birth of such son, then he devised a rent-charge of £200 a year issuing, and to be paid by his said son, out of the said manors and lands, unto the said respondent and his heirs, with a power of distress in case of non-payment. But if the said after-[256]-born child proved a daughter, then he gave to such daughter £5000 to be raised and paid out of the rents and profits of the said estate, at the age of 18, or marriage. And if his wife should not be with child at his death, then he gave all his said manors, messuages, lands, tenements and hereditaments, to his said cousin the respondent William Robinson Lytton, and his heirs. The testator then ordered his executrix to pay all his father Sir George Strode's just debts; and gave the residue of his personal estate, after his debts, legacies, and funeral expences were paid, to his said wife Bridget Lytton, whom he appointed sole executrix of his will. And he appointed that all his furniture, goods, and household stuff, then being in his manor seat at Knebworth, should remain and continue in his said house after his death, for the use and benefit of the said respondent, to whom he thereby gave the same.

The testator Lytton Lytton soon after died without issue; and immediately after his death, Strode Bedingfield entered upon the premises in Sussex, comprised in the mortgages to Brook and Seyliard, and complied with the condition in Sir George Strode's will, by taking the surname and arms of Strode; and in Michaelmas term 1710, brought his bill in the Court of Chancery, against Dame Margaret Strode, and Bridget Lytton the executrix, and the respondent William Robinson Lytton, and also against Brook and Seyliard the mortgagees, and Dame Ann Bedingfield and Elizabeth Bedingfield the heirs at law of Sir George Strode, to redeem the mortgaged premises. The several defendants having put in their answers to that bill, the cause was heard before the Lord Chancellor Harcourt, on the 22d of February 1712, when it was, *inter alia*, decreed, that the monies due to Brook and Seyliard on their respective mortgages for principal and interest, together with their costs, should be paid out of the assets of Lytton Lytton; and that Brook and Seyliard, on payment thereof, should assign their respective mortgages to Dame Margaret Strode, or to whom she should appoint, in order to secure to her what principal and interest was due thereon at the death of Lytton Lytton, together with all other interest which should grow due from that time; but the same was to be subject to a redemption by the said Strode Strode; and therefore, if Strode Strode should pay to Dame Margaret Strode, the principal and interest due on the said mortgages at the death of Lytton Lytton, with all such interest as should become due for the same, at such time and place as the Master, to whom the account was referred, should appoint; and no assignment should have been made of the said mortgages to Dame Margaret Strode; then Brook and Seyliard, being first paid their said principal, interest, and costs, out of Lytton Lytton's assets as aforesaid, were at Strode Strode's charge, to assign the said mortgages to him, or as he should appoint; but such assignment was to be subject to such further direction as the Court should think fit to make, when proper parties should be before the Court.

[257] Pursuant to this decree, by indenture dated the 21st of July 1713, Francis Brook, in consideration of £1253 1s. (being the money reported due to him for principal, interest, and costs) paid to him by the respondent William Robinson Lytton, who had purchased of Bridget Lytton the benefit of Lytton Lytton's personal estate, assigned to the appellant (who, pending that suit, had married Dame Margaret Strode) the premises mortgaged to the said Brook, for the remainder of the said two terms of 1000 years; subject to a condition, that if Strode Strode, or such other persons as should be entitled to the inheritance of the premises under Sir George Strode's

will, should pay to the appellant £1100 and interest, at a day therein mentioned; then the appellant should assign the premises to such person as Strode Strode, or such other person so entitled as aforesaid, should appoint, for the residue of the said terms; but such assignment was to be subject to such further directions as the Court should think fit to make touching the remainder of the said terms, when proper parties should be before the Court.

And by indenture dated the 28th of April 1714, the appellant, in consideration of £1100 paid to him by the respondent Mascall and Joseph Meal, since deceased, assigned the same premises to Mascall and Meal for the remainder of the said terms subject to redemption, and subject to the like further directions of the Court.

And by another indenture dated the 1st of August 1713, Mary Seyliard, in consideration of £558 4s. 9d. (being the sum reported due to her for principal, interest, and costs) paid also by the respondent William Robinson Lytton, assigned to the appellant the premises mortgaged to her for the remainder of her term of 1000 years, subject to the like redemption as aforesaid, and to the like further directions of the Court. And by indenture dated the 28th of April 1714, the appellant, in consideration of £500 paid to him by the respondent Bedingfield, assigned the same mortgaged premises to Bedingfield for the remainder of the said term, subject to redemption, and to the like further directions of the Court, as in the foregoing assignments. But the respondent William Robinson Lytton did not join in the execution of any of these assignments.

In December 1715, Dame Margaret Strode died; upon whose death, the appellant her husband obtained letters of administration with her will annexed; by which will she gave the residue of her estate to the appellant.

In May 1725, Strode Strode died without issue; and upon his death, the reversion and inheritance of the mortgaged premises did, by virtue of the will of Lytton Lytton, come to the respondent William Robinson Lytton; subject to the said mortgages made by Sir George Strode to Brook and Seyliard, and afterwards assigned to the other respondents Mascall and Bedingfield as aforesaid.

In Michaelmas term 1725, the appellant exhibited his bill in the Court of Chancery, against the now respondents and George [258] Darnelly; praying, that the respondents Mascall and Bedingfield might receive what was due to them for principal and interest on the said mortgages, and re-assign the mortgaged premises to the appellant; and that he might hold and enjoy the same for the remainder of the said several terms of 1000 years.

To which bill the several respondents put in their answers; and the respondent Lytton by his answer insisted, that he was well entitled under the will of Lytton Lytton to the said mortgaged premises, subject to the monies due thereon, and hoped he should be at liberty to redeem the same.

In Easter term 1726, the respondent Lytton exhibited his cross bill against the appellant and George Darnelly, and the other respondents, to redeem the said mortgaged premises, upon payment of the principal and interest due on the said mortgages, and to be quieted in the possession of the premises.

Both these causes were heard on the 13th of November 1727, before the Lord Chancellor King; when his Lordship was pleased to order, that the Judges of the King's Bench should be attended with a case upon the will of Sir George Strode, for their opinion, Whether George Darnelly, alias Strode, upon the death of Strode Strode, became entitled to the said estate by Sir George Strode's will? And after the Judges had given their opinion, either party was at liberty to resort back to the Court for further directions.

The Judges of the King's Bench accordingly certified their opinion, that George Darnelly could not take any estate after the death of Strode Strode, by virtue of Sir George Strode's will; the said Strode Strode having, during his life, taken upon him the surname of Strode, and in every other respect complied with the will of Sir George Strode.

On the 3d and 4th of March 1728, the causes were heard upon this certificate, and the matters reserved by the former decree; when the Lord Chancellor was pleased to declare, that George Darnelly did not take any estate by the will of Sir George Strode; and decreed, that an account should be taken of what was due for principal, interest, and costs, to the respondents Mascall and Bedingfield on the said several

mortgages; and that upon payment thereof by the appellant, the said respondents should, at the appellant's costs, assign to him, or as he should appoint, the said respective mortgaged terms; but in default of payment by the appellant, his bill should be dismissed with costs. And as between the appellant and the respondent Lytton, it was decreed, that the appellant should hold the mortgaged premises absolutely against the said respondent and his heirs, and all claiming under him; and that the tenants should pay the rents of the mortgaged premises, accrued since the death of Strode Strode, to the appellant, and that the said respondent's cross bill should be dismissed.

The respondent Lytton, conceiving himself aggrieved by this decree, obtained an order for rehearing the causes; and the [259] same being reheard accordingly on the 25th of October 1729, his Lordship was pleased to declare his opinion in favour of the respondent Lytton against the former decree; but offered the appellant, if he desired it, to re-hear the causes again, assisted with two of the Judges, which the appellant desiring, it was ordered that the said causes should come on again to be re-heard on that day fortnight.

Accordingly, the causes came on again to be re-heard on the 8th of November following, before his Lordship, assisted by the Lord Chief Justice Raymond, and Mr. Justice Denton; when his Lordship and the Judges were all unanimously of opinion, and did declare, that the respondent Lytton was entitled to the equity of redemption of the said several mortgages and mortgaged premises; and therefore his Lordship reversed his former decree in that point, and decreed, that an account should be taken by the Master of what was due to the respondents Mascall and Bedingfield for principal, interest, and costs, on the said mortgages; and upon payment thereof by the respondent Lytton, the other respondents should, at his costs, assign those mortgaged terms to him, or as he should appoint; and in default thereof, his cross-bill was to be dismissed. And as between the appellant and the respondent Lytton, it was decreed, that the said respondent should hold the mortgaged premises absolutely against the appellant, his executors and administrators, and all claiming under Dame Margaret Strode deceased: and that the tenants should pay the rents of the mortgaged premises, accrued since the death of Strode Strode, to the respondent Lytton; and the appellant having received some of the rents, he was decreed to account for the same before the Master, and to pay what should be reported due from him to the said respondent Lytton; and the appellant's original bill was dismissed.

The appellant therefore appealed from this last decree; insisting (C. Talbot, T. Lutwyche), that the testator Lytton having the remainder in fee of the estate in Sussex, which was mortgaged, he had undoubtedly a power to dispose of the 1000 years term, and the equity of redemption thereof, absolutely against every one, except Strode Bedingfield, who had an estate for life by the will of Sir George Strode, and except the contingent remainders created by the same will, if they had happened to take place, which they did not. That as Lytton had such power, he had by plain and express words given these terms for years to his mother Dame Margaret Strode, absolutely, and without any condition, or subject to any redemption, so far as he had power; for he directed, that his executrix should pay off and discharge all mortgages and incumbrances upon his estate in Sussex, charged by his father Sir George Strode; and that the several mortgage leases should be kept on foot, and be assigned to his said mother, *for her sole use and benefit, during the remainder of the several terms in the said mortgages contained.* That in case the general devise to the respondent Lytton and his heirs, might be sufficient to include the premises in Sussex, by virtue of [260] the general words, though not expressly mentioned; yet it was apprehended, that both devises of the same premises being consistent, they ought both to stand; and that accordingly, the appellant was entitled to the terms of years absolutely, and the respondent Lytton only to the reversion in fee of the premises comprised in those terms; he having, by the same will, a very large estate given to him in possession in other counties. That the appellant and the respondent Lytton both derived their respective titles to the premises in Sussex under the same will, *as voluntary devisees*; and therefore it was highly reasonable, that the will should be construed in such a manner, as that an express and particular devise of lands, fully and plainly ascertained and described, should not be defeated or invalidated by a general indefinite clause.

But it is objected, that the devise of these terms to Dame Margaret Strode, is too

remote a limitation of an estate or interest of that nature, and therefore void. To this it may be answered, that here is no devise or limitation of any term in tail, or any tendency to a perpetuity, but only a devise of these terms for years, which were capable of being disposed of by will, according to the interest which the testator had in them; and though Strode Strode had such an interest for his life, that he might redeem them by virtue of the will of Sir George Strode, in respect of such interest, yet subject thereto, they were well devised to Dame Margaret, her executors and administrators. It is also objected, that by the decree in the former cause, the Court did in effect determine, that Dame Margaret was entitled to the terms, only as a security for the mortgage monies, by decreeing a redemption to Strode Strode. But to this it is answered, that Strode Strode's title arising under the will of Sir George, the testator Lytton could not deprive him of his right of redemption in respect of his estate for life; but the respondent, claiming under the will of Lytton only, could have no greater interest than was given him by that will; and by the old decree, before Strode Strode could redeem the mortgages, so as to have the terms attendant upon his estate for life, he was ordered to pay Dame Margaret the several sums advanced for her benefit out of the assets of the testator Lytton, and applied in discharging those mortgages; but this was not decreed to her in lieu and satisfaction of all her interest in the terms, and therefore the assignments to be made, were to be subject to the further direction of the Court, and such assignments were drawn accordingly. But where the Court intended, that another mortgage, which was to one Bridges upon another estate, should attend the inheritance, it was expressly so ordered by the decree. It was therefore prayed, that the said decree of the 8th of November 1729, might be reversed, and the former decree of the 4th of March 1728, affirmed.

On behalf of the respondents Mascall and Bedingfield, it was hoped (J. Wood), that as they were no way interested in the question between the appellant and the respondent Lytton, touching the right of redemption, and had, by their answers to both bills, submitted to accept their principal, interest, and costs, from such of the parties as had a right to redeem them; that whether they should be decreed to assign their mortgage terms to the appellant, or the respondent Lytton, they should, upon such assignment, be paid not only their principal and interest, together with their costs in the Court of Chancery, but also their costs occasioned by this appeal.

And on the part of the respondent Lytton it was argued, that the testator Lytton did not intend to give Dame Margaret Strode the absolute interest in the terms; but only to give her the same as a security for the money due upon those mortgages. And that this was his intention, appeared manifestly from the whole frame of the will, the devise to Dame Margaret of these mortgage terms being amongst the pecuniary legacies, and before the devise of his lands; and when he came to devise his lands to the respondent Lytton, he described them by *all and every his manors, messuages, lands, tenements, and hereditaments, which he was then seised of in law or equity, or which he had power to give*; which conveyed the lands in question to the respondent, in as plain and certain a manner, as if the testator had devised them by express words. That this intention was still the more evident, if it was considered, that the devise of his real estate to the respondent Lytton, was in the same words as the devise to the testator's own son, in case his wife had been with child of a son; and it could not be imagined, that the testator intended to give these lands from his own son to his mother. That no devise by the testator of these terms, but as mortgage interests, could possibly take effect till the determination of the estate to Strode Strode, and the estates tail to his sons, and the contingent estates limited to George Darnelly for life, and to his sons in tail; and it was hardly to be imagined, that it could ever enter into the thoughts of the testator, to give his mother a remote interest in lands, which she could never probably either enjoy or sell, only in order to sever such long terms of 1000 years from the inheritance of his estate, and that his mother might have the power of giving them away from his family to a stranger, as the fact had really happened. That the words of the devise in question were proper to convey these terms as securities, and to put his mother in the place of the mortgagees, and such interest only they must necessarily be understood to pass, so long as any of the intermediate estates, precedent to the testator's reversion in fee, subsisted; and there was no reason to imagine, that the testator intended his words should have two

different meanings. That as the decree now stood, Dame Margaret, under whom the appellant claimed, and who had a jointure besides of £400 per ann. had, by the will of her son Lytton, legacies to the amount of £3600 over and above a rent-charge of £100 per ann. thereby given to her for her life; and which was very near as ample a [262] provision as he designed for an only daughter, in case he had left one: but if the construction now contended for by the appellant should prevail, then he, in right of his wife, would receive out of Lytton's estate, four times as much as the provision made by the testator for an only daughter, which it could never be imagined he intended. But supposing it to be ever so plainly the testator's intent to devise the absolute interest in the terms to Dame Margaret, yet it was apprehended such a devise could not take effect in point of law; because those terms, or (which was the same thing as to the present question) the equity of redemption of them, would then, at the testator's death, stand limited in the following manner, viz. in trust to attend the freehold and inheritance so long as the estate for life of Strode Bedingfield, the estates tail to his sons, and the contingent estates for life and in tail of George Darnelly and his sons, should last; and the residue, after all those estates spent, not to attend the inheritance, but to be for the benefit of Dame Margaret, her executors and administrators, as terms in gross. But it was conceived, that such a devise of the remainder of terms after estates tail was void, as being too remote, when separate from, and not attendant upon the inheritance. It was therefore hoped, that the last decree would be affirmed, and the appeal dismissed with costs.

AND accordingly, after hearing counsel on this appeal, it was ORDERED, and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed: and it was further ORDERED, that the appellant should pay to the respondents Mascall and Bedingfield, £5 for their costs in respect of the said appeal. (Jour. vol. 23. p. 503.)

CASE 16.—Lord DUNSANY,—*Appellant*; THOMAS SHAW,—*Respondent*  
[7th March 1732].

[Mew's Dig. xiv. 1721.]

The heir of a mortgagor files his bill to redeem an old mortgage made by demise for 999 years, under a rent of 20s. and redeemable at any time on paying £1200 at one entire payment. The defendant pleads his title as a purchaser for a valuable consideration, under a marriage settlement, without notice of the mortgage. The settlement was made by the original mortgagee, and there was a quiet possession of 70 years. The plea was allowed.

Where a plaintiff replies to a plea, he admits it to be a good bar, if the facts therein alledged are true; and therefore cannot afterwards complain of the order made for allowing the plea, but must proceed to examine witnesses to falsify it.

ORDER of the Irish Chancery, AFFIRMED.—See *ante* Case 2, and the note there.

Edward Plunket, the appellant's father, soon after the Restoration, viz. in 1663, exhibited his claim before the Commissioners appointed to put in execution the acts of *settlement* and *explanation* in Ireland; thereby praying to be decreed, *inter alia*, to the towns and lands of Kentstown, Veldentown, [263] *alias* Peldenstown, Curraghtown, and Erick, *alias* Knockirk, *alias* Knockhurly, with their appurtenances in the barony of Duleck and county of Meath, part of the ancient estate of the Dunsany family: And on hearing this claim on the 21st of August 1663, it was adjudged and decreed, that the said Edward Plunket was an innocent papist, within the true intent and meaning of the said acts, and that he and his heirs should be restored to the said estate.

William Shaw, the respondent's grandfather, was chief agent and manager for Patrick Lord Dunsany, and the said Edward Plunket his son, in all their affairs, and particularly in prosecuting and carrying on the said claim, and in obtaining the said decree of innocence, and also in procuring a clause in the act of *settlement*;

whereby, after reciting that the said Patrick Lord Dunsany, and some other noble men and gentlemen therein particularly named, had, for reasons known to his Majesty, in an especial manner merited his royal grace and favour; it was declared, that every of them should, without being put to any further proof, be restored to their former estates, according to the rules and directions in the said act for that purpose specified; and afterwards in procuring a further clause in the act of *explanation*, by which it was enacted, amongst other things, that forthwith, and without any previous reprisals, the said Lord Patrick and his heirs should be restored to the possession of his principal and capital seat, and also one third part of all other his estate, of what kind or nature soever, of which he, or any other person to his use or in trust for him, were seised or possessed of upon the 22d of October 1641; and that, with all convenient speed, the whole residue thereof should be restored to him and his heirs; the respective adventurers or soldiers, or their heirs, then in possession thereof, or claiming the same, being first satisfied their respective shares and proportions due to them by the said act.

The said Edward Plunket and Catherine his wife, together with Christopher Plunket then their eldest son and heir-apparent, and the said Patrick Lord Dunsany, by indenture dated the 18th of November 1663, mortgaged the said premises to the said William Shaw for 999 years, at the rent of 20s. per ann. subject to the following condition or proviso of redemption, viz. "That whensoever the said Patrick Lord Baron of Dunsany, Edward Plunket, Catherine Plunket, and Christopher Plunket, or any of them, their or any of their heirs or assigns, should pay or cause to be paid to the said William Shaw, his executors, administrators, or assigns, the just and full sum of £1200 sterling, in one entire payment; that then, and from thenceforth, the said indenture of demise, and the said estate and term thereby granted, should be utterly void, frustrate, and of no effect; and that then, and from thenceforth, it should and might be lawful to and for the said Edward Plunket, his heirs or assigns, into all and singular the said demised premises, and every part thereof, to re-enter, and the same to have again, re-possess and enjoy, as in his or their first or former estate; any thing in the said [264] deed contained to the contrary notwithstanding." To which indenture the said William Shaw was a perfecting party; and by virtue thereof entered upon and became possessed of the premises.

Edward Plunket died in 1665, leaving issue the said Christopher, afterwards Lord Dunsany, and the appellant; and Lord Christopher dying some time after without issue, the appellant became intitled to the equity of redemption of the premises.

In 1686, the appellant filed a bill in the Court of Chancery in Ireland, against the said William Shaw, for a redemption, and an account of the profits of the said premises; which bill Shaw answered, and soon afterwards left Ireland, but never returned again.

In 1692, or 1693, William Shaw junior, son of the said William Shaw, went into Ireland; and he and his father being sensible they had no right to the premises, but under the said mortgage; William Shaw junior, by his father's directions, proposed to give up the possession to the appellant, upon his paying the said sum of £1200 and confirming the leases which had been made by William Shaw senior; which proposal the appellant did not come into, thinking it unreasonable; but William Shaw senior, continued from time to time to make fresh proposals to the appellant for ending their differences amicably, and thereby hindered him from bringing the said cause to a hearing.

William Shaw senior died in 1706, before the dispute could be settled by any agreement, leaving the said William Shaw junior, his son and heir, who took out administration to his father with his will annexed.

William Shaw junior died intestate in 1710; leaving issue the respondent and his mother Hester, who took upon her to be his guardian; and having taken out administration *de bonis non*, with the will annexed of William Shaw senior, entered into, and became possessed of, the said premises, and received the rents, issues, and profits thereof.

On the 12th of April 1722, the appellant filed his bill in the said Court of Chancery against the respondent, and Hester his mother; praying an account and redemption of the premises. And, on the 28th of September 1723, the respondent put in his answer and plea to the said bill. By his answer he set forth, that the appellant's

father exhibited such claim, and was thereupon decreed innocent, and to be restored to the lands as in the bill mentioned, and admitted the mortgage from the appellant's father to the said William Shaw; but insisted, that the said lands and premises were seized and sequestered on account of the rebellion which broke out in Ireland in 1641, and were vested in the Crown by the act of *settlement*; and that King Charles II. by his letters patent, dated the 17th of July, in the 19th year of his reign, granted the premises to the said William Shaw; and that he held the same under that title, without regard to the said mortgage, and never had or applied for any reprisals or satisfaction [265] for the said lands, or his right therein, as a soldier: And that being so in possession, he, by deed dated the 7th of June 1690, settled the said lands on William Shaw junior, his eldest son, in consideration of £500 as a marriage portion, and of a marriage before had and solemnized, and pursuant to an agreement before marriage: And as to such part of the bill as sought relief and redemption, and required him to convey his estate therein to the appellant, and to give him up the possession, and to account with him for the profits, and to set forth the value of the premises; he pleaded and insisted on the said letters patent from King Charles II. to the said William Shaw senior, without any saving to any person whatsoever, except the said Lord Patrick, his heirs, and assigns, and that there had been no reprisals set out in lieu; and he also pleaded an act of parliament made 10th William III. intitled, *An act for confirming estates and possessions held and enjoyed under the acts of settlement and explanation*; and the aforesaid deed of settlement, and the length of time.

This plea was argued on the 7th of December 1723, when the Lord Chancellor of Ireland was pleased to order the same to be allowed, with costs.

To this order the appellant submitted, and so long afterwards as the 15th of February 1724, he filed a replication to the respondent's plea; but never thought proper to proceed further in the cause till the year 1731, when he brought the present appeal.

In support of which it was argued (T. Lutwyche, W. Hamilton), that Edward Plunket had a decree of innocence pronounced for him, and his claim allowed, and possession ordered to be delivered to him, several years before William Shaw passed the patent. That there could be no stronger acknowledgment, or any clearer evidence of the appellant's title to the lands in question, than Shaw's own acceptance of a mortgage under it; especially when, by the respondent's own admission, he appeared to be an agent employed by the family in their affairs. That though Shaw, by suing out the patent in his own name, endeavoured to defeat this title, yet it was apprehended, that no estate thereby passed to him in the premises, or could be divested out of the appellant's father, because he was decreed *innocent*; and because, by the express words of the act of *settlement*, it was provided, "that nothing therein contained should vest, or be understood to vest in the crown, any lands, tenements, or hereditaments, of any innocent papist, or their innocent heirs." That the mortgage being indefinite in its first creation, and the term being for 999 years, at 20s. annual rent, and redeemable at any time on payment of £1200, no subsequent settlement or other disposition could discharge it from the condition it was originally made subject to, without the act or concurrence of the mortgagor; nor consequently preclude his title of re-entry and redemption upon performing that condition; and therefore the length of time ought not to be any plea or bar in this case. And as this mortgage was only a chattel real, and not capable of being entailed, it [266] was conceived the respondent could derive no sort of interest to it under the settlement alledged to have been made upon his mother's marriage; he had not therefore, upon his own shewing, the least colour for protecting himself by his plea as a purchaser for a valuable consideration. That there was plainly notice at the time of the settlement: for it was not in the least denied that Shaw the father, who was privy to the whole affair, had notice; and more particularly of the mortgage, to which he was a perfecting party; and if the father, who was a party to the settlement, had notice, that would be no notice to the son, and the rest claiming under the settlement. That if the appellant's father had not claimed and been decreed to the estate, yet the title of Lord Patrick being particularly provided for by the clauses inserted in his favour in the acts of *settlement* and *explanation*, the appellant would be entitled to be relieved as his heir at law; especially when it was considered, that Shaw, by accepting the

mortgage, and thereby attorning to the appellant's ancestor, either admitted, or at least waived the benefit of reprisals; for if he had not, Lord Patrick was absolutely entitled to one third part of his estate without any reprisals whatever; and which, for ought that could appear to the contrary before the hearing of the cause, might comprehend the very lands in question. Besides, the profits received by Shaw in his life-time under the mortgage, would appear to exceed in value any reprisals he might otherwise have pretended to. Neither was the statute relied upon by the plea, any bar to the appellant's demands, as it extended only to those cases where the decree of innocence left the party afterwards to take his remedy at law; and not to any case where the person decreed innocent was, in consequence of such decree, restored to his estate and the actual enjoyment of it; and this plainly appeared to have been the case of the appellant's ancestors, as there could not be a more effectual acknowledgment of the right from any tenant in possession, than what, in the present case, the acceptance of a mortgage amounted to. Lastly, that the respondent had over-rated his plea by his answer, he having first answered the bill to which he pleaded, which was contrary to the rules of a Court of Equity; the same ought not therefore to have been allowed as a plea, but at most ought only to have stood for an answer, and the benefit of it reserved to the hearing.

On the other side it was contended (P. Yorke, C. Talbot), that the respondent appeared to be a purchaser of the premises for a valuable consideration, under the marriage-settlement of June 1690, without any notice of the title now insisted on by the appellant, either to the respondent's father or mother, or any other person, whereby his right to the premises could be affected; which was a full bar to the appellant's having any relief against the respondent in a Court of Equity. But if such bar did not stand in the appellant's way, yet he appeared to have no right to a redemption of the premises, by reason of Lord Patrick or Edward Plunket's not having granted any reprisals according to the terms of the act of *explanation*; and [267] also by reason of the act of the 10th of William III. and of the length of time and continued possession against his title for above 70 years. That the appellant, by replying to the plea, so long ago as February 1724, had submitted to the order for allowing it, and had only put the truth of the facts therein contained in issue; he ought therefore to have proceeded to examine witnesses to falsify the plea, and to prove such notice of his pretended equity previous to the settlement, as might affect the respondent's title. And if the plea had never been argued, yet the appellant, by replying to it, had admitted it to be a good bar to the relief sought by the bill; if the facts alleged therein and in the respondent's answer were true. It was therefore prayed, that the order for allowing the plea might be affirmed.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed; and the order therein complained of, affirmed (Jour. vol. 24. p. 205.)

CASE 17.—GEORGE HARTPOLE,—*Appellant*; HUNT WALSH, and another,—*Respondents* [17th April 1740].

[Mew's Dig. xiv. 1721. Considered in *Teulon v. Curtis*, 1832, Yo. 619.]

Where the mortgage money is stipulated to be paid in one entire sum, and the mortgagee and those claiming under him, continued in possession for near 100 years, without foreclosing; a bill brought to redeem shall be dismissed with costs.

DECREE of the Irish Chancery AFFIRMED. See *ante* Case 4, and the note there [5 Bro. P. C. 187].

Robert Hartpole Esq. the appellant's great great grandfather, being seised in fee of the castles, towns and lands of Blackford, and the hamlets thereof, viz. Bawn Ballyna, *alias* Oulertleagh, Cloukerim and Monneferick, in the Queen's county; did, by indenture of feoffment, dated the 30th of July 1639, in consideration of £600 then lent him by Oliver Walsh, Gent. the respondent's grandfather, convey the same to the said Oliver Walsh, in fee; subject to the following proviso: "That the indenture of feoffment should be void whenever Robert Hartpole, his heirs, executors, administrators, or assigns, should on any last day of June or December, pay unto the said



Oliver, or his heirs, the sum of £600."—And the premisses being then in lease for a term of 41 years, at a rent of £60 a year, and £10 per cent. being the then legal interest of money in Ireland, it was agreed by the said indenture, that Oliver Walsh and his heirs should receive that yearly rent in lieu of his interest money. And in pursuance of this agreement, he was soon afterwards put into possession of the premises, and the tenants duly attorned.

[268] By indentures, dated the 10th and 12th of March 1640, Robert Hartpole and Katherine his wife, in consideration of a further sum of £2300 paid to them by the said Oliver Walsh, granted and conveyed not only the premises comprised in the former mortgage, but the castle, town and lands of Ballykillcaven, and other towns and lands in the Queen's county, to the said Oliver, his heirs and assigns: And the said Robert thereby covenanted, for himself and his heirs, that whenever Oliver Walsh, his heirs or assigns, should give to him, his heirs or assigns, eighteen months notice, by letter in writing, requiring payment of the said £2300; that then the said Robert, his heirs or assigns, should pay the said £2300 within eighteen months next after such request; and that whensoever he the said Robert Hartpole, his heirs or assigns, should pay the said £2300, that he or they would also satisfy and pay to the said Oliver Walsh, his heirs or assigns, after the rate of £10 per cent. for the said money, from and after the last *gale* before any such payment made: And in this indenture, there was also a covenant that the said Robert and Katherine should levy a fine, and suffer a recovery of all the lands and premises therein comprised, to the uses following; viz. as to the premises in the first mortgage, to the same uses, intents and purposes, as were expressed therein; and as to the premises in the last mortgage, to the use and behoof of Oliver Walsh, during his natural life; and after his decease, to such uses, intents and purposes, as the said Oliver Walsh, by any instrument in writing under his hand and seal, testified and subscribed by three or more credible witnesses, or by his last will and testament in writing under his hand and seal, testified and subscribed as aforesaid, should appoint; and, for want of such appointment, to the use of the said Oliver Walsh, his heirs and assigns, for and until such time as the said Robert Hartpole, his heirs, executors, administrators, or assigns, should, at one entire payment, pay to Oliver Walsh, his heirs or assigns, the sum of £2300; and after such payment, to the use and behoof of the said Robert Hartpole, his heirs and assigns for ever. And the said Robert thereby also covenanted, that Oliver and his heirs should peaceably hold and enjoy the premises, free from all incumbrances; and that he and his heirs would, at any time upon request, make further assurances.

In pursuance of this conveyance, Oliver Walsh was, in March 1640, put into possession of all the last mentioned premises, and a fine and recovery were accordingly levied and suffered by Robert and Katherine Hartpole. But Robert being a papist, and a person of great note and estate in those times, engaged very early in the rebellion in Ireland, (which began in 1641, about seven months after the last mentioned conveyance,) and seems to have borrowed this sum of £2300 for the promotion of that rebellion; for which he was afterwards in 1643 attainted: And Oliver Walsh, being a protestant, was, in the beginning of the rebellion, turned out of possession of all the premises by Robert Hartpole, and was kept out of possession till the year 1654, by him and William Hartpole, his [269] eldest son, (who was likewise a nocent papist and concerned in the said rebellion, and attainted of high treason for the same;) during which time, Walsh neither did or could receive any of the rents or profits of the said mortgaged premises, or any interest for the mortgage money.

In 1654, Oliver Walsh was restored to the possession of the premises by a decree of the then Court of Claims; and in 1657 died in possession, leaving Oliver Walsh, his only son and heir; who thereupon entered into possession of the premises.

Sir Robert Hartpole, the only son of William, and grandson of Robert, on the 17th of August 1663, obtained a decree before the Commissioners of Claims in Ireland, which related to many other manors, towns, lands, tenements, and hereditaments, in Ireland, besides the mortgaged premises; grounded on a voluntary settlement, alledged to have been made by Sir Robert's grandfather in the year 1639. And this decree stated, that Robert, the mortgagor, was and continued seised by perception of the rents, issues and profits of the mortgaged premises, until the time of his death, in August 1649; that William his son, immediately after his death, became seised of an estate for life, therein, with remainder to his first and every other son in tail

male; and continued so seised by perception of the rents, issues and profits thereof until his death in 1654; that immediately after the death of William, the estate and interest in the premises came to Sir Robert the claimant, as only son and heir of William, which Sir Robert was then an infant; that he, by his mother and guardian, entered into the premises, and was seised in fee tail thereof by virtue of the limitation in the said settlement, and continued so seised until some time in the same year 1654 when he was dispossessed thereof by the then usurped powers; and that he had from that time been kept out of possession: Wherefore, it was by the said decree declared, that the said Robert the mortgagor, and William his son, were both nocent papists guilty of the then late rebellion in Ireland; but that the claimant was an infant of tender years, and an innocent person; and that a settlement had been made of all the lands mentioned in the said decree in 1639, except the said mortgaged premises, which were by the said deeds of mortgage, for the considerations of the several sums therein expressed (which are in the decree mentioned, and by mistake computed to amount in the whole only to £2300 instead of £2900) legally conveyed by Robert the mortgagor, subject to such conditions of redemption as aforesaid, unto the said Oliver Walsh in fee; and that the said mortgaged premises were then held and enjoyed by the said Oliver Walsh, son and heir of Oliver the mortgagee; and that the said Robert the mortgagor had only a power of redemption thereof; and therefore, although it was decreed that Sir Robert the claimant should be restored to the possession of the rest of the premises, and that the heirs male of his body should have and enjoy such estate and interest therein, as the said Robert Hartpole the mortgagor was seised of on the 22d of October 1641, yet it [270] was directed, that all the said mortgaged premises should be excepted out of the said decree, and that Sir Robert the claimant should be left to take such course, either in law or equity, concerning the same, as he should think fit; and that Oliver Walsh, and the other defendants in the said decree, should likewise be left to take such course in law or equity as they should think fit, to try the title to the premises, or any part thereof; and that the claimant, and the heirs male of his body, should have and enjoy the premises, subject to such incumbrances as the same were liable to.

In Hilary term 1670, Sir Robert Hartpole filed a bill in the Court of Exchequer in Ireland, against the said Oliver the son; whereby he set up a title to all the mortgaged premises, under colour of the aforesaid voluntary settlement, and thereby endeavoured to avoid the mortgages; and although it appeared by the aforesaid decree, that William, the father of Sir Robert, was in possession till 1654; yet he charged by his said bill, that Oliver, the mortgagee, entered into possession of the premises in 1654, and received the rents and profits thereof, and committed great waste in the woods; and that after his death, in 1657, Oliver, the son, entered into possession, and received the rents and profits, under pretence that the premises had been mortgaged by Robert the grandfather of Sir Robert; who by his bill denied that there had ever been any such mortgage, and therefore Sir Robert prayed an account and relief.

This bill the defendant Oliver answered, and set forth both the mortgages, and that due notice had been given to Robert Hartpole, the mortgagor, requiring the payment of the mortgage money; and insisted, that the settlement under which the plaintiff claimed, was voluntary, and made since the beginning of the rebellion: and therefore that the mortgage money ought to be paid, before the plaintiff should be restored to the possession.

Issue having been joined in the cause, witnesses were examined on both sides; and it was proved by several of Sir Robert Hartpole's witnesses, that Robert the mortgagor was in possession and receipt of the rents of the premises, till the May before his death; and that Oliver the mortgagee did not enter into possession till 1651, which was two years after the death of Robert the mortgagor.

In November 1671, Oliver Walsh, the son, filed a bill in the Court of Chancery in Ireland, against Sir Robert Hartpole and others; setting forth the said mortgages in fine and recovery, and that the mortgagor covenanted, that the premises were free from all prior incumbrances; and that Oliver the mortgagee entered and was possessed by virtue of such mortgages, and built and made improvements on the premises to the value of £200 and upwards; that Oliver the son, entered after his father's death, and built and improved the estate to the value of £200 more; that his father and he had been disturbed in the possession and enjoyment of the said lands by one Lawrence

on, who had a statute-staple affect-[271]-ing the mortgaged premises, and by others, who had other incumbrances affecting the same, prior to the said mortgages, whereby said Oliver and his father were damaged above £600. That Sir Robert Hartpole, under pretence of a settlement made by Robert his grandfather, had entered upon several parts of the mortgaged premises of the value of £20 a year, pretending the same to be parcel of other lands claimed by him under the said settlement; and had obtained such bill in the Court of Exchequer to avoid the said mortgages, as before stated; and therefore the said Oliver the son prayed to be relieved in the premises, and particularly to be paid the mortgaged money, and the value of the improvements, and what profits of the lands had fallen short of the interest money.

To this bill Sir Robert put in his answer; whereby he denied any knowledge of the mortgages, and admitted, that by virtue of the settlement he entered on the lands; but insisted that the mortgagees had no title to the same.

Issue being joined in this cause, several witnesses were examined on both sides: and it appeared by the proofs on the part of Oliver Walsh, that he or his father never made or received £150 a year, out of all the mortgaged premises during the time they were in possession, and for several years not above £130 a year, on account of the then low value of the same, and of the disturbances given them by means of the aforesaid prior incumbrancers; and by Sir Robert Hartpole's endeavouring to lay a quit-rent of his whole estate on the mortgaged premises, which were not liable to the payment of it, and for that purpose, procuring a cattle of the said Walsh's tenants to be distrained for the arrears of the said quit-rent; on which account the tenants left the lands, which therefore lay waste. Sir Robert Hartpole's proofs went only to a general imaginary value of the mortgaged premises, as amounting to £300 a year; and an attempt to prove that waste had been committed in the woods by Oliver the mortgagee, to about £1000 value.

In 1682, Sir Robert Hartpole died, and William, his son and heir, by his mother and guardian Dame Bridget Hartpole, in June 1683, filed a bill of revivor of the said cause in the Exchequer, against the said Oliver the son; and thereupon Oliver revived the cause in Chancery, against the said William Hartpole, the son of Sir Robert.

In December 1683, Oliver the son filed another bill in Chancery against the said William Hartpole, the son of Sir Robert, setting forth both the mortgages and the several uses of the lands thereby granted; and that Robert the mortgagor, borrowed the farther sum of £100 from Oliver the mortgagee, on a bond; and therefore praying, that if he was to account with the said William Hartpole, he might be allowed for all his improvements, and be paid the £600 and £2300 together with the said £100 and all the interest thereof.

To this last bill, the said William Hartpole, by his guardian, pleaded and demurred, for that the bill was to the same purpose [272] as the said Oliver Walsh's former bill: And in February 1683, the plea and demurrer was overruled, and the defendant was ordered to answer. Whereupon his counsel and clerk in court agreed to allow the eighteen months notice to have been given, pursuant to the covenant in the second deed of mortgage as proved, and also liberty to prove the before mentioned bond on taking the account.

On the 5th of February 1683, a decretal order was made as well on the bill of revivor, as on the original bill of Oliver Walsh; in which decree, both the mortgages were recited, and a fine and recovery were mentioned to have been had to the uses, and in pursuance of the covenant contained in the second mortgage; and the decree likewise recited, that it was admitted by the defendant's counsel, that notice had been given by the plaintiff Walsh, for calling in the mortgage money in such manner as was expressed in the plaintiff's bill of revivor; and that both parties had submitted their causes, as well in the Exchequer as in the Court of Chancery, to the determination of the Court of Chancery; and the plaintiff Walsh consented, that the defendant Hartpole should be qualified to have a decree in the Court of Chancery, in the same manner as if he had been plaintiff in the cause there depending: And a question arising, Whether the £600 mentioned in the first bill was included in the £2300 secured by the second mortgage, or whether they were distinct sums; and the defendant's counsel having offered several reasons men-

tioned in the said decretal order, why the said £600 should be supposed to be included in the £2300; but it seeming very clear by the second deed of mortgage, that the £600 was not included in the £2300, the then Lord Chancellor declared his opinion accordingly; but added, that since the defendant's counsel made a matter of it, he would have some of the judges opinions on that point: And in the mean time decreed, that the parties should go to an account before two of the masters, in relation to what rents or profits had, or might have been received out of the premises by the plaintiff or his father, and in relation to the interest due for the several sums of £600 and £2300, and to such improvements as had made the land the better, and to the charges occasioned by the defendant Hartpole and his father, and to the interest of the money during the time that Sir Robert Hartpole's father enjoyed the lands in the then late rebellion; and the masters were to allow the defendant such consideration as they should think fit, for what waste of woods had been committed by the plaintiff, or his father, or their orders: And as to the bond of £100 the plaintiff was to be allowed the same with interest, in case he could prove the perfection thereof before the masters: and they were thereby armed with a commission to examine witnesses as to the proof of the bond, and also to any other matters of account or waste, not before examined to; and they were to settle the whole account as far as they could, and to report the particulars in which they were not able to settle it.

[273] The Masters accordingly entered into the examination of the matters referred to them by this decree, and on perusal of the depositions and other proofs taken in the cause, they found them so various, uncertain, and disagreeing with each other, that on the 20th of June 1684, they reported that they could not proceed to the true stating the account, and settling the other matters directed by the decree, until the following issues, which had been agreed and consented to by all parties, should be tried in such manner as the Lord Chancellor should direct; viz. I. What rents and profits had, or might have been yearly made or received out of the lands in the said order mentioned, by the plaintiff or his father, without wilful default, from the 1st of May 1653, to the 1st of May 1660; and from the 1st of May 1660, to the 1st of May 1670; and from the 1st of May 1670, to the 1st of May 1684; over and above all the necessary charges.—II. Who did possess and enjoy the said lands, or any and what part thereof, from the 23d of October 1641, to the 1st of May 1653.—III. What waste or destruction of woods had been made or committed by the plaintiff or his father, or either of their orders, on the said lands, or any and which of them, since the 1st of May 1653, and of what nature were such woods so wasted or destroyed.—IV. What improvements the plaintiff or his father, or their tenants had made on the premises, since the 1st of May 1653, and when the same were made, and by whom, and of what value, and how much the said lands were, or had been bettered thereby, and from what time.—V. What charges the plaintiff's father, or the plaintiff, had been at in defending the said lands against the said Allen's statute, or any other and what account, till the 1st of May 1684.

This report was filed, and notice given of the filing thereof by the plaintiff's clerk in court, on the 25th of June 1684; and though William Hartpole attained his full age of 21 in the year 1692, yet no step was taken in either of the said causes, from the 25th of June 1684, until the 4th of April 1709; which was several years after the death of the said Oliver Walsh, the son, which happened in 1697; and then and not before, William Hartpole filed an original bill, in the nature of a bill of revivor against the respondent Hunt Walsh, eldest son and heir of the said Oliver the son, who, on his father's death, entered into possession of the mortgaged premises; setting forth the several matters aforesaid, and particularly the decretal order and report, and that no further proceedings were had in the said cause; and complaining, that the cause being abated by the death of Oliver the son, the respondent refused to revive the same, and try the said issues; but had entered into the premises, and from thenceforth received the rents and profits thereof, and pretended a right to the £600 and £2300 as due on the said mortgages, though the plaintiff was advised, that it appeared by the said deeds of mortgage, that the £600 secured by the first deed, was included in the £2300 secured by the last deed; and therefore the plain-[274]-tiff prayed an account to have the benefit of the former proceedings, proofs, and decree in the said cause in Chancery, and to revive the same, and offered to pay what should finally appear to be due: But the plaintiff, in this his bill, did not object to the issues which had been reported by the Masters, either as improper or unnecessary.

The respondent Walsh put in his answer to this bill; and thereby insisted, that two sums of £600 and £2300 were distinct sums; and that the said Robert and William, the plaintiff's ancestors, were attainted for the rebellion in 1641; and that for so great a length of time, the plaintiff ought not to be admitted to a redemption, the defendant obliged to account for the rents and profits, which had amounted no more than £272 10s. per ann. The respondent likewise added, that he had not made several improvements on the premises, but that he had, on his marriage, led the same on his wife Eleanor Tench, and her issue.

In July 1710, William Hartpole filed a supplemental bill in Chancery, against the respondent and the trustees in his marriage settlement; setting forth, that he knew nothing of the respondent's marriage settlement, till it was disclosed by his answer; and therefore, as he could not seek relief against the same by his first bill, he prayed relief against it by this.

The respondent Walsh answered the supplemental bill, and set forth his marriage articles, and that he made the same; apprehending, that the plaintiff, having so grossly surceased any proceedings in the suit, had no right to redeem.

In January 1713, William Hartpole died, leaving issue two sons, Robert, the elder, who died soon after, an infant, without issue, and the appellant.

The appellant, in February 1715, and during his minority, filed a bill of revivor of his father's suit, and the proceedings therein, and also in the former causes, and of the said decretal order in 1683, against the respondent Walsh and the trustees in the said settlement; and prayed he might stand in the same plight and condition, with respect to the said proceedings, as his father was in at his death; and thereby set forth, that several of the leases made by Oliver, the father and son, were expired, and the leases made at an improved rent, but that the same were under-set; and that the respondent, by cutting woods on the premises, and by perception of the rents and profits, had been satisfied what was due for the principal and interest on the said mortgages.

The respondent Walsh put in his answer to this bill; and insisted, that the mortgages were not redeemable on account of the length of time and the difficulty of counting, and denied that any of the mortgaged premises were under-set; but averred, that the whole rents and the yearly value thereof amounted, in 1716, to about £38 a year; and that he had made considerable improvements on the lands of Ballyllicaven, and had never cut down any woods.

[275] Though issue was joined in this cause in 1720, yet no further proceedings were had therein, as against the respondent Walsh, till 1730, when the appellant attained his full age, and obtained an order for liberty to proceed in his own name. And one of the said trustees in the respondent's marriage articles being dead, the appellant, in 1733, and not sooner, applied to the respondent Walsh's agent, and desired there might be an answer filed in the name of the other respondent Philip Tench, to the appellant's said bill, which was filed within less than a month after the same was desired; to which the appellant having replied, and issue being joined, the appellant examined two witnesses only, one to the yearly value of the mortgaged premises, and the other to the proof of some woods cut down by Oliver Walsh, the son, in the decree in 1683; whose deposition, relating to facts which were in issue in the cause wherein the decree was made, was therefore, not permitted by the Court, to be read on the hearing.

The respondent Walsh examined many witnesses to the value of the mortgaged premises, from 1692 to 1735; and it was proved in the causes, that several sums, amounting to about £2000 sterling, were expended by the respondent Walsh, his ancestors, and their tenants, in valuable and lasting improvements, whereby the yearly value of the mortgaged premises had been much raised, and that the rents thereof never amounted to more than £272 10s. from 1692 till the year 1713; and, notwithstanding the several improvements which had been made, never exceeded £450 per year, till the year 1734; and that at that time, the rents, making due allowances for improvements, did not amount to above £500 a year.

Publication having passed in the cause, the same came on to be heard before the Chancellor of Ireland, on the 5th and 9th of February 1736, the 13th and 14th of July, the 18th, 19th, 21st, 22d, 25th, 29th, and 30th of November, and 1st of December 1737; and on hearing the proofs read, and on debate of the matter, the

Court was pleased to take time to consider of the same; and, on the 27th of July 1738, his Lordship was pleased to decree, that the appellant's bill should be dismissed with costs.

From this decree the appellant thought proper to appeal; contending (D. Ryder, W. Murray), that this mortgage appeared to have been an indefinite mortgage in its first creation, and expressly made redeemable, whensoever the principal sum of £2900 should happen to be paid in one entire payment to the mortgagee, his heirs or assigns according to the then known and received usage and method in Ireland of conveying lands in mortgage; and therefore it was apprehended, that no length of time ought to be insisted upon, in bar to a redemption in the present case, contrary to the plain intent of the parties, and the positive terms of their agreement; at least not by the respondent, who claimed only as heir at law to the mortgagee, and had not been able to shew any sale, settlement, or other disposition, whereby to entitle himself, as a purchaser [276] for a valuable consideration, to any part of the premises. That the repeated submissions of Oliver Walsh to a redemption, not only in his answer to the bill filed against him in 1670, but in all his own bills for a foreclosure; the exceptions inserted afterwards of that right, in the leases made by him of the premises; together with the like saving, which would have appeared in the respondent's own marriage articles, if he had thought proper to produce them; amounted to the clearest and most explicit acknowledgment of the appellant's undoubted right to redeem the premises, notwithstanding the pretences now set up to preclude him. And that any objection which might arise in this case, from the difficulty of accounting, was fully answered by the appellant's submitting to pay the principal in one entire payment, and to let the profits be set against the interest, according to the plain express provision of the mortgage deed; by which the mortgagee was let immediately into the receipt of those rents, but to receive no interest, except the mortgagor should pay back the entire principal without such convenient notice, as might enable him to look out for another security, and then only for six months; which was a case that never happened. It was therefore, hoped, that the decree of dismissal would be reversed, and that the appellant would be let into a redemption.

On the other side it was argued (J. Strange, T. Clarke), that the mortgage deed of the 12th of March 1640, comprising all the mortgaged premises, put it in the power of the mortgagee, or his representatives, to ascertain and limit the time of redemption, by demanding the mortgage money; and such demand was admitted to have been made by Oliver Walsh, the son, as appeared by the decree of 1683. But if there had been no such admission, it was conceived, that the filing of the bill by Oliver, the heir of the mortgagee, in 1671, was equivalent to an actual demand of the mortgage money; and therefore from that time, the mortgage, whatever it was originally, became of such a nature, as made the equity of redemption liable to a foreclosure, either by a decree, or great length of time. That no step was taken towards a redemption of the premises, till 1670, which was thirty years after the mortgages were made; and even then, the bill exhibited by Sir Robert Hartpole, the appellant's grandfather, was principally founded, not upon an equity of redemption, but upon a legal title under a settlement set up by him, in opposition to the title of the mortgagee; and when afterwards, in the progress of that cause, it was thought necessary by the Masters to whom the account was referred, and by all the parties concerned in the cause, to try five issues, in order to settle the account; the appellant's father, who, though nominally a defendant, was, nevertheless, in the nature of a plaintiff, deserted that cause; and during the seventeen years after he came of age, proceeded no further in it, as he might and ought to have done: And therefore, after so much delay and negligence in the appellant's ancestors, as well as in the appellant himself, and at so great a distance of time as very near 100 years, it was conceived, that no redemption [277] of the premises ought now to be decreed, but that the appellant ought to be left to his remedy at law, if he had any. For it would be very unequal, that the mortgaged premises, happening by the accidental rise in the value of lands, to be now worth more than £2900 the appellant should therefore, at this distance of time, be at liberty to redeem: when none of his ancestors ever tendered, or even offered to pay the £2900 when the lands were not worth so much, and when the mortgagee, or any deriving under him, could not, on account of the mortgagor's attainder, ever compel either him, or any of his descendants, or pay even the principal money due on the mortgages, though the

ands were fallen, as they actually were, from 1641 to 1704, ever so much below the value of such principal money. But if a redemption was to be decreed, yet, as it appears by the mortgage deeds, that the respondent's grandfather advanced £2900 on the security of lands, out of which he received no rents or profits for the first twelve years, from the beginning of the rebellion in 1641, and which afterwards, till about 1709, (on account of the badness of the times, occasioned by that rebellion and other subsequent accidents, as well by means of the prior incumbrances laid on the premises by Robert, the mortgagor,) never yielded half the yearly interest of the principal mortgage money; it would be highly unreasonable to decree a redemption of the premises without an account, by setting the supposed imaginary profits, great part of which were, in fact, received by the mortgagor and his son, against the interest; and decreeing the respondent only the £2900 originally advanced, the value of which, at this distance of time, is not above one third of what it was at the time of advancing it: And if an account was to be directed, it would be absolutely impossible to settle that account, which comprehends a period of 100 years, and a proportionable variety of transactions; for even 50 years ago, it was thought impossible to settle the account, which was then requisite to be taken, without a trial of five issues; none of which had been, nor could now be tried, or the matters to which they related cleared up, by any living witnesses. That it appeared by the multiplicity of bills, answers, and proceedings in the causes, that the respondent and his ancestors had been put to very great expences in recovering and keeping possession of the mortgaged premises, after having been forcibly turned out by the original mortgagor himself, during the rebellion in 1641, and in defending their title, first in the two Courts of Claims, and afterwards in the Exchequer and Chancery in Ireland; but which expences it was now impossible to ascertain: And therefore it was hoped, that the appeal would be dismissed with costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 25. p. 516.)

[278] CASE 18.—Dame MARY LAKE, Widow,—*Appellant*; ALICE MASON, Widow,—*Respondent* [14th April 1746].

[Mew's Dig. i. 337.]

There being accounts subsisting between A. and B. a banker, B. gives a cash note to E., a trustee for C., for £5000, and A. mortgages his estate to another trustee for C. as a collateral security for the money. C. keeps the note by him; and after the mortgage was forfeited, B. becomes bankrupt; A. brings his bill for relief against the mortgagee, because C. neglected to turn the note into money. Held that A.'s estate was liable to pay the principal and interest due on the mortgage.

On an appeal, the House reserved giving judgment upon the point, till an account is taken between the parties. The account is accordingly taken, but before the appeal is brought on again, one of the parties dies; and the suit below is thereupon regularly revived. This is sufficient, and the appeal itself need not be revived.

DECREE of Lord Harcourt, C. AFFIRMED.

The case depends on its own peculiar circumstances. See 2 Eq. Ab. 481. c. 14.

The facts of this case having been already stated, upon occasion of the appeal in the year 1717 (see Brown P. C. vol. 2. p. 495. tit. Demurrer, Ca. 1.); it is now only necessary to state the subsequent proceedings, which laid a ground for the present final determination.

Pursuant to the order made on hearing that appeal, the Master, on the 23d of February 1731, made his report; whereby he certified, that on the 13th of September 1707, there was a balance of £16,235 7s. 10d. due from Mason to the Newells; and that at the time of their failure, there was a balance of £12,433 9s. 1d. due to them from Mason.

Many exceptions were taken to this report, which was argued and re-argued, and several issues were thereupon directed to be tried; but both sides appealed from

several parts of the orders made on that occasion: And upon the hearing of this appeal, on the 4th of March 1736, some of those orders were reversed, and another issue was directed. (Jour. vol. 25. p. 38).

This issue being tried accordingly, the cause was heard on the 4th of July 1738, upon the equity reserved, and for further directions, before the Lord Chancellor Hardwicke; when it was, amongst other things, ordered, that it should be referred to the Master to rectify the former report, according to the several directions then given.

Pending these transactions, Joseph Newell died, having made his will, and appointed Benjamin Stoakes and others executors; but Stoakes only proved the same and the suits and proceedings were therefore, revived against him. Charles Mason also died, having first made his will, dated the 10th of September 1739, and thereby devised to his wife Alice Mason, her heirs, executors, administrators, and assigns, all his real and personal estate; and appointed her sole executrix of his will, and she duly proved the same.

Sir Bibye Lake afterwards exhibited his supplemental bill, in the nature of a bill of revivor, against the said Alice Mason widow, devisee and executrix of Charles Mason, and against Richard Mason, his son and heir: And the said Alice Mason, by her answer, [279] insisted upon the devise made to her by the will; and that she was well entitled to all the real and personal estate which Charles Mason died seized or possessed of. But the said Richard Mason, by his answer, declaimed all right or interest in or to the premises, or any part thereof. And upon hearing this supplemental cause on the 16th of November 1741, it was decreed, that the former suit and decree should stand revived, and be carried into execution; and that the present parties should be at liberty to proceed in the account thereby directed, in the same manner as if the said Charles Mason had been living.

Accordingly, the Master made another report, dated the 5th of March 1743, and thereby certified, that the said Charles Mason was indebted to the Newells in £9120 Os. 8d. on the said 13th of September 1707, after having credit for £5000, which he, on that day, received from Thomas Lake, as the consideration of the indenture of mortgage in the original decree mentioned, and which was paid over by him to the Newells: And that the said Charles Mason was indebted to the Newells on the balance of accounts, in £3818 2s. 7d.

Before this report was absolutely confirmed, Sir Bibye Lake died; having made his will, dated the 5th of September 1743, and thereby appointed the petitioner his executrix and residuary devisee of all his estate; and soon after his death, she proved the will; and the proceedings in the causes, which became abated by the death of Sir Bibye Lake, being revived, the last mentioned report was absolutely confirmed: but before any further proceedings were had, the said Benjamin Stoakes died; whereupon letters of administration of the personal estate of Joseph Newell, unadministered by the said Benjamin Stoakes, with the will of Joseph Newell annexed, were granted to George Payne, Esq. in trust and for the benefit of his Majesty.

There was due to Sir Bibye Lake, by the Master's report of the 17th of November 1715, £11,537 Os. 5d. and the same still remained due with interest from that time: and the petitioner, as his representative, was entitled to whatever benefit and advantage he had under the decrees and several orders made in these causes; which were now ripe for final judgment, upon the matters so reserved by the order of the 10th of May 1717.

The principal reasons insisted on by Mr. Mason, upon the hearing of the first appeal for reversing the decree, were, that the £5000 was a loan, not to Mr. Mason, but to the Newells, who gave their notes for that sum; that this mortgage was only a collateral security, and that he was not really indebted to the Newells at the time of such loan.

But it now appeared by the Master's report, that so far were the Newells from being indebted to Mason on the 13th of September 1707, the time when the mortgage was made, that he was on that day indebted to them in £9120 Os. 8d.; and, at the time of their failure, on the 6th of December following, he was indebted to them in £3818 2s. 7d. so that there did not appear to be the least colour for saying, that this mortgage was only a collateral security for the Newells; especially, since at the time of the execution of the mortgage, the £5000 lent was paid by Mr. Lake into Mason's own hands, and applied to pay part of his debt to the Newells; on the con-



trary, soon after the failure of the Newells, Mr. Mason owned this to be his own debt; and never pretended, that the Newells were any otherwise concerned than as security for him, till after the filing of the bill by Thomas Lake; there seemed therefore no reason to be offered against affirming the said decree, and giving the proper directions consequential thereto: And therefore the petitioner prayed, that that part of the decree, from which the said Charles Mason so appealed as aforesaid, might be affirmed.

To this petition Mrs. Mason put in an answer, admitting the several facts and proceedings therein stated; but insisted, that as the appeal brought by Charles Mason, against the original decree of December 1713, abated by his death, and the death of Sir Bibye Lake, and had not been revived by the respondent, nor had she brought any new appeal against the said decree, such appeal was at an end, and ought not to be farther proceeded in: But that the petitioner ought to have carried that decree, and the other proceedings in the Court of Chancery into execution, according to the method prescribed by the rules and orders of that Court; and that therefore, no judgment should now be given by the House in that appeal.

But on behalf of the petitioner it was submitted (D. Ryder, W. Murray, W. Hamilton), that her present application was not only proper, but absolutely necessary, to have the cause finally determined: For Mr. Mason having appealed from that part of Lord Harcourt's decree, which charged his estate with £5000 and interest, and directed the same to be sold for satisfaction thereof; and the house having reserved giving judgment on the point in question, till the account should be finished, and directed the parties to resort back again when that was done; there was a stop to all proceedings in the Court of Chancery, except such only as related to the account; and it was impracticable for the parties to proceed a step farther, without resorting back to the House for their determination. It was therefore immaterial, whether the appeal was revived by the respondent, or not; for the cause itself being revived in the ordinary way in the Court of Chancery, the petitioner had thereby a right to apply to the House, which she had done, and humbly hoped for their judgment upon the case.

After hearing counsel for the petitioner, and none appearing for the respondent, it was ORDERED and ADJUDGED, that so much of the said decree of the 9th of December 1713, as was complained of in the said appeal, should be affirmed. (Jour. vol. 26. p. 562.)

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[281] CASE 19.—ROGER PALMER and another,—*Appellants*; GEORGE JACKSON and others,—*Respondents* [11th May 1756].

[Mews' Dig. xiv. 1720. See 37 and 38 Vict. c. 57, s. 7.]

On a bill filed to redeem a mortgage, 55 years after the date of it, 47 years after the mortgagee had got into possession, after five ejectments brought to defeat his estate by a title paramount, and after refusing, by four different answers, to come to an account on the foot of the mortgage, and redeem the lands, a redemption was decreed, and an account of the rents and profits directed.

DECREE of the Irish Chancery AFFIRMED. See *ante*, case 4. and the note there [5 Bro. P. C. 187].

Captain Francis Jackson passed a patent for several lands in the county of Mayo, in Ireland, which were granted to him, and others who had served under him, during the war which commenced in that kingdom in the year 1641, and he afterwards acquired several parcels of those lands from the persons respectively entitled thereto; and being seised thereof in fee, and having three sons, William, Samuel, and Oliver, the said Francis, by deeds of lease and release, dated the 18th and 19th of December 1674, conveyed part of those lands to trustees, to the use of himself and his wife Elizabeth for life; remainder to his third son Oliver, who had lately intermarried with Jane King, for life; remainder to the first and other sons of Oliver by the said Jane, in tail male; remainder to Samuel the second son of Francis, and the heirs

male of his body; remainder to the right heirs of Oliver: But no estate was limited to the trustees to support the contingent remainders.

Francis Jackson died in 1676, William his eldest son died without issue, Samuel the second son died, leaving issue a daughter, who intermarried with Andrew Kirkwood. Elizabeth the wife of Francis, being also dead, Oliver entered upon the lands comprised in the settlement of 1674, and taking advantage of the omission of trustees to support the contingent remainders, and having no issue, he in Easter Term 1681 levied a fine, and suffered a recovery, and thereby vested the fee in himself. He afterwards purchased some other lands, and having borrowed £2200 from Sir John Davis, he mortgaged his estate for the same; and in the mortgage deeds, seems to have taken the denominations indiscriminately from his father's patent, without attending properly to his own right in them.

For by lease and release, dated the 8th and 9th of December 1684, Oliver conveyed to Sir John Davis and his heirs, not only the lands comprised in the settlement of 1674, and the other lands which he had purchased, some part whereof he had before mortgaged to William Knox, but also some denominations of his [282] father's lands which were not comprised in the settlement of 1674, and to some denominations of which, neither he or his father had acquired the equitable right from the other adventurers; subject to a proviso of redemption on repayment of the said £2200 at the end of nine years, with interest at the rate of £10 per cent. per annum, to be paid half yearly in the mean time, but with power for the mortgagee to call in the money at a certain short time therein mentioned.

Sir John Davis never received any part of the principal or interest of this debt during his life: He died in 1691, leaving his son Paul Davis his heir and executor: who finding so large an arrear of interest, and having called to no purpose for his money in 1692 entered upon such part of the mortgaged premises as he could get into possession of, but which fell short of the whole.

Oliver Jackson the mortgagor died in 1694, leaving Jane his widow, and two sons, John and Oliver, who were born after the fine and recovery suffered by their father, in 1681.

Jane the widow, not having been party to the mortgage deed, set up her title to dower out of the mortgaged estates; and a claim was made on the behalf of John, the eldest son, to all the lands comprised in the settlement of 1674, upon a suggestion, that he was born before the fine and recovery in 1681, and that his remainder was not barred thereby; wherefore they threatened to bring ejectments for recovering those lands.

At this time, the lands of which the mortgagee obtained possession, produced a very considerable income over and above the quit-rent reserved to the crown; and the original mortgage deed to Sir John Davis having been lost during the troubles in Ireland, and Paul Davis being apprehensive that he could not support his title at law without it, he, in 1696, exhibited a bill in the Court of Chancery in Ireland, against Jane Jackson, John Jackson, and others, for a discovery of the mortgage deed and settlement, and other writings relating to the estate; and also to discover the time of the birth of John Jackson, and for an injunction to stay the proceedings at law, and for general relief; suggesting, that the mortgaged premises yielded at that time not above £30 a year, clear of all outgoings.

Jane Jackson and John Jackson, by the said Jane his mother and guardian, put in their answers to this bill; and thereby they admitted the mortgage made by Oliver Jackson to Sir John Davis for securing the £2200 and interest, and that the counterpart thereof was in their hands. They set forth the purport of the settlement of 1674, and said that John Jackson was born the 26th of March 1681. They alleged that the mortgaged premises had, before the late troubles in Ireland, been worth £300 per ann. and were, at the time of putting in their answer, as they believed, worth above £100 per ann. Jane the widow, insisted on her right of dower in the mortgaged premises; and John Jack-[283]-son insisted upon a title paramount the mortgage, by virtue of the settlement of 1674; alleging that the entail had not been barred and that he intended to proceed at law for the recovery of the premises from the mortgagee. There were no farther proceedings in this suit at that time. Jane Jackson recovered her dower at law; but no attempt was then made by John Jackson to evict the mortgagee.

The profits of the estate falling very short of the interest of the money originally lent, and the debt being greatly swelled above the value of the estate, as estates were valued in Ireland at that time, and no likelihood that the representatives of the mortgagor could ever be brought to redeem the mortgage, and it being extremely troublesome for Paul Davis to keep an estate in hand, which was at so great a distance from his own estate, and his usual abode, and in order to get the best rent that could be had for the same, and for the better improvement thereof, he, by indenture of lease, dated the 30th of November 1699, demised the mortgaged premises to Francis Palmer and Charles O'Hara Esqrs. for three lives renewable, but so as not to continue longer than Davis's interest in the premises should subsist, at the yearly rent of £260, to commence from the 1st of May then next ensuing. This was the highest rent which then could be had for the lands; and, out of this rent, the quit rent amounting to about £30 was to be paid, and £80 per ann. the dower recovered by Jane Jackson; so that the net profits to Davis amounted to no more than about £150 a year.

Paul Davis having in the whole received but £721 5s. 5d. from the commencement of the mortgage, and there being above £5500 due for principal and interest, he, by indentures of lease and release, dated the 24th and 25th November 1702, conveyed all his right and title to the mortgaged premises to John Lovett Esq. and his heirs, in trust for the said Francis Palmer, to whom O'Hara had before made over his right under the lease of 1699; and by this indenture, Davis covenanted to make good the title to the mortgaged premises, in the manner therein mentioned.

About the same time, John Jackson brought an ejectment for the lands comprised in the settlement of 1674, founding his claim upon that settlement, and insisting, that the entail was not barred by the fine and recovery in 1681; but Paul Davis appearing, and making defence, John Jackson did not proceed farther in that suit. He died in 1704, without issue, leaving his brother Oliver his heir at law.

In 1714, Oliver Jackson revived the pretensions formerly set up by his brother John, and brought an ejectment for the lands comprised in the settlement of 1674. To this suit Paul Davis (then Lord Mount Cashell) appeared, and made defence; he being concerned in interest by virtue of the covenant contained in his assignment to Francis Palmer. And soon afterwards, both Lord Mount Cashell and Francis Palmer exhibited a bill in the Court of Chancery in Ireland, against Oliver Jackson, for a disco[very] of the mortgage deed, the original of which had been lost as aforesaid; and likewise for a discovery of the settlement of 1674, and the circumstances of the fine and recovery which barred the same, and for an injunction to stop proceedings at law in the ejectment; and that Oliver Jackson might account on the foot of the mortgage, and pay what should appear due, or be foreclosed of the equity of redemption of the mortgaged premises.

Oliver Jackson put in his answer to this bill, and thereby admitted the mortgage; but denied that Lord Mount Cashell, or Francis Palmer, were entitled to the mortgaged premises; and insisted, that he was himself entitled to the same by virtue of the settlement of 1674. He absolutely refused to come to any account on the foot of the mortgage; and insisted on his right to proceed in the ejectment for recovery of the estate under the settlement, which he admitted he set up in order to defeat the title of the mortgagee.

This suit afterwards abated by the death of Lord Mount Cashell, and in 1719, Oliver Jackson caused a new ejectment to be brought upon the plan of the former; to which Edward then Lord Mount Cashell, son and heir of Paul Lord Mount Cashell, by his guardian, appeared and made defence; and together with Francis Palmer, in 1720, exhibited a new bill in the Court of Chancery in Ireland against the said Oliver Jackson, of the like purport with the former bill; and Oliver Jackson put in the like answer as he had done to the former bill, relying upon the settlement, and refusing to go into an account on the mortgage. But Francis Palmer dying in June 1721, and Oliver Jackson dying in February following, these suits also abated.

The respondent George Jackson, the eldest son and heir of the last named Oliver Jackson, brought a new ejectment in 1722, for recovery of the lands contained in the settlement; to which ejectment Edward Lord Mount Cashell appeared and made defence; and he together with Roger Palmer, the brother and heir, and one of the devisees of Francis Palmer, and also his acting executor, exhibited their bill of revivor and supplemental bill against the respondent George Jackson, to revive the last men-

tioned suit, and for relief against this new ejectment brought by him to defeat the mortgagees of their security.—To this bill the respondent George appeared by his guardian, he being then under age, and by his answer, insisted on a right under the settlement of 1674; and that Oliver Jackson his grandfather being tenant for life, a security entered into by him could bind or charge the lands contained in that settlement, for any longer term than his own life; and therefore insisted, he ought not to be restrained from proceeding to try his title at law: And, no injunction being obtained, the respondent George Jackson proceeded in his ejectment: And the cause coming on to be tried at the bar of the Court of Common Pleas in Ireland in 1727, and it being proved at the trial, that John Jackson the eldest son of Oliver, the mortgagee, was not born till [285] some time after the fine was levied by his father to bar the settlement of 1674, a verdict was found against the respondent George Jackson: and from that time, till the year 1739, the appellants remained unmolested by the respondent.

But some time afterwards, Michael Kirkwood, the grandson of Samuel Jackson, and heir at law of Francis Jackson, brought ejectments for some of the lands contained in the mortgage made by Oliver Jackson, which were not comprised in the settlement of 1674, and which he claimed as heir at law of Francis, and which he accordingly recovered, as the appellants were not in possession of the settlement of 1674, which defeated the title of the heir at law; although in some years after, viz. in 1736, the appellants, having got access to the settlement, became qualified to recover again some part of the lands so evicted by the heir at law, it appearing that they were actually comprised in that settlement.

In 1739, fifty-five years after the original mortgage, and forty-seven years after the mortgagees got into possession, after five ejectments brought to defeat his claim by a title paramount; and after refusal, by four different answers, to come to an account upon the foot of the mortgage, and redeem the mortgaged lands; the respondent finding, by the eventual rise of lands in Ireland, and by the improvements made upon the premises, that they might be worth redeeming, and that the representatives of the mortgagee would be under great difficulties to make out and charge the estate with the expences they had been at; he exhibited his bill in the Court of Chancery in Ireland against the appellant, and others, setting forth the settlement made by Francis Jackson in 1674, on his grandfather Oliver, and the mortgage to Sir John Davis, but contesting the validity thereof, although it had been established by the verdict upon the ejectment: He likewise set forth the several proceedings by ejectments, and bills before mentioned; and notwithstanding the long lapse of time, and the repeated refusals by himself and his ancestors to come to an account, he now prayed a redemption of the mortgage, and a general account; and insisted, that the bills filed in 1720 and 1722, left the equity of redemption still open to him, notwithstanding the length of time.

The appellant Roger Palmer the elder appeared, and put in his answer: and thereby set forth his title to the premises under the mortgage, as he was eldest son and heir of Roger Palmer, deceased, the brother and heir of Francis Palmer; and that he and the mortgagee, and his assigns, under whom he claimed, had been in the actual possession of the mortgaged premises ever since the year 1692; and that they had been put to very great expence in defending the title to the mortgaged premises, and insisted on the difficulty and hardship of accounting for so great a length of time back, and on the said length of possession; and also upon an act, made by the parliament of Ireland, 8 Geo. I. intituled, *An act for the more effectual quieting and securing possessions, and preventing vexatious suits at law*; whereby it was enacted, "That in case any mortgagee or mortgagees of any lands, tenements, or hereditaments whatsoever, had been in possession thereof by the space of twenty years, or upwards; and the mortgagor or mortgagors, or his or their heirs, executors, administrators, or assigns, or the person or persons entitled to the equity of redemption of such land, tenements, or hereditaments, had permitted the mortgagee or mortgagees, his or their heirs, executors, administrators, or assigns, to continue in possession of the mortgaged premises, without bringing his or their suit to redeem the same: or to bring the mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns to an account for the profits of the lands and premises mortgaged; and should not, before the 29th of September 1723, commence their suit in equity to re-

deem such mortgage, or for the recovery of the possession of the said mortgaged premises, and prosecute the same with effect; in every such case it should be lawful for the person or persons claiming the interest or estate in any such mortgage or mortgages, in all courts of equity, to plead such possession in bar of any relief; and that the mortgagee or mortgagees, their heirs, executors, administrators, or assigns, should hold the lands and premises mortgaged to them, freed and discharged of and from all equity of redemption whatsoever;" and said, he hoped to have the benefit thereof, in the same manner as if he had pleaded the same in bar.

The appellant Roger Palmer the younger, also appeared and put in his answer, and thereby set forth, that his father Thomas Palmer, who was the younger son of Roger Palmer, deceased, being, by virtue of a devise in his will, in the actual possession and enjoyment of part of the said premises, did, by indentures of lease and release, dated the 19th and 20th of May 1729, made previous to, and in consideration of the marriage of his said father Thomas Palmer, with Sophia Palmer his wife, grant and release several parcels of the said mortgaged premises, which he claimed title to, unto and to the use of the said Thomas Palmer, for his life, with remainder to the first and other sons of that marriage in tail male, and that the appellant Roger Palmer the younger, was the eldest son of that marriage; and that he was a purchaser under that settlement for a valuable consideration without notice, and insisted on the same, and the length of possession, and the said statute of King George I. in bar to the relief sought by the respondent George Jackson's bill.

The rest of the respondents also appeared, and put in their answers to the said bill: And the defendants Charles Lord Archbishop of Dublin, and Charity Blake, by their answers, admitted they were two of the surviving executors of Francis Palmer, deceased; and the defendant Catherine Jackson, by her answer, admitted she was the administratrix of Oliver Jackson, the father of the respondent George Jackson.

[287] The respondent George Jackson amended his bill several times, and answers were put in accordingly; and the cause being at issue, witnesses were examined: And after several abatements and revivors, the cause came on to be heard on the 11th of March 1755, when a redemption was decreed of the lands comprised in the mortgage made by Oliver Jackson to Sir John Davis, and assigned by Paul Davis his son to John Lovett, in trust for Francis Palmer, and which lands were particularly specified in the decree (excepting certain lands therein mentioned, which were mortgaged by the said Oliver Jackson the elder, to William Knox, deceased, and certain other lands therein also mentioned, which appeared to be the estate of the appellant Roger Palmer the elder) upon payment of the principal and interest due on the foot of the said mortgage, as also the costs and expences which the mortgagees, and their representatives respectively, were put to in defending their title to the said mortgaged lands, with interest for such costs and expences from the time they were paid; and it was referred to the Master to take an account of what was due upon the foot of the said mortgage, for principal and interest, and of the said costs and expences, and to report the interest thereof specially, and to take an account of what the mortgagees made, or without wilful default might have made of the said lands, since the time that the said Paul Davis (afterwards Lord Mount Cashell) first got the possession thereof, without regard had to the lease made by him in 1699, to the said Francis Palmer and Charles O'Hara; and also to take an account of what woods were on the said lands since the said Paul Davis first got the possession of the mortgaged premises, who cut down the same, and how they were disposed of, and the value of the said woods at the time they were so cut down; and the consideration of further directions was reserved, till after the Master should have made his report: And it was further ordered, that the bill, so far as it related to redeem a mortgage made to John Knox, a defendant therein named, should be dismissed without costs, the respondent George Jackson being a pauper.

From this decree the present appeal was brought, and on behalf of the appellants it was argued (R. Henley, C. Yorke), that the practice of courts of equity of relieving from the strict rule of law upon the breach of a condition, is to be governed by the power of giving an adequate compensation; and where that cannot be done, the law ought to take place. In the present case, the court could not give any such compensation to the mortgagees; for it is well known, that if they had been paid their principal and interest at any time during the first 30 years after the mortgage was

made, they might have purchased in Ireland lands in fee under indisputable title, of much greater yearly value than the mortgaged premises; and as during that time the mortgagees often called for their money, and offered to account, and were constantly refused both, it would be extremely hard to compel them to come to an account and be redeemed, after so great a length of possession, and such an alteration in the value both of land and money, since the time at [288] which they had a right to be paid. That it has been often determined in courts of equity, that a redemption of a mortgage shall not be decreed where a mortgagee has been 20 years in possession, and there was nothing in the present case which could take it out of the general rule: on the contrary, this case was attended with circumstances sufficient to justify the making such rule: For it was evident, that the difficulty of accounting was as great in this case as it could be in any case whatever, as well in regard to the fluctuation of the value of lands in Ireland at different periods, as by reason of the many suits occasioned by the carelessness or fraud of the first mortgagor, who confounded together in the same mortgage deed, lands which he had before mortgaged, lands which were liable to other charges, and lands to which he had no right: In consequence of which, the mortgagees were adjudged to pay dower to his wife, which she enjoyed above forty years, some part of the estate was evicted by Kirkwood, the heir at law of Francis Jackson, some part was always retained by Knox, a prior mortgagee, and some parts the mortgagees never could obtain the possession of, as belonging to other persons: Besides all which, many of the parties were dead, or vouchers lost, which were material to make out the account. That the Irish statute of the 8th of Geo. I. relied on by the appellants in their answer, ought to be considered as a bar to all equity of redemption in the respondent, as no suit had ever been brought by the mortgagor, or those claiming under him, for a redemption, from 1692, when the mortgagee first entered upon the estate, to 1739, when the respondent's bill was filed: And the statute being intended to quiet possessions, ought to receive a literal construction against those who would disturb them, to support the end for which it was made; and for this reason, the several attempts of the respondent and his ancestors, to defeat the estate of the mortgagees by a title paramount, could not be construed as suits commenced to redeem, within the words or meaning of that act; nor could the suits commenced by the mortgagees, for a discovery of deeds to support their title against such attempts, be construed within it. That the Court thought proper to dismiss the bill as to Knox's mortgage, and the case of the appellants differed from his only in this, that he had never been molested in the possession of his security: whereas it had been the misfortune of the appellants, and those under whom they claimed, to have been perpetually harassed, deprived of some part of the lands comprised in their security, other parts evicted, and suits instituted for the rest: It would therefore be severe, and against conscience, to consider offers which they made for the sake of peace, and which were so often rejected, as an absolute waiver of the legal right acquired by length of possession.

On the other side it was contended (W. Murray, C. Pratt), that the estate in question was originally a mortgage, and as such only had been always enjoyed by the persons under whom the appellants claimed; for Francis Palmer purchased the estate as a mortgage, and so avowedly held it down to the time of his death in 1721, during which time he and Lord Mount Cashell filed no less than five bills of foreclosure; and after his death, Roger Palmer, his heir and executor, with Edward Lord Mount Cashell, filed a sixth bill for the same purpose, at which time the respondent was an infant, and so continued till 1737, and within two years after he came of age, he filed the present bill to redeem: so that this estate, by the acts of both parties, was considered as a redeemable estate, home to the filing of the present bill, in which case a redemption must be decreed of course, unless some statute of limitation, bar or waiver, has interfered to preclude the mortgagor from this common equity.

It has been therefore insisted by the appellants, that they and the several persons deriving under the mortgage, have been in possession without interruption from 1692 till 1739, when the bill was exhibited; and that the respondent's right to redeem was barred as well by the statute of limitations, as by the act 8th G. I. no bill to redeem being ever brought by the respondent, or any of his ancestors, before the bill of 1739.—But to this objection it is said, that the original acquirement of the possession was tortious and illegal, not in consequence of any judicial recovery, but of intrusion

only, whereby the mortgagee took advantage of the confusion of the times, and the imprisonment of the mortgagor; and that this possession had been ever since obtained by the like oppressive methods, favoured by a succession of animosities, and the continued distress of the family, who had constantly sued in the character of paupers against opulent and noble adversaries. That all mortgages being coupled with a trust, are therefore not within the purview of any statute of limitations; and from the preamble to the act of 8th George 1.\* it appears, that the respondent's claim was not such a dormant incumbrance as was intended to be barred, nor was the possession of the mortgagees such a quiet or peaceable possession as was intended to be thereby favoured; or if it had been so, yet the respondent and his father were both entitled to the benefit of the saving clauses.† The father died before the time limited by the act for bringing his bill to redeem, and even before the act passed; and the son's [290] bill was exhibited within two years after the determination of his minority, although the act allowed him a respite of five years for that purpose.

But then it is objected, that the several ejectments brought by the father and uncle of the respondent, are not to be considered as seeking, or calculated to preserve a redemption, but as defeating and destructive of that right by a title paramount; and that the several offers of an account and redemption by the different bills are of no avail, from the refusals in the different answers to enter into the account, which amounted to a disclaimer of the equity of redemption offered by those bills.—But surely the pursuing a title paramount, can never be called a relinquishing of the equity of redemption. The execution of the mortgage was never controverted; the respondent's ancestors never went farther than to insist, that part of the mortgaged lands were under settlement; and by their ejectments they sought to recover such part only; insisting at the same time upon both rights, as well under the settlement, as that of an equity of redemption under the mortgage. That it appeared from the whole tenor of the answers of the respondent's ancestors, that they were willing to go to an account, but afraid of the expence with such powerful adversaries. Besides, the mortgagees themselves never went farther than bill and answer, when they should and might have proceeded to an actual foreclosure, and have sold the land; and especially after a verdict against the respondent's title under the settlement, obtained during his minority. But the last bill of revivor exhibited against the respondent in 1722, after his father's death, at once answered this objection, by acknowledging, that the right to redeem was then in the respondent; and it was not pretended, that since he attained 21, he ever brought any ejectment, or did any one act to disturb the appellants, or to revive his right of redemption, before he exhibited his present bill, which disclaimed the defence made by the answer during his minority, and prayed an account and redemption on the foot of the mortgage, and concurred with what the appellants sought by their bill of revivor.

A third objection however is made to the decree, from the difficulty of accounting after so great a length of time, and that the account cannot now be settled with so much certainty, as that no injury should arise to the mortgagee, or those deriving under him; and particularly with regard to the costs and expences which the appel-

\* The words of this preamble are: "Whereas many of his Majesty's loving subjects, that have been in quiet and peaceable possession for many years of lands, tenements, and other hereditaments, as heirs at law by descent from their ancestors, or as purchasers for valuable consideration, or otherwise, have been, and may hereafter be put to great trouble and expence, in defending themselves and their estates from vexatious suits to be had against them, by colour of old dormant debts and incumbrances, pretended to have been contracted and due by persons under whom they derive a title to their estates: And whereas it is highly reasonable for quieting of possessions, that there should be a time limited for the redemption of mortgages; it is therefore enacted, etc."

† These clauses are: "That nothing herein contained shall be construed to bar the title or claim of any person, who shall commence and prosecute his action or suit within five years next after his title shall accrue.—Nor to bar the right or remedy of any person who shall be a feme covert, or within the age of 21 years, etc. provided he or she shall bring his action or suit within five years after the disability is removed."

lants, and those under whom they claim were at, in defending their title to the mortgaged premises from the suit in dower, the several ejectments and bills, and two or three suits with the heir at law of Francis; and that the redemption carried the still greater hardship from the depreciation of money, and the proportionable advance in the value of lands.—The difficulty of accounting, if real, was the fault of the mortgagees. It was incumbent on them to keep regular accounts, and the several ejectments were so many warnings for that purpose. Besides, this difficulty was waived and dispensed with by the several bills for account and [291] foreclosure; for at the respective times of filing those bills, they must have been ready with their accounts, or they would not have filed them; and it was their own laches only, that not one of their many bills was prosecuted to a foreclosure, but stopped at the injunctions; it seemed therefore to have been their sole object rather to retard and avoid the claim of the mortgagor, than bring it to a determination; nor could the ejectments have long delayed the account, had not the bills of the mortgagees prevented those ejectments from being brought to trial. That it was not pretended, that the mortgagees ever expended £5 in improvements on any part of the mortgaged estate, or ever considered themselves as owners of it; or that any thing was ever done by the respondent or his ancestors, to create any difficulty in the accounts, except in bringing the several ejectments, and thereby occasioning the several bills of foreclosure, which from time to time dispensed with that difficulty. But the accruer of £10 per cent. interest upon the mortgage money, was an ample compensation for any supposed temporary disadvantage in the alteration of times and circumstances, or for the present difference in the value of money, from what it was when originally advanced. That the difficulty of accounting is a strong argument against redemption, in all cases where the mortgagee has been encouraged to consider the estate as his own, by the laches and neglect of the mortgagor; but in the present case, the possession had been continually disputed from the beginning, and the mortgagee had himself postponed the redemption from time to time, by filing bills not in reality to foreclose, but to prevent the trial of the claim under the settlement; so that this long possession was not to be imputed to the neglect of the mortgagor, but to the artifice of the mortgagee.

As to another objection, that the appellant Palmer the younger was a purchaser without notice, for a valuable consideration, under his father's marriage settlement; it was said, that the father had not the least right at the time of the settlement, for he had been in possession but five years, and held as tenant at will only by the sufferance of his brother, in violation of the will of the very person under whom that brother pretended to derive title: besides, the settlement was made *pendente lite*, in the year 1729.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that, with a variation as to some particular descriptions of the mortgaged premises, the decree should be affirmed. (Jour. vol. 28. p. 594.)

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[292] CASE 20.—WILLIAM BELCHIER and others,—*Appellants*; JOHN RENFORTH,—*Respondent* [9th February 1764].

[Mew's Dig. ix. 1606. See *In re Russell Road Purchase-Moneys*, 1871, L. R. 12 Eq. 85.]

It is an established rule in equity, that a third mortgagee having lent his money, without knowing there was a second mortgage upon the same estate, may, by paying off the first incumbrancer, and taking an assignment of his interest to himself, hold the estate against the second mortgagee, till he shall be paid what is due to him upon both mortgages. The principle upon which this doctrine was first established, and has ever since prevailed, is, that the third mortgagee having innocently lent his money, without knowing that the second had any claim upon the estate, has in conscience as good a right to be paid the whole money he has lent, as the second mortgagee has to the payment of what he advanced; and having by the assignment of the first mortgage got a right to hold the estate absolutely at law, and having possession of the title deeds, with-



out which the estate cannot be sold, a Court of Conscience ought not to take from him his legal protection of an honest debt.

DECREE of Lord Keeper Henley AFFIRMED.

See the case of *Symmes v. Symonds* [Bro. P. C.] vol. 4. p. 328. title *Incumbrance*, Ca. 1. and the note there; as also *Powell on Mortgages*, vol. 1. cap. 12. The reason assigned for this preference of the third mortgagee, is, that, by thus obtaining the legal estate, he has both law and equity on his side, which supersede the mere equity of the second. And even Lord Hale held it right that the third should seize what he called the *tabula in naufragio*, a plank in the shipwreck, and thus leave the second to perish. See 2 *Comm.* c. 10. p. 160. and Mr. Christian's note (4) there; where the reasonableness and equity of this doctrine are, indirectly questioned.

John Butler, an attorney at law, being seised in fee of a piece of ground, containing three acres, formerly two meadows, situate in the parish of St. Mary Magdalen, Bermondsey, in the county of Surry, together with several new-built brick messuages erected thereon; some time in February 1742, borrowed of James Pace a sum of £600 and to secure the repayment of the same, by indentures of lease and release, dated the 27th and 28th of February 1742, mortgaged the said premises to Pace.

On the 29th of July 1747, Butler paid Pace all interest then due for the £600 and also £300 in part of the principal; and he afterwards paid Pace all interest for the remaining £300 up to the 28th of February 1754.

By lease and release, dated the 22d and 23d of October 1744, Butler mortgaged the same premises to Rebecca Jarvis and Robert Watson, for securing £500 and interest; and he at different times afterwards, paid off £200 of this sum.

John Butler afterwards, by indentures of lease and release, dated the 30th of September and 1st of October 1747, mortgaged the same premises to the appellant Belchier, and the said Edward Ironside, for securing £800 and interest.

And by indenture dated the 30th of November 1751, he demised the same premises to Mary Butcher, for 99 years, for securing £1000 and interest; and afterwards, by another indenture, dated [293] the 27th of June, he charged the same premises with the payment of the further sum of £500 and interest to the said Mary Butcher.

By other indentures of lease and release, dated the 10th and 11th of October 1752, Butler mortgaged the same premises to the respondent, for securing £1200 and interest; and on the same day, he charged the premises with the payment of a further sum of £800 and interest to the respondent; and delivered to him the complete title deeds of the mortgaged premises.

On the 14th of December 1755, Butler died; having made his will, dated the 4th of January 1754, and thereby, after directing the payment of his just debts, he gave and devised the residue of all his real and personal estate to Elizabeth Butler, his widow, her heirs, executors, administrators, and assigns; and appointed her sole executrix of his will, and she duly proved the same.

Soon after the death of Butler, the respondent caused declarations in ejectment to be delivered to the several tenants in possession of the premises, in order to recover the possession of the same, and to pay and satisfy himself the principal and interest due on his respective mortgages; whereupon the appellant Belchier and the said Edward Ironside, on the 16th of March 1756, filed their bill against the respondent and against Elizabeth Butler, the widow and devisee, and the said James Pace, Thomas Pierce, and Mary Butcher; stating, that John Butler, in September 1747, applied to the appellant Belchier and Mr. Ironside, who were bankers and partners in London, to lend him £800 upon a mortgage of the aforesaid premises, of which he pretended to be seised in fee, clear of all incumbrances, and of which he was in possession and receipt of the rents and profits; and at the same time produced to them several parchments and writings, which were, as he pretended, the title deeds of the said estate. That Butler, being an attorney in whom the appellant Belchier and Mr. Ironside reposed great confidence, and whom they had frequently employed in their law business, they were prevailed on, and did actually, about the 1st of October 1747, lend him £800 upon a mortgage of the said premises, by indentures of lease and release, dated respectively the 30th of September and 1st of October 1747. That at the time of executing the said mortgage, Mr. Ironside took into his custody all the deeds and writings which were produced by Butler, as the title deeds relating to the mort-

gaged premises, and which upon his affirmation and assurance, Ironside believed to be the title deeds relating thereto. That Ironside died in November 1753, having made his will, and thereof appointed the appellants Belchier and Ironside executors, who duly proved the same. That on the 14th of December 1755, Butler died, having made his will to the effect before set forth. That soon after Butler's death, the appellants Belchier and Ironside applied to the said Elizabeth Butler, for payment of the principal and interest due to them on their mortgage, which she refused to pay; and the appellants were informed, that Butler had mortgaged the said premises to divers [294] other persons besides them. They therefore prayed by their bill, that the defendants Pace, Pierce, and Butcher, might severally set forth their interest in the premises, together with their securities, and how much was due thereon, and how their debts arose; and that the respondent might set forth what interest he claimed therein; and that all the defendants might set forth, whether they had any and what title deeds in their custody; and that the mortgaged premises might be sold, and the money thereby arising applied in payment of what was due to the appellants, and the other creditors who had incumbrances thereon, in their just order; and that the defendants might be restrained by injunction from proceeding at law, for recovering possession of the premises, and for general relief.

The respondent by his answer, insisted upon his mortgage for £1200 and the further charge of £800, and denied that at the time of lending his money he had any notice whatsoever of the mortgage of the appellants, or any prior mortgage or incumbrance made to them, or to any other person or persons, of the said premises; but that when he advanced the said £1200 and £800 to Butler, he had reason to suppose, from the production and delivery of the title deeds of the premises, and the counterparts of the tenant's leases, and did believe that Butler had a clear title to and power to convey and mortgage the same, without being subject to any prior incumbrance.

The defendant Elizabeth Butler by her answer, submitted to the Court, whether she was not entitled to dower out of the mortgaged premises.

The defendant James Pace, who was the first mortgagee, by his answer, stated his mortgage for £600 and interest, by indentures of lease and release, dated the 27th and 28th of February 1742; and said that Butler, about the time of the execution of such indentures, delivered to him several deeds or writings, which, as he believed, related to the title of the mortgaged premises; but that Butler, on the 27th of August 1744, applied to him to see the title deeds and writings so left with him, and faithfully promised, that if the defendant would trust him with the same, he would shortly return them to him; that Butler being his attorney, in whom he placed great confidence, and relying on his integrity and promise, he was prevailed on, and did, about the 27th of August 1744, re-deliver all such deeds and writings to Butler, except the indentures of the 27th and 28th of February 1742; and Butler at the same time, by a writing under his hand, promised to return the same to him on demand; that he several times afterwards applied to Butler to re-deliver such deeds, and Butler often promised that he would return the same to him, but never did. That Butler, on the 28th of February 1754, paid him all interest then due for the £600 and also £300 in part, so that the principal sum of £300 only, with interest for the same, remained due to the defendant on his said mortgage; and upon payment thereof, he submitted to assign his mortgage to the ap-[295]-pellant Belchier and the said Edward Ironside, or as they should direct.

The appellant Pierce, as executor of Rebecca Jarvis, who survived the said Robert Watson, by his answer, insisted on the mortgage of the 22d and 23d October 1744, made to Jarvis and Watson, and admitted that Butler paid off at different times £200 principal money, part of the said £500. And the defendant Butcher by her answer, insisted on her mortgage, and further charge; and said, that she, relying on Butler as an honest man, took such deeds as he put into her hands for her security.

The cause being at issue, and divers witnesses being examined on both sides, came on to be heard before the Lord Keeper Henley, on the 11th of July 1758; when it being objected by the counsel for the respondent, that the appellant Belchier was not before the Court in his own right, but only as one of the executors of Edward Ironside; his Lordship was pleased to order, that the cause should stand over, with liberty for the appellants Belchier and Ironside to amend their bill.

The respondent, pending this cause, in order to strengthen his title, and to gain

a priority, paid off all principal and interest due to the defendant Pace, the first mortgagee, on his mortgage; and by indentures of lease and release, dated the 5th and 6th of December 1757, Pace, in consideration of £356 10s. 9d. conveyed the premises to the respondent, his heirs and assigns for ever, subject to the proviso of redemption contained in the indenture of release, of the 28th of February 1742.

The appellants having amended their bill, the respondent, on the 20th of March 1758, filed his cross bill against the appellants, and also against the said Elizabeth Butler and Mary Butcher; praying, that the said Elizabeth Butler might come to an account with him for the said three sums of £1200, £800, and £356 10s. 9d. and all interest due or to grow due thereon; and that the same might be paid to the respondent, together with his costs, by a short day to be appointed for that purpose; and in default thereof, that the said Elizabeth Butler might stand absolutely foreclosed; or that the mortgaged premises might be sold, and by and out of the money arising by such sale, the respondent might, in the first place, be paid all his principal and interest, together with his costs at law and in equity.

Issue being joined in both causes, and witnesses examined, the same came on to be heard before the Lord Keeper Henley, on the 4th of December 1760; when his Lordship was of opinion, that the respondent, by virtue of the assignment of the defendant Pace's mortgage, was entitled to hold the premises till satisfaction of the money due on his three several mortgages; and in both causes ordered and decreed, that it should be referred to the Master, to take an account of what was due to the respondent, for principal and interest on the said three several mortgages, and to tax him his costs both at law and in equity; and the Master was likewise to take an account of what was due to the several [296] other incumbrancers, for principal and interest on their several mortgages, and to tax them their costs in both suits; and by consent of all parties, his Lordship decreed, that the premises comprised in the several mortgages should be sold, with the approbation of the Master, subject to the dower of the defendant Elizabeth Butler, the widow, to the best purchasor or purchasors that could be got for the same, to be allowed of by the Master; wherein all proper parties were to join, as the Master should direct; and all deeds and writings in the custody or power of any of the parties, relating to the estate in question, were to be produced before the Master, upon oath; and it was ordered, that the money arising by such sale should be applied in the first place, in payment of what should be reported due to the respondent, for principal, interest, and costs on the said Mortgages, and then in payment of what should be reported due to the several other incumbrancers, for principal, interest, and costs on their several mortgages, according to their priorities; and it was ordered, that the residue of the money arising by such sale, if any, should be paid to the defendant Elizabeth Butler, as devisee to the said John Butler.

From this decree, so far as it gave the respondent a priority to the other mortgages, the present appeal was brought; and on behalf of the appellants, it was said (T. Sewell, C. Yorke) to be an established rule in equity, that as between incumbrancers having only equitable securities, that incumbrancer whose security is prior in point of time, shall be preferred in payment to those whose securities are subsequent. *Qui prior est tempore, potior est in jure.* And the reason is, that neither of them having a legal title, there can be no ground for a Court of Equity to take from a prior incumbrancer, in favour of the subsequent incumbrancer, that right which the former was possessed of before the latter became an incumbrancer. In this view, as matters stood at the commencement of the original cause, and when the same first came on to be heard, the appellants were entitled to be paid in preference to the respondent. That though in common and ordinary cases, an incumbrancer who has the legal estate, shall be preferred in payment to one who is only an equitable incumbrancer, and this not only where he originally took the legal security, but also where a subsequent equitable incumbrancer has obtained an assignment of such legal security, and this even so far as to enable him to tack his equitable incumbrance to his legal one, to the prejudice of a former intervening incumbrancer; yet this holds only in cases, where the conscience of the party is not affected by any circumstance of equity, nor his right restrained, qualified, or limited, so as to prevent his gaining such benefit of priority. But in the present case, the defendant Pace, by his answer, had submitted to assign his legal security to the appellants, and that the estate should

*be sold, and all the incumbrancers paid according to their respective priorities;* after which he could not assign his securities to any subsequent incumbrancer: nor could the respondent, who was a party in the [297] cause, and had notice of Pace's submission, take the same with a safe conscience, to the prejudice of the plaintiff in that cause. That the defendant Pace, of whose legal security the respondent would not avail himself, to the prejudice of other incumbrancers whose securities were prior to his own, had the title deeds of the estate delivered to him at the time of making the mortgage, and afterwards delivered the same back to the mortgagor, and thereby enabled him to draw in and deceive subsequent incumbrancers; which was conceived to be a sufficient reason even to postpone Pace himself, though he was the first incumbrancer and had the legal title, to the subsequent innocent incumbrancers: and the respondent's case was very far from being such, as to put him in a better situation than Pace himself was in, at the time of assigning his mortgage to the respondent.

On the other side it was contended (W. de Grey, S. Cox), that it is an established rule in equity, that a third mortgagee having lent his money without knowing of there being a second mortgage upon the same estate, may by paying off the first incumbrancer, and taking an assignment of his interest to himself, hold the estate against the second mortgagee, till he shall be paid what is due to him upon both the mortgages. That it is near a century since this doctrine was, upon long argument and mature deliberation, first settled; and it has prevailed ever since without variation: so that a second mortgagee, when he lends his money upon an equity of redemption, knows (or, what is the same thing in questions of property, must be understood to know) that his security lies open to the hazard of a subsequent incumbrancer's getting into his hands an assignment of the first mortgage, and being thereby postponed: and a subsequent incumbrancer, confiding in the notoriety and certainty of the rule, is induced to buy in the first incumbrance at a new expence. That the principle upon which this doctrine was first established, and has ever since prevailed, is, that the third mortgagee, having innocently lent his money without knowing that the second had any claim upon the estate, has in conscience as good a right to be paid the whole money he has lent, as the second mortgagee has to the payment of what he advanced; and having, by the assignment of the first mortgage, got a right to hold the estate absolutely at law, and having possession of the title deeds, without which the estate cannot be sold, a Court of Conscience ought not to take from him his legal protection of an honest debt. That in the present case, the justice of the rule was strengthened, because the second mortgagee did not make use of the common precaution in transactions of this nature, namely, taking care that the title deeds, which were then in the mortgagor's hands, were deposited with him; and from which neglect two consequences result: 1st, That he confided more in the personal integrity of the mortgagor, than in the real security of the mortgage; and 2d, That he left in the hands of the mortgagor the means of trafficking again with the estate, and of deceiving innocent incumbrancers, who are generally justified in presuming, that he who has the possession of the lands, and the custody of the title deeds, has a right to the estate. This rule of equity looks no further, than to see whether the third mortgagee had notice of the second mortgage, at the time when he first lent his money; for it is then that he becomes an honest creditor, and has a right to protect his debt: but he has no occasion to look for protection, till he thinks himself in danger of being hurt; and therefore, whether his danger is first discovered to him, by the second mortgage being disclosed in a suit in equity, or by any extrajudicial means, as the honesty of his debt is not affected, his right of protecting it, and the efficacy of that protection, by buying in the first incumbrance, are not prejudiced: nor were in this case prejudiced by the respondent's having purchased the first incumbrance, after the first incumbrancer had, in his answer to the appellant's bill, submitted to a sale of the estate, and to an application of the money in discharging the incumbrances according to their just order and priorities: 1st, because the submission, taken in its full extent, could only bind the right of the person submitting, and not that of subsequent incumbrancers; but the right of protection claimed by the third mortgagee, is not claimed or derived from the first, but arises from the personal situation of the third mortgagee, as soon as he gets the legal interest in the estate, and attaches originally in himself: and, 2d, because the submission to a sale would not have that effect, though it had been made by the third mortgagee himself, and much less when made by the

first; for the rights of mortgagees are not altered by turning the mortgaged estate into money, since in such cases, the Court directs the money to be applied, according to the rights of redemption; and if the second mortgagee has not a right to redeem the estate, without paying what is due upon the first and third mortgages, he will of course have no right to partake of the money, till their claims are satisfied. The decree therefore was just, and agreeable to the rules of equity, and ought to be affirmed, with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 30. p. 470.)

[299] CASE 21.—Earl of BELVEDERE,—*Appellant*; WILLIAM ROCHFORD,—*Respondent* [8th May 1772].

[Mew's Dig. vi. 1481. See now the Real Estates Charges Acts 1854 (17 and 18 Vict. c. 113), 1867 (30 and 31 Vict. c. 69), and 1877 (40 and 41 Vict. c. 34).]

Money due upon a mortgage is a debt of the mortgagor, to the payment whereof his personal estate is primarily liable (the land being considered only as a pledge) as between his heir or devisee and his executor; unless some express, or necessarily implied declaration of his, exempts his personal estate, and throws the charge upon the real.

DECREE of the Irish Chancery AFFIRMED. See *ante*, Case 11 of this title, and the note there [5 Bro. P. C. 221].

Peter Hughes, esq. being seised in fee of a denomination of land called the town and lands of Freaghmore, being a part of a sub-denomination of Mill Castle, containing about 578 acres, in the county of Westmeath, in August 1706, mortgaged it for £450 English, to Thomas Proby, in trust for Grace Spencer, redeemable on payment of the principal and interest at £8 per cent. and also gave Proby a bond, in the penalty of £900, with a warrant of attorney for confessing judgment, conditioned for payment of principal and interest.

In the year following, the then Lord Chief Baron Robert Rochford, having agreed with Hughes for the purchase of the mortgaged premises for £900, Hughes by lease and release of the 4th and 5th of July 1707, in consideration of the £900, conveyed the premises to the Chief Baron and his heirs, by the description of "all that and those the town and lands of Freaghmore, and part of Mill Castle, containing by estimation 578 acres, two roods, and 16 perches, profitable land, plantation measure," etc. with a warranty against him and his father and their heirs, and usual covenants for the title; and in that against incumbrances was the following exception, viz. "other than and except one lease by indenture bearing date the 3d day of August 1706, made by the said Peter Hughes unto John Rider, esq. of the premises for the term of 21 years, commencing from the 1st day of May last, etc. and also one mortgage by way of lease and release, dated the 9th and 10th days of August 1706, made of the premises by the said Peter Hughes unto Thomas Proby, esq. her Majesty's surgeon general of Ireland, for the sum of £450 principal money, payable with interest; which said principal money of £450, with the interest thereof from the 10th day of February last past before the date hereof, is to be paid and discharged by the said Robert Rochford, his heirs and assigns, out of the consideration money in this present deed expressed." And on the back of the conveyance was an indorsement signed by Hughes, acknowledging the receipt of the £900, thus, "£450 sterling in money in the perfection of the deed, and £450 allowed on account of the mortgage."

[300] The Chief Baron lived 20 years after this purchase, but never paid off the mortgage. On the 10th of July 1723, he leased the premises to Charles Pollard Hampson, esq. for 41 years, from the 1st of May preceding, at the clear yearly rent of £74 18s. 6d. by the description of "all that and those the town and lands of Freaghmore, and part of the town and lands of Mill Castle, now in the possession of Thomas Rider and Thomas Smith, or their under-tenants, containing, by a survey lately made thereof by Mr. Garrett Hogan, 504 acres and two roods, profitable and unprofitable land, plantation measure, be the same more or less, as the same is more

particularly delineated and described in a map or survey thereof hereunto annexed." And the map was intituled, *A Map of Freaghmore, being part of the lands of Mill Castle.*

The Chief Baron being seised in fee of a very large real estate in Ireland, and possessed of a great personal fortune, and having a wife and a son George, who was married and had several children; by his will, dated the 31st of May 1726, devised to his wife for life, in increase of her jointure, all his lands in the county of Westmeath, (except those of Seyonan, Lissenoyd, and Killnegenahan,) not otherwise settled or disposed of, particularizing them, together with some leasehold interests, and his dwelling house and other houses and buildings in Dublin; and after her decease, he gave all these lands, leasehold interests, and houses to his eldest son and heir apparent, George Rochford, his heirs and assigns, subject to such debts, legacies, and conditions, as he should therein after limit and appoint. The will then proceeded as follows: "Item, I devise to my said dearly beloved wife, all my personal estate, goods and chattels, (except the legacies hereafter named and mentioned,) and also my household goods and furniture, of what kind soever, which I shall leave at the time of my death in my said dwelling house, as also all the furniture and goods belonging to my house at New Park, together with all my coach horses and mares, and cattle of all kind soever, and hay and corn, to be disposed of by her as she shall think fit: I also devise and bequeath to her all my plate and jewels of what kind soever, together with all my ready money and gold which shall be at the time of my death in her or my hands, or in the power, custody, or in trust for either of us, as also all arrears of rent which shall be unpaid and due to me at the time of my death." He then devised two specific mortgages to his wife, in trust for his grand-daughter, Mary Rochford, one of the daughters of his son George. And reciting, that after his wife's death, his son and heir and devisee George Rochford would be possessed of a considerable real estate, which he left to him to dispose of for the benefit of his children, as he should judge proper, he proceeded; "It is my intent and will, and I do hereby devise, that in case my said son George shall die, before he makes any provision for his younger sons, that then and in such case, I do devise to each of my grandsons, Arthur Rochford, George Rochford, and William [301] Rochford, sons of the said George Rochford, and to each of them, one annuity or yearly rent charge of £100 per ann. during each of their natural lives, to be issuing out, and chargeable on my said lands herein devised, and to be due and payable to them respectively, from the death of my said son George Rochford: but if my son George, by any deed executed in his lifetime, or by his last will, makes any provision for them or any of them, my will is, that such younger son or sons, so provided for by him, shall not be entitled to the said annuity of £100 per ann. nor have any benefit by this devise; my intent being only to make some provision for them, in case my said son George should die without making such provision for them as he intends, and this provision for my said grandsons shall only take place after the death of my wife." He then gave several legacies and annuities to particular persons, and went on; "Item, It is my will that the interest of the money I owe to Mrs. Grace Spencer, and which is now chargeable on the lands which Mr. Hampson holds from me in the county of Westmeath, shall be paid to her by my son George Rochford, out of the lands which I leave to him in the county of Meath, and which I have purchased there since my settlement on him; my intent being, that my wife may hold and enjoy the aforesaid lands in the county of Westmeath, to which said Hampson is tenant, free and discharged of the above debt, and of any other incumbrance whatsoever, during her life:" and after a few other legacies and directions, he added, "And as to all the residue and the rest of my goods and chattels and personal estate, *after payment of all my just debts*, and also all my lands, tenements and hereditaments not herein before devised, or otherwise here or heretofore by me settled by this my last will, or by deeds duly executed in my lifetime, and all other lands whatsoever, wherein or whereof I the said Robert Rochford, or any other person or persons whatsoever, am or are seised in trust for me, or whereunto I, or any other person or persons in trust for me, am or are entitled of or for any estate of freehold, inheritance or term of years, either in law or equity, in possession, reversion, remainder, or expectancy. I give, devise and bequeath, unto my said son and heir George Rochford, and unto his heirs and assigns for ever." And he appointed him sole executor of his said will

On the 14th of October 1727, the Chief Baron died, and George Rochfort his son and executor proved his will, taking very valuable interests under it both in land and money.

Hannah the widow became entitled under the will to the lands demised to Hampson, and received the rents during her life; and George the executor, though he did not pay off the principal of the £450 mortgage thereon to Mrs. Spencer, yet considering it in the light his father had done, of a debt due from the father, continued to keep down the interest during the time he survived, which was a few years only.

[302] By deed poll, dated the 23d of December 1729, Hannah the testator's widow, after reciting her marriage settlement, and the addition made thereto by her husband's will, in order to accommodate her son, and out of her great love and affection to him, in consideration of an annuity of £400 secured to be paid to her during her life, released to him her life estate in all the lands and interests mentioned in the settlement and will; wherein her principal motive was to enable him to provide for his younger sons and daughters, in pursuance of her husband's purpose.

On the 5th of April 1740, George the son made his will, with an apparent view to his father's will, and mother's preceding deed poll; whereby, after reciting a part of his own marriage settlement, relative to his daughters portions, he divided the provision thereby made amongst them, and made further additions thereto. And then reciting a power in his marriage settlement, to charge the lands therein comprised with any sum not exceeding £50 per ann. for the support and maintenance of every one of his younger sons after his death, during their lives; he, in execution of such power, charged all those lands with the several yearly sums of £50 a-piece for life, to his three younger sons, Arthur, George, and the respondent: he then devised several specific estates of which he was seised in fee, and *inter alia* the lands of Freaghmore, with all the rents, issues, and profits thereof, to his wife and his mother, and two other trustees, his brother John Rochfort, and Thomas Staunton, in trust, out of the rents and profits to pay to his said three younger sons, until they respectively attained the age of 25 years, for their maintenance respectively, in addition to the aforesaid £50 charged for them, such yearly sums as the trustees should judge proper and convenient for them respectively. But from and after his sons Arthur and George should respectively attain their said age of 25 years, he gave them respectively several specific estates therein mentioned, in fee: "And as for the said lands of Freaghmore, Rathcan and Fann, in the county of Westmeath, etc. (being a fee-farm rent, and a leasehold for years) and all and singular the rents and profits thereof, and all my estate and interest therein, to the use and behoof of my said son William Rochfort, his heirs, executors, administrators and assigns, *according to such estate as I have therein*; from and immediately after his attaining the age of 25 years:" And till his said sons should respectively attain 25, in trust to pay and apply the rents and profits of all the lands so limited to them, over and above what should be paid for their support and maintenance till 25, for the benefit of his said three younger sons, and two of his daughters, in such manner and proportions as the trustees should think fit. And he gave the guardianship of his said younger sons and daughters to his four trustees. And to his eldest son Robert, the appellant, he gave all his real estate not thereby otherwise devised, but chargeable with his three daughters portions, as therein mentioned. And further gave him all the deer in his park, and the *residuum* of all his personal estate, not thereby otherwise disposed of; and [303] appointed him and John Rochfort executors. And by a codicil to his will, the said testator gave some small pecuniary and a few specific legacies.

On the 10th of June 1730, the testator George Rochfort died, leaving his four sons, the appellant the eldest, and the respondent the youngest, and three daughters. The appellant upon his father and mother's death (which followed in less than two years after) succeeded to several large estates of the yearly value, even at that time, of £3800 sterling, as admitted by himself; but all the provision for the respondent, and the rest of the younger children, was confined to the small interests they took under their father and grandfather's wills.

George's will was proved by both the executors, though the appellant acted almost alone, who thereby also became executors of the grandfather, and received large and

valuable assets of both. The respondent, being an infant at his father's death, and for many years after, fell under the care of John Rochfort his uncle, and one of the testamentary guardians appointed by his father.

Notwithstanding George's total silence in his will as to the £450 mortgage on the lands of Freaghmore, which continued at his death under the original lease to Hampson, whereby he would seem the absolute owner of these lands, free from incumbrances; yet it came out after his death, that he too, as well as his father, had neglected paying off the principal of the mortgage, though he duly paid the interest.

Hannah Rochfort, the grandmother, died in June 1732, having during the time she survived her son, kept down the interest of this mortgage, which had been assigned to Dean Percival, and upon his death vested in Kane Percival his son and executor. But after her death, and during the respondent's minority, the appellant, the rich elder brother, refused payment either of interest or principal, and the respondent, though some payments were made by his guardian, being unable to keep down the interest, Kane Percival, in July 1735, brought his bill of foreclosure against both the brothers, which the respondent answered by his guardian, and the appellant, by his answer, not only refused paying the mortgage out of assets, but set up a new pretence, that the lands of Mill Castle (though comprised with and considered to be the same as the lands of Freaghmore, in the original mortgage and purchase deeds, and in the lease and maps annexed to it, and in the wills both of his father and grandfather, and always held by one and the same tenant, and as part thereof) were a distinct estate from the lands of Freaghmore, and not being specifically devised by either of the wills, had descended to him as heir or residuary devisee of his father; and therefore, as far as the value of the lands of Mill Castle, and no farther, he submitted upon that ground to be charged with a proportion of the mortgage. But this pretence, being destitute of all foundation, was not attempted to be supported by the least proof, either in this or the subsequent cause.

[304] On the 23d of May 1739, the mortgagee obtained a decree for an account, which being taken, and the debt liquidated at £731 0s. 10d. besides costs, a final decree was made on the 20th of February 1739, for sale of the mortgaged premises, viz. the lands of Freaghmore, and part of Mill Castle, containing 950 acres, or a sufficient part thereof, in default of payment of that sum, with interest and costs, which were afterwards taxed in December 1740, at £69 1s. 6d. and paid by the respondent's guardian, the respondent not attaining his age of 25 till the year 1745.

The respondent for many years, under all the disadvantages of the most streightened circumstances, and an increasing family, kept struggling to make what payments he could to his humane mortgagee; who, seeing his distresses, and hoping they might one day penetrate his elder brother, after first reducing the interest to £6 per cent. gave him every respite and indulgence for upwards of 15 years; for it was not till the 14th of June 1756, that he brought the estate to sale, when it produced £906 0s. 7½d. which was paid to the mortgagee, who had in the intermediate space from 1740 to 1753, received no less than £485 5s. 9d. interest, besides the costs, by different payments from the respondent and his guardian, as they could raise them, in satisfaction of the principal, interest and costs due on his mortgage. the whole of his receipts from the respondent and his estate to that day, amounting to no less than £1411 6s. 1½d.

As the last effort for preserving this small estate of a younger brother, and whilst there was yet a possibility of doing it, so early as the 24th of January 1749. the respondent exhibited his bill in the Court of Chancery in Ireland, against the appellant, as the executor of his father and grandfather, and against John Rochfort and Kane Percival, stating the original mortgage, and his grandfather's purchase lease and will, with the will of his father, and charging that Robert the grandfather. from the time he made the purchase, always considered the mortgage debt as a debt due from him to Grace Spencer, and that he meant it by the debt mentioned in his will that he owed her, and that George the son duly paid her the interest thereof during his life, in performance of the will, and though he did not pay off the principal, yet he considered it as a trust debt of his father, chargeable on and payable, as it really was, out of the real and personal estate to him devised. That George having made no express provision by his will for discharging the mortgage, but having devised the lands of Freaghmore, to the use of the respondent and his brothers



and sisters till 25, and afterwards to the respondent and his heirs, the executors ought to have paid the mortgage out of George's personal estate, pursuant to both wills; but that the appellant, the executor and residuary legatee of his father, though he had paid the interest to his mother's death, had refused paying it from that time; in consequence whereof, the mortgagee had filed his bill of foreclosure against him and the respondent, and had obtained the decree of 1739, during the respondent's minority, and principally for want [305] of a cross bill being filed against him on the respondent's part, for a satisfaction out of the assets in the appellant's hands. But that the respondent having since attained 25, had been forced by the appellant's refusal to discharge the debt, to apply the accruing rents towards the interest, and was in danger of having the estate exposed to sale. That the appellant pretended, that the widow was the residuary legatee of the whole of Robert's personal estate, whereas the bill charged that Robert, besides other specific and pecuniary legacies therein mentioned, only left her such part of his personal estate, goods and chattels, as he should leave at his death in his dwelling house in Dublin; and by express words, bequeathed all the residue of his goods, chattels and personal estate, after payment of his just debts and legacies, to George; and that George accordingly possessed all his father's personal estate not specifically bequeathed, a considerable part of which remained unadministered at his death, and came to the appellant's hands. And as to the appellant's pretence of being entitled to the part of Mill Castle, as heir to his father, the bill charged, that Hampson's lease was subsisting at George's death and long afterwards, and an entire gross rent, and not an acreable rent, was reserved thereon, and that George intended to devise to the respondent, the entire rent and reversion of the lands demised to Hampson, after he attained 25. The bill therefore prayed a discovery of the assets of Robert the grandfather and George the father; that the lands of Freaghmore might be exonerated from the mortgage money, out of their or one of their personal estates, together with the sums and interest thereon, which had been then already paid by the respondent; and in case their personal estates should not be sufficient, then out of the real estate devised by Robert the grandfather to his widow for life.

The appellant by his answer said, he believed George did not pay off the £450, but not that he considered it as a just debt of his father's, otherwise than as a charge on the lands, and not to be paid out of his personal estate. Said, *he did not know or believe, that any part of Robert the grandfather's personal estate came to his hands*; and denied, that George's personal estate, which came to his hands, was of the value of £40,000 or any such value, after payment of his debts and legacies, but on the contrary believed it was not sufficient to pay them. Admitted he had only paid the interest to the widow's death, and had refused to pay the principal £450 or any interest thereon from her death, except in such proportion as the value of that part of the mortgaged lands which descended to him as heir of his grandfather and father, bore to such part thereof as were devised to the respondent, and insisted he was not liable to pay more. Admitted he had paid no part of the principal, interest and costs, decreed to Percival; and believed he might have threatened to proceed to sell the lands, and that the respondent had applied to him as in the bill, but that he had refused to comply therewith; *and he insisted that no part of Robert his grandfather's assets had come to his hands*; and that no part of [306] his or George's assets remained in his hands unapplied. Said, he was willing to account for a proportionable part of the mortgage money, the respondent at the same time accounting with him for the rents of the lands of Mill Castle descended to him.

The respondent having in 1750 amended his bill for the purpose of obtaining some further discovery of his grandfather and father's assets, the appellant, on the 15th of May 1751, put in an answer thereto, which being insufficient, he on the 18th of November following put in a further answer, wherein he gave some account, though very imperfect, of George's personal estate; and admitted, that George was seised at his death of a real estate of the yearly value of £3800, and that there were some arrears of rent due to George at his death, part of which the appellant had received.

The appellant (not content with insisting upon privilege throughout the cause, so as to occasion an application to Parliament, to compel him to waive it) on the 5th of February 1752, filed a cross bill against the respondent and the mortgagee and

lessee, and against John Rochford, charging that the mortgage never was the proper debt either of Robert or George, and that no part of Robert's personal estate remained undisposed of by his will, nor had any part thereof, except some specific legacies bequeathed to George, come to his hands, and that George's personal estate was insufficient to pay his debts and legacies, and that Freaghmore and Mill Castle were separate denominations; and praying an account against the mortgagee, and that on payment of principal, interest and costs, he might convey to the appellant that part of the mortgaged premises known by the name of Mill Castle; and that the respondent might pay a proportionable part of what should appear due to the mortgagee, with an account of rents against the tenants, and an injunction against their paying any more till the hearing.

The respondent answered this bill, insisting upon his right under George's will to the denomination called Freaghmore, being part and a sub-denomination of Mill Castle, and not a separate and distinct one, in the same manner as they were devised by Robert to Hampson, and that the whole passed to him by the devise in George's will. That not only the original principal and interest on the mortgage, but also the accumulated interest thereon by the decree, together with the interest since paid by him, and the costs, ought to be paid by the appellant out of the Meath estate, or out of the residue of the real and personal estate of Robert and George; and that Robert by his will, not only entirely discharged the mortgaged premises from that debt and interest, but thereby declared it to be his proper debt, and charged it on the Meath estate, and that he having covenanted with Hughes to discharge it, and to indemnify him therefrom, it affected him and George, as his heir, executor and residuary legatee; and said he believed, that much more of Robert's personal estate than sufficient to discharge the same, remained undisposed of by his will, and had since come to the appellant's hands.

[307] The appellant having attained all he wanted by this bill, which was delay, never prosecuted it farther.

Issue was joined in the original cause, but no witnesses were examined on either side, there having been a consent to read the several deeds and wills.

The original cause was heard by the Lord Chancellor Jocelyn, in November 1753, and on the 30th of May 1754, his Lordship referred it to a Master, to take an account of the personal assets of the grandfather Robert Rochford, into whose hands the same came, and how disposed of, together with an account of his debts and legacies; and also an account of the personal assets and effects of George Rochford the father, into whose hands the same came, and how disposed of, together with an account of his debts and legacies; and reserved the consideration of further directions.

The Master, by his report of the 19th of November 1766, certified, that Robert Rochford died possessed of assets which came to the hands of the appellant, as executor of George, the sole executor of Robert, to the amount of £4421, besides four dozen of silver plates; and that no debt or legacy of Robert's had been paid by the appellant. That Robert owed the debt, (viz. the £450 to Grace Spencer,) and bequeathed the several legacies in the second schedule to the report mentioned; and he did not find that any debt of Robert had been satisfied out of his assets, but (it being so admitted by the respondent) that his pecuniary legacies were satisfied by his son, heir and sole executor, George, amounting to £476. That the several sums set forth in the third schedule, had been paid at the times and in the manner therein mentioned, by the respondent, and had been raised out of his estate in satisfaction of principal, interest and costs of the debt due by Robert at his death to Grace Spencer, the right to which debt afterwards vested in Kane Percival, as heir and executor of his father William Percival, amounting to £1411 6s. 1½d. He also found, that George died possessed of assets, which came to the appellant's hands, and part of which the appellant had admitted, to the amount of £699 2s. over and besides the rents and arrears in the tenant's hands of George's estate, the whole annual income of which amounted to £3800, but that the appellant, though required by the bill and personal interrogatories, had not set forth the particulars or amount of the sums received by him of such rent and arrears, alledging he had kept no books, accounts or entries thereof; and also over and above the several parcels of plate and other particulars, admitted to have come to his hands, the value whereof he had not set forth, though required as aforesaid, and which the Master could not therefore ascertain. That

George owed the several debts, and bequeathed the several legacies in the report mentioned, amounting to £9873 5s. all which the Master found had been paid by the appellant: but in regard the appellant had not discovered the *quantum* of the rents and arrears due to George at his death, and how much thereof was received by him, and the value of the several articles of plate, and of great part of the fur-[308]-niture, stock and effects of George, which came to his hands; the Master could not set forth, whether the assets of George did or did not exceed the debts and legacies of George, paid by the appellant, or whether any part, or how much, of the said assets of George, remained unapplied in the appellant's hands.

The first schedule to this report, containing an account of the assets of Robert the grandfather, which came to the appellant's hands, as acting executor of his father George, the sole executor of Robert, which constituted the £4421, had the following charge, viz. "To a leasehold interest in a house, offices and grounds, with the appurtenances, on Ormond Quay, held by the said Robert Rochfort, by virtue of a lease from Sir William Temple for 99 years, commencing 25th March 1681, subject to a rent of £13 yearly, and enjoyed by the defendant from the death of Hannah Rochfort his grandmother, which happened in June 1732, and was worth, to set to a solvent tenant, £100 yearly; so that the defendant is chargeable with a clear yearly profit rent of £87 yearly, for the said house, offices and ground, from June 1732, to June 1765, being 33 years, and amounting to £2871." In the second part of this schedule, containing an account of the debts due by Robert, and his legacies, was the following article: "To a debt due to Grace Spencer, by Robert Rochfort at his death, being the mortgage debt in the pleadings mentioned to affect the lands of Freaghmore, and part of Mill Castle, in the county of Westmeath, principal money, £450, which sum, with interest, from the death of Hannah Rochfort, and costs, was paid as after-mentioned." And in the third part of the same schedule, containing an account of the several sums paid by the respondent and his guardian, during his minority, or levied out of his estate to satisfy the principal, interest and costs, the Master thus stated the account, viz. "To principal and interest, liquidated and decreed to be due to Kane Percival, on the foot of the mortgage, on the 20th day of February 1739, £660 15s. 7½d. besides costs. To costs taxed pursuant to the decree, and paid by the guardian, £69 1s. 6d." And then stated the several yearly payments made by the appellant for interest, which was regularly charged to 20th November 1745, and further payments on account in 1748, and the succeeding years to 1753, together £436 4s. And then proceeded; "1756, June 14th, to a sum raised by sale of plaintiff's estate in the mortgaged premises, and paid in satisfaction of the principal, interest, and past costs, due to Kane Percival, and that day paid to him, £906 0½d. Total payments, £1411 6s. 1½d."

After eight months deliberation, the appellant, on the 7th of July 1767, took three exceptions to the report. I. That the Master had charged him with the leasehold interest on Ormond Quay, at the clear yearly profit rent of £87, from the death of Hannah Rochfort, till June 1765, amounting to £2871, whereas it was at her death only worth to be sold £800, and would not produce a greater yearly rent from a solvent tenant from that time, [309] than £40; and the appellant in 1761 sold the house, with several valuable chimney pieces and locks, his own property, for £800, which was the greatest price he could get; and yet the Master had charged him with £2871, instead of the £800. II. That the Master had reported, that there was a debt due by Robert Rochfort, at his death, of £450 to Grace Spencer, which he should not have done, as that was the matter in question between the parties for the judgment of the Court, and he had no sufficient proofs to warrant the same. III. That it appeared in the progress of the accounts, that Robert devised to his wife all his personal estate, goods and chattels, except a few specific legacies in his will, and also his household goods and furniture in his dwelling house on Ormond Quay, and at New Park, and all his coach horses, mares, and cattle of all kinds, hay, corn, and all his plate and jewels, with his ready money and gold, and all arrears of rent, to the value of £20,000, and that the same, upon her death, came to the hands of John Rochfort, as her sole executor; and yet the Master had taken no notice thereof, though the decree directed an account to be taken of all the assets of Robert Rochfort, into whose hands they came, and how disposed of.

The cause was heard on the report, exceptions and merits, on the 21st, 24th, 25th

and 28th of April 1769, by the Lord Chancellor Lifford; when his Lordship overruled the first and third exceptions, reserved the consideration of the second to the hearing on the merits, and took time to consider of his final judgment, till the 29th of January 1770, when his Lordship declared, that the mortgage on the lands of Freaghmore, at the time of the death of Robert Rochfort the grandfather, was and ought to be considered as a debt of the said Robert, and that his personal estate, which came to the hands of George, his son and executor, and since to the appellant's hands, was liable to the payment thereof; and that the respondent was entitled to be satisfied and repaid out of the personal estate of Robert, reported to have come to, and to be remaining in the appellant's hands unapplied, all such sums of money as he had been obliged to pay, or had been raised by sale of his estate, in satisfaction of the principal, interest and costs, recovered in respect of the said mortgage of Freaghmore, together with interest for the same, from the respective times of payment thereof, and he decreed the same accordingly. And his Lordship further declared, that the respondent ought to have his costs of that suit against the appellant, and that John Rochfort must have his costs against the respondent, who should have the same over against the appellant; and decreed the same accordingly. And referred it to the Master, to enquire and report what had been paid by the respondent, or recovered against him for the principal money, interest and costs, in respect of the said mortgage of the said lands of Freaghmore, devised to the respondent; and to compute the interest of the said several sums so paid or recovered, from the times of the payment thereof respectively; and that the amount of such principal, interest and costs, so paid and recovered, together with [310] interest for the same respectively, should be paid and satisfied to the respondent by the appellant, out of the assets of Robert Rochfort the grandfather, reported to be in his hands; and that the Master should tax the respondent his costs of that suit, as also the costs of John Rochfort, to be paid by the respondent to him; and that the respondent, when his costs were so taxed, should be paid the same by the appellant, together with, the costs to be paid by him to John Rochfort.

From this decree the appellant appealed, insisting (A. Wedderburn, J. Dunning, J. Morgan), that this was not the case of an ancestor making a mortgage, whereby the personal estate is benefited, but the reverse; being the case of a purchaser of an equity of redemption, whereby the personal estate was diminished; and the respondent had the benefit of the purchase. That this was not a debt of the Chief Baron's, there being no consideration moving from the lender to him; and to subject him to the payment, would be giving the mortgagee an additional security not contracted for. And as to intention, there was not the least evidence that he ever intended an exoneration; for he even directed the payment of the interest out of another estate, during the life of his widow. But admitting the mortgage money to have been a debt of the Lord Chief Baron Rochfort, and even supposing that he had expressly directed that debt to be discharged out of his personal estate; it was difficult to conceive how that point could at all affect the question between the appellant and respondent; for they both claimed under George Rochfort, to whom the Chief Baron devised the mortgaged estate, appointing him executor and residuary legatee. George, being the owner of both funds, could not by any possible means be obliged to apply the one in exoneration of the other; and the respondent, who was only a specific devisee under George's will, of an estate which it was supposed George ought to have disincumbered, could have no claim against the representative of George, except what he derived from his will; and had no right therefore to insist, that George was bound to apply the personal estate of his testator in discharge of an incumbrance on his real estate. That the original order in 1754, improperly directed an account of the assets of Robert Rochfort; the question however remaining undecided, no prejudice, besides the trouble and expence of an unnecessary account, was done to the appellant; but that order had served to mislead the Chancellor in the final decree, which supposed the respondent to have a right to insist on the application of the assets of his grandfather, to discharge a mortgage upon an estate which he did not claim under the will of the grandfather, but under the will of his father, who was absolute owner both of the real and personal assets of the grandfather. And that the order over-ruling the first exception to the Master's report was erroneous, because the appellant ought not to have been charged with the rent of a house, which, though

it originally belonged to the Chief Baron, came to the appellant as part of his father's assets; but the Master ought to have set a value upon the house, and charged [311] the appellant with that value as a gross sum carrying interest; besides, the house in fact sold for a sum much inferior to the supposed rent set upon it.

On the other side it was argued (E. Thurlow, A. Forrester), that a mortgage is a debt of the mortgagor, to the payment whereof his personal estate is primarily liable (the land being considered only as a pledge) as between his heir or devisee and executor, unless some express or necessarily implied declaration of his, exempts his personal estate, and throws the charge upon the real. Here the transaction with Hughes in 1706, was upon the face of it a contract for the purchase, not of an equity of redemption, but of the land itself, for £900, which was then mortgaged for £450. The plain intent was to put the purchaser Robert Rochford, in the place of the vendor Hughes, who was to be no longer liable; and that he might not be so, a sufficient part of the purchase money was left in the purchaser's hands, for satisfaction of the mortgage; the purchaser thereby taking upon him the vendor's bond and covenant for payment of the mortgage, as fully as if he had himself covenanted to pay it off; and either the vendor or mortgagee might, upon that contract, have compelled him to pay it. That the purchase deed was express to this purpose, the words being, "which said principal money of £450 with the interest thereof from the 10th day of February last, is to be paid and discharged by the said Robert Rochford, out of the consideration money in this deed expressed:" and the receipt on the back of the conveyance was correspondent thereto. Thus Robert Rochford's personal estate became the primary debtor, and applicable to the completing of the purchase, by paying off the mortgage debt in ease of the land thus mortgaged. Nor did the mortgagee's ultimate resort to the land for satisfaction, make any difference; he being at full liberty to call upon the real or personal representatives of the mortgagor, for such satisfaction. That so far from any express or implied declaration of Robert Rochford's, for exempting his personal estate from the payment of this or any other of his debts, he by his will made his son George sole executor and residuary legatee of his goods, chattels, and personal estate, *after payment of all his just debts and legacies*; or, in other words, *subject thereto*. The bequest to his wife was of specific personalties only, neither mentioning bond debts or leases; and not of that residue so subject to the payment of his debts, and found by the report to have come to and remained in the hands of George unapplied, more than sufficient to pay off this mortgage debt. And to what purpose were the different accounts of Robert's and George's personal estates directed by Lord Locelyn's decree in 1754, and afterwards taken without objection on the appellant's part, and that order acquiesced under to this hour, if the respondent was to be ultimately entitled to no satisfaction against either? That it makes no kind of difference, whether the exoneration be sought by the immediate heir or devisee, or by the devisee of such heir or devisee, the *hæres factus*, or even a partial heir, being entitled to have the personalty [312] applied in case of the realty. But if it did, the particular circumstances of the present case put the respondent's right beyond all doubt. For, first, the mortgage was a debt of Robert Rochford's, whose personal estate was liable hereto at his death; and a sufficient part of that personal estate remaining specifically at this very time, was therefore applicable to the payment of the mortgage; and George, by the express words of his father Robert's will, could take no part thereof himself, till after the debts were paid. And, 2dly, the appellant, as the executor of an executor, was representative of the first testator, and his father taking the grandfather's residuary personalty only as subject to debts, the appellant could take it no otherwise, it being still in him as representative of his grandfather. That the father George's intent was not less clear than the grandfather Robert's: he in his will, included these lands with other fee simple estates, giving the rents and profits of the whole to trustees for the maintenance of his younger sons, without any reserve for payment of the interest of this mortgage, which he must therefore intend to be paid out of his personal estate, as he could not expect that the mortgagee would wait 15 years, till the respondent should attain 25; and by allotting these mortgaged premises to the respondent as part of his provision, he must intend it to be as full and effectual as that made for his other younger sons, which was of lands free from imbrances; for otherwise the mortgage must, as in fact it since had, have totally swallowed it up. He was answering a debt of nature, and carrying into execution

his own father's intent, who had anxiously recommended to him the providing for his younger children (the mortgaged lands being part of the fund devised for that purpose) with a temporary bounty from himself in the mean time. So that however the respondent might stand nominally the devisee of his father, he was virtually such from his grandfather; the father's devise being in pursuance of the confidence placed in him by the grandfather, and so well seconded by the grandmother, in giving him up the whole provision made for her, in consideration of an annuity only, to enable him to make provision for his younger children.

As to the first and third exceptions, the determination upon the merits made at the end of them; for the appellant at all events stood charged with £4421, and four dozen of silver plates, or 700 ounces, as personal estate of his grandfather remaining unapplied, and over and above the specific bequests to his wife; a fund amply sufficient for the respondent's demands, without going further into the personalty or resorting to the real estate, of which the appellant was likewise the devisee.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (MS. Jour. sub anno 1772, p. 675.)

[313] CASE 22.—LORD MILTON,—*Appellant*; MOORE EDGWORTH and others,—*Respondents* [3d February 1773].

[Mew's Dig. ix. 1437, 1476. See *Gregory v. Pilkington*, 1856, 8 De G. M. and G. 616.]

- A. lends money upon a mortgage at a certain rate of interest, and afterwards by parol, agrees to reduce the rate of interest; this agreement, though not in writing, is binding. But the fact ought to be tried by a jury, upon a proper issue.

ORDER of the Irish Exchequer AFFIRMED.

See Case 12 of this title, and the note there [5 Bro. P. C. 233].

Robert Edgworth and Catherine his wife being seised in fee of the manor of Longwood, and several other manors and lands in Ireland, in April 1703, mortgaged the same to John Percival esq. for securing £2600 with interest at the rate of £8 per cent.

John Percival by indentures of lease and release, dated the 30th of April and 1st of May 1706, assigned and conveyed the said mortgaged premises, and all his estate and interest therein, to Joseph Damer gent. in consideration of £2700 in full of principal and interest, due on the said mortgage of April 1703; to hold to the said Joseph Damer and his heirs, subject to redemption nevertheless by the said Robert Edgworth and Catherine his wife, upon payment to the said Joseph Damer of £2700 with interest at £8 per cent.

Joseph Damer afterwards advanced to Robert Edgworth the further sum of £300 and for securing the same, by an indorsement, dated the 20th of November 1706, Edgworth charged the mortgaged premises with the payment thereof, with interest at the rate of £8 per cent.

Catherine Edgworth died in 1707, and in 1711 Robert Edgworth and Joseph Damer came to an account, and the sum of £2300 appeared to remain due on the 1st of November 1711 to Damer, on the foot of all the said incumbrances; upon which day he advanced to Edgworth the further sum of £2000 and in consideration thereof, and of the £2300 so due, Edgworth, by indentures of lease and release, dated the 31st of October and 1st of November 1711, released and conveyed to Joseph Damer and his heirs, all the manors, lands and premises comprised in the original mortgage of April 1703; as also several towns, lands and premises in the several counties of Westmeath and Longford, to hold the same to Joseph Damer, his heirs and assigns, subject to redemption, on payment by Edgworth or his heirs of £4300 with interest at £8 per cent.

Joseph Damer afterwards from time to time, till the year 1718, advanced and lent to the said Robert Edgworth, divers other sums of money, amounting to £2552 6s. and which were secured and charged upon the manors, lands and premises so mortgaged to Damer.

[314] In 1720, Joseph Damer died, having by his will devised all his real and personal estate to his nephew John Damer, and appointed him and Joseph Damer, since deceased, his executors: and the said John Damer duly obtained a probate of his will.

Robert Edgworth had issue by Catherine his wife, Edward his eldest son and heir at law, and Packington his second son, and other children.

The said Edward Edgworth having, in the lifetime of his father, set up a title to the reversion of the said manor and estates, under articles alleged to have been made previous to the intermarriage of Robert Edgworth and Catherine his wife, dated the 5th of July 1692, and under a settlement pretended to have been made in pursuance hereof, dated the 25th of December 1703, the said Robert Edgworth filed his bill in the Court of Exchequer in Ireland against the said Edward his son, to have these articles and settlement set aside and lacerated as forged; but before the cause came on to a hearing, Robert Edgworth died on the 8th of July 1730, having first made his will, dated the 10th of September 1729, whereby he bequeathed to his said son Edward the sum of 5s. and to Robert the son of the said Edward, the like sum of 5s. and declared, "that he did so, with intent to prevent their hopes of getting a penny more out of his real or personal estates." The testator then devised and bequeathed to his son Packington Edgworth and his heirs, executors and administrators, all and singular his real and personal estates in the counties of Meath, Westmeath, Kildare and Longford, and elsewhere in Ireland.

But the said Edward Edgworth having by undue means got into possession of part of his father's real estate, under colour of the said pretended articles and settlement, and of other deeds alleged to have been executed by the said Robert Edgworth, dated the 30th of June and 1st of July 1730; Packington Edgworth, on the 28th of August 1730, exhibited his bill in the said Court of Exchequer, against Edward and Mary his wife, Robert his son, and the said John and Joseph Damer, the heir and executors of Joseph Damer deceased, praying to be decreed the possession of the said estate of Robert Edgworth, under his said will, and to have an account taken against the said John Damer, on the foot of the said mortgages.

After various proceedings, this cause came on to be heard upon the 22d of November 1735, when it was ordered and decreed, that the following issues should be tried by a jury of the county of Westmeath, viz. whether the said articles, dated the 5th of July 1692, were perfected by the said Robert Edgworth, or not? And whether the said settlement, dated the 25th of December 1703 was perfected by the said Robert Edgworth or not? And whether the said deeds of the 30th of June and 1st of July 1730, were perfected by the said Robert Edgworth, or not? And whether the said Robert Edgworth was of sound mind at the time of the execution of the said deeds of the 30th of June and 1st of July 1730? And whether an indorsement on the said deed of settlement of the 25th of December 1703, to which the name of Joseph Damer was alleged to be subscribed, was perfected by the said Joseph Damer, or not? On the 27th of January following it was ordered, that these issues should be tried at the bar of the said Court of Exchequer, by a special jury of the county of Meath; and on the 8th of June 1739, another order was made, That the issues as to the articles of the 5th of July 1692, and settlement of the 25th of December 1703, and the indorsement thereon, should be tried in one record, and that the other issues should be tried by another record.

Accordingly, on the 3d of July 1739, the issues as to the articles, settlement and indorsement, were tried at the bar of the said Court; and the jury found, that the said articles, and the settlement of the 25th of December 1703, were not perfected by the said Robert Edgworth; and that the said indorsement was not perfected by the said Joseph Damer. The other issues were tried on the 16th of November following, when the jury found that the said deeds of the 30th of June and 1st of July 1730, were perfected by Robert Edgworth, but that he was not of sound mind at the time of the execution thereof. These verdicts were afterwards confirmed by order of the Court; and upon a further hearing, on the 11th of February 1739, it was decreed, that it should be referred to the Chief Remembrancer of the Court, or his deputy, to state an account between the said Packington Edgworth and the said John Damer, of what was due to him for principal, interest and costs, on the foot of the said securities; and that injunctions should issue to put the said Packington Edgworth into possession

of the lands and towns therein mentioned, and of the said mortgaged lands, subject to the said John Damer's mortgages and securities; and a perpetual injunction was awarded against the said articles of the 5th of July 1692, the settlement of the 25th of December 1703, and the deeds of the 30th of June and 1st of July 1730, and against the said Edward Edgorth and Mary his wife, and Robert Edgorth his son, and all persons claiming under them.

Packington Edgorth was accordingly put into possession of the said premises and continued to hold the same till his death, which happened in July 1758, leaving issue the respondents, his only children, who were both infants, and were under their father's will entitled to the equity of redemption of the said mortgaged premises and the respondent John Magill was the surviving executor of that will.

John Damer afterwards, by deed, dated the 17th of April 1764, conveyed to the appellant, who was his heir apparent, and his heirs, the said mortgaged premises and all the securities so perfected thereof by the said Robert Edgorth to the said Joseph Damer, and all money due thereon; whereby the appellant became entitled to all money due on the said securities, amounting to £30,000 and upwards: and in June 1764, he filed his bill in the Court of Exchequer in Ireland against the respondents, stating the several matters aforesaid, and praying to have the benefit of all [316] the proceedings and proofs taken in the before mentioned cause, and that an account might be taken on the foot of the several mortgages and securities, between the appellant and such of the defendants as should appear to have any interest in the said mortgaged premises under Packington Edgorth, pursuant to the said decree: and that the money which should appear due thereon might be paid to the appellant by a short day, or that the defendants might be foreclosed of all equity of redemption; and that the mortgaged premises might be sold for payment of what should appear due, and that a receiver might be appointed to receive the rents thereof in the mean time.

The respondents by their answer to this bill, admitted most of the matters therein stated, but insisted upon the benefit of an agreement, which they alleged had been made by the said John Damer and the said Packington Edgorth, for reducing the interest upon the said several mortgages to £6 per cent.

Issue being joined in the cause, several witnesses were examined, and the same came on to be heard upon the 20th, 21st, and 25th of November 1771; when upon reading an answer put in by the said John Damer, on the 8th of May 1758, to a bill filed against him in the said Court, by the said Packington Edgorth in the year 1757, whereby the said John Damer admitted, that pending the suit between the said Packington Edgorth and the said Edward Edgorth and others, the said Packington Edgorth had told the said John Damer, "That the debts affecting the estates of the said Robert Edgorth were so great, that if the said John Damer did not make an abatement in the interest of the money due to him, he would have little benefit in case he succeeded in the said suit, from it." And that the said John Damer then said, "That if that should be the case, he would leave any reasonable abatement to his friend Ambrose Harding." And upon reading the deposition of the said Ambrose Harding, whereby it appeared, that such conversation had passed between the said Packington Edgorth, the said John Damer and Ambrose Harding; and that the said Ambrose Harding understood, that the said John Damer had agreed to accept of £6 per cent. interest upon the money so due to him on the said securities; and also upon reading evidence, whereby it was fully proved on the part of the respondents, that the personal appearance of the said Packington Edgorth, was of great consequence and advantage in the said cause against the said Edward Edgorth, and others, to the said John Damer, and that the expence thereof, amounting to £4000 and upwards, had been defrayed by the said John Damer, and the suit wholly managed and transacted by him or his order; the Court made an order, directing the following issue to be tried at the next assizes for the county of Clonmell, viz. "Whether there was any and what agreement between John Damer esq. deceased, and Packington Edgorth, deceased, at any and at what time, for any and what abatement of interest, on the principal sums due to the said John Damer?"

[317] From this order Lord Milton thought proper to appeal, and on his behalf it was contended (A. Wedderburn, J. Madocks), that the decree of February 1739, directed an account to be taken on the foot of the several mortgages and securities.



and the rate of interest reserved upon those mortgages and securities was £8 per cent. so that the rate of interest could not be varied, without reversing so much of the decree as directed an account to be taken upon the foot of it, i.e. according to the mortgages and securities. That the present order directing an issue to be tried respecting the rate of interest, was nugatory, if the Court could not vary the rate of interest; and that could not be done without reversing a decree, which had been many years enrolled, and could not now be reversed even upon an appeal, because no appeal could now be brought. The order was also manifestly irregular; for the bill being brought for the sole purpose of having the benefit of the decree of 1739, the Court could not regularly make any other order, than either to dismiss the bill, or decree according to the prayer of it. But if any such agreement as was made the subject of the present issue ever existed, it was supposed by Harding's evidence, to have been made before the trial at bar, viz. before the decree of 1739; and therefore Packington Edgworth ought to have insisted on it by a cross bill, before the cause was heard again upon the equity reserved, after those trials; it was too late to do it afterwards, otherwise than by a bill of review. But no bill of review could have been brought, because Packington was stated by the evidence to have known the fact of the supposed agreement, before the decree of 1739 was made; and could not therefore have supported a petition for a bill of review, by an affidavit that the fact came to his knowledge after the decree was pronounced. But in truth the respondents, or Packington Edgworth himself, never could in any stage of the cause make out such an agreement; nor was the evidence now offered of sufficient weight, even to merit an enquiry by a jury. The only colour of evidence lay in the deposition of Ambrose Harding, who spoke of a conversation at which no other person was present but himself and Mr. Damer, and Packington Edgworth; and deposed, that Mr. Damer said, he would leave it to Harding, whether he should abate £2 per cent.; that Harding said, "Do not leave it to me, for if you do, I shall give it against you;" and that Mr. Damer replied, "If you do, I cannot help it." This conversation by no means proved an actual agreement to abate £2 per cent. or even an absolute agreement to be bound by the decision of Ambrose Harding, or any decision by him of the matter; for the whole referred to something to be done in future by the parties, and it was not pretended that any such reference or decision was afterwards made. Besides, Packington's total silence upon this head, both before the decree of 1739, and after till 1757, and standing by and hearing that decree pronounced, wholly inconsistent with such an agreement, was a demonstration that he did not understand the conversation to import an agreement, and that no further treaty was had between the parties, [318] from which any such agreement could be inferred: the Court therefore, at the last hearing, ought to have decided upon Harding's evidence, he being dead, and not have sent it to a jury. That considering the state of the evidence before the Court, it was unjust to direct an issue; because the answer of Mr. Damer, which was read by the respondents at the hearing, denied any agreement between him and Packington Edgworth, to reduce the rate of interest; and this denial being set in opposition to any conclusion drawn from Harding's evidence, took away all ground for the Court's interposing. Whereas, by directing an issue, upon the trial of which Mr. Damer's answer could not be read for the appellant, he would be deprived of that evidence, which the respondents had made evidence at the hearing of the cause.

On the other side it was said (E. Thurlow, J. Skynner, J. Lloyd), that the objection made by the appellant at the hearing of this cause, to the order directing an issue, was, that a parol agreement contrary to the express terms of the agreement contained in the several mortgage deeds, could not, even if it was found by the jury upon the trial of the issue, be admitted in evidence. The rule that a parol agreement ought not to be admitted to contradict the terms of an agreement contained in a deed, or any other agreement in writing, is admitted to be generally true; but then it is likewise true, that a written agreement may be waived in part, or in the whole, or be varied in the terms of it, by a subsequent parol agreement, and which was the case now in question; a new subsequent agreement having been made between the parties, for reducing the interest of the mortgage money, upon a new and good consideration, which did not exist at the time of the execution of any of the mortgage deeds; and the subject matter of the agreement not requiring that it should be in writing. It might be objected by the appellant, that the conversation alledged to have passed between John Damer and Packington Edgworth, relative to the reduction of interest,

did not in point of fact, supposing the same to be proved by the respondents, amount to a binding agreement on the part of Mr. Damer, for reducing the interest to £6 per cent. But it was said, that even if any such doubt had been entertained by the Court of Exchequer in Ireland, yet they could not have made any other order, than that which had been pronounced. They were of opinion, that such an agreement, if really made, would in point of law, be binding between the parties. It was therefore agreeable to justice, and to the practice of all Courts of Equity, that the existence of such an agreement being a question of fact, and in dispute between the parties, should be the subject of a further enquiry, and be tried and ascertained by a jury. That it would be a very great hardship upon the respondents, should they be precluded from establishing this agreement; and if the appellant should be permitted to receive interest upon his securities, at the rate of £8 per cent. down to the present time: when there could be no doubt, but that if Packington Edgworth had not firmly believed and fully relied on such an agreement, he [319] might without the least difficulty, at any time from the year 1739, have borrowed money at £6 per cent. or less, upon the security of the estates mortgaged to John Damer, and have paid him off, and taken an assignment of his securities.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of, should be affirmed, with this addition; viz. "That the appellant be at liberty, at such trial, to read the answer of John Damer esq. filed the 8th day of May 1758, to the bill filed by Packington Edgworth, in the said Court of Exchequer in Ireland, the 23d day of August 1757." (MS. Jour. *sub anno* 1772-3. p. 177.)

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CASE 23.—JAMES Earl of CLANBRASSILL,—*Appellant*; ROBERT TAYLOR,—*Respondent* [19th February 1781].

[Mew's Dig. xii. 28.]

'By an act of the Irish Parliament of the year 1772, a mortgagee, when three half-years' interest are in arrear, may by a summary application get a receiver appointed of the estate in mortgage, in order to satisfy and keep down the arrears and growing payments of the interest.—An application of this kind was made by the respondent to the Court of Chancery in Ireland, and though the appellant held the office of Chief Remembrancer of the Court of Exchequer in that kingdom, yet he was not permitted to plead any privilege of office against such an application.

ORDERS of the Irish Court of Chancery AFFIRMED.

In 1771, upon an application to the respondent, he agreed to advance the appellant £40,000 for the purpose of paying several incumbrances on his estate, upon the appellant making a mortgage to the respondent of the estates after mentioned, for securing the re-payment thereof; and the £40,000 being accordingly advanced, the respondent by deeds of lease and release, bearing date respectively the 24th and 25th of December 1771, delivers castles, manors, towns, lands, tenements, and hereditaments in the county of Lowth in Ireland, which were conveyed in mortgage by the appellant to the respondent and his heirs for ever, subject to a proviso or condition of redemption on payment by the appellant, at the days and times in the said indenture of release mentioned, of such sum or sums of money as therein mentioned; and by a covenant in the said deed, the appellant agreed, that, in case one year's interest was at any time due, the respondent should be at liberty to appoint a receiver of the rents and profits of the mortgaged premises for the payment of the said interest.

In 1772, an act of parliament passed in Ireland, intitled, "An act for rendering securities by mortgage more effectual;" which recites, "That by default of the punctual payment of the interest payable upon mortgages, and on account of the great delays [320] in bills of foreclosure, securities by mortgage were fallen into dispute;" for remedy whereof, it was thereby enacted, "That from and after the first day of December 1772, in all cases where one year and an half's interest should be

due, a Court of Equity, upon application in manner thereafter mentioned, should appoint a receiver to receive such part of the rents of the mortgaged premises as should be sufficient to pay such arrear of interest, and also the accruing interest of the said mortgage money, from time to time, one half year when the other should become due, until the whole of such interest due on the said mortgage should be discharged, and no longer, together with such fees or salary as should be appointed by the said Court for such receiver; as also the necessary costs out of pocket of such application; and that out of the sums so received, such interest, salary, and costs should be ordered to be paid." And it was thereby further enacted, "That such order should be made upon petition and affidavit, after reasonable time given to shew cause, and whether any bill was or was not filed relative to the said mortgage."

The appellant paid the interest of the mortgage up to the 25th of June in the year 1778, when he having declined to continue such payments, an arrear of interest incurred, and on the 25th of December 1779, there was due to the respondent three half years' interest of the said principal sum of £40,000, amounting, at the legal interest in Ireland of £6 per cent. per ann. to the sum of £3600; in consequence of which, the respondent, on the 15th of January 1780, presented a petition to the Lord Chancellor of Ireland, grounded upon an affidavit of there being three half years' interest due on said 25th of December 1779, and praying that a receiver should be appointed pursuant to the aforesaid statute; and accordingly, by an order of the said Court, bearing date the said 15th of January 1780, it was ordered, That the appellant should shew cause, if any he could, on Saturday the 12th of February then next, why a receiver should not be appointed pursuant to the said statute; and it was further ordered, That the appellant should be served with a copy of the order twelve days before the said 12th day of February.

The appellant was personally served with a copy of the said order within the time limited, as appeared by the register's certificate in the words following: "Upon search made in the register's office of his Majesty's High Court of Chancery in Ireland, I do not find any cause, shewn pursuant to the foregoing order, although it appears by the affidavit of Patrick Quin, that the Right Honourable James Earl of Clanbrassill was on the 22d day of January last personally served with the said order, which I certify this 14th day of February 1780.

(Signed) George Roath, R."

The time for shewing cause against the order expired the 12th of February, and the respondent could have obtained the above certificate of no cause on the 13th, but it happened on a Sunday.

[321] The appellant's clerk in court, on the 14th of February, served a notice on the respondent's clerk, dated 12th of the said month, purporting, that counsel on the appellant's behalf would shew cause, *the first opportunity*, why a receiver should not be appointed, pursuant to the respondent's petition, under the mortgage act, which motion would be grounded on the said petition and affidavit verifying the same, *an affidavit that day filed in the proper office*, and reasons to be offered.

The solicitor for the respondent finding, on the 15th of February, that no affidavit had been filed, conformable to the appellant's notice of 12th, gave notice, that the counsel on behalf of the respondent would apply to the court on *Thursday then next*, or the first opportunity after, by petition, to make the order of the 15th of January absolute, grounded on the said order, the register's certificate of no cause having been shewn, the usher's certificate of no affidavit filed, the nature of the case, and reasons to be offered.

On the 16th of February, and not *before*, the appellant *swore* an affidavit, which was filed the same day: by which affidavit the appellant, amongst other things, stated, that, by letters patent under the great seal of the kingdom of Ireland, the office of Chief Remembrancer of the Court of Exchequer in that kingdom, and also the office of keeper of all the records, inquisitions, writs, files, and muniments in the said office remaining, and all profits, privileges, jurisdictions, liberties, and advantages to the said office theretofore at any time, or in any manner whatsoever belonging, incident, appendant, or appertaining; were granted unto the appellant; and by virtue of the said office of Chief Remembrancer, the appellant contended that he was entitled to the privilege of being sued or proceeded against in the said Court of Exchequer, and not elsewhere in that kingdom.

The appellant, *though he had frequent opportunities*, never made any attempt to move the Court according to his notice, to shew cause why a receiver should not be appointed, pursuant to the order of the 15th of January 1780; and this matter at last came on to be heard on the 7th of July 1780, upon the respondent's petition, when counsel for the appellant attended to shew cause against the order of the 15th January; but the Chancellor was then pleased to order, That the cause shewn by the appellant should be disallowed, and the order of the 15th of January be made absolute; and that it should be referred to Thomas Burroughs, Esq. one of the Masters of that Court, to approve of a proper person to be appointed receiver of the rents and profits of the mortgaged premises.

The Master, in pursuance of the said order, proceeded on the reference to appoint a receiver; and on the 3d of August made his report, appointing Walter Sweetman, Esq. receiver, on his giving the usual security, which report was absolutely confirmed on that day.

[322] On the same day the appellant, in order to harass the respondent, gave notice of a motion to set aside the Master's report, appointing Walter Sweetman, Esq. receiver, and that the Master might approve of Thomas Reed, Esq. as receiver. This motion was grounded upon affidavits made by the appellant and his agent; and the notice was intended to prevent the respondent's proceeding, pursuant to the order confirming the Master's report, and to hinder the receiver so appointed from receiving any of the rents of the estate, as by that means no motion might be made until Michaelmas term following; but the respondent's solicitor on the 12th of September gave notice to the appellant, that if the said motion was not made to the Lords Commissioners for hearing causes in the absence of the Lord Chancellor in a proper time, the respondent's solicitor would apply to have a day appointed to discharge the appellant's notice.

The respondent's solicitor presented a petition accordingly. Their Lordships, on the 13th of the said month of September, ordered, That the appellant's said notice should be discharged, unless moved on Monday the 25th day of September then instant; at which time the matter on the respondent's petition came on to be heard before Mr. Justice Robinson, Master Walker, and Master Burroughs; and after full debate by counsel on both sides, it was ordered, That the notice of the appellant, dated 3d of August 1780, should be discharged, and that the Master's report should be confirmed.

From which said several orders of the 15th of January, and 7th of July 1780, the appellant thought proper to appeal, insisting (Ld. Kenyon, J. Dunning), that officers and ministers of courts of justice are allowed privilege on account of their necessary attendance on those courts, and must be sued in the courts to which they belong, and cannot be impleaded elsewhere. But it is objected, that by the act of parliament upon which the respondent's application to the Court of Chancery was founded, it is enacted, That in all cases where a year and a half's interest is due, a Court of Equity, upon application, shall give such remedy as is thereby provided, without any saving whatever of the rights of privileged persons; and therefore the respondent thought proper to apply for relief in the Court of Chancery, and that the appellant was not entitled to the privilege he seeks, as Remembrancer of the said Court of Exchequer in Ireland. That the privilege allowed by courts of justice to their officers and ministers extends to such cases only, where the party suing them has a sufficient remedy in their own courts; and here the respondent could not have sufficient remedy in the Exchequer; for, at the time of the application to the Court of Chancery, the Exchequer was not open; and even had it been open, the appellant being a Benchor of that court would have been judge in his own cause, and being the officer who signs the orders thereof, would have had it in his power to retard the respondent's proceedings. And a person entitled to privilege ought [323] to plead his privilege, or bring a writ of privilege, and cannot avail himself thereof otherwise.

To these objections it was answered, that the act of parliament does not take away privilege by any express words, and it cannot be taken away by implication: the words, "A Court of Equity," cannot extend to give the party suing, his option to apply in what Court of Equity he pleases, but must mean that he should apply to the proper Court of Equity; and the Court of Exchequer, where alone the appellant

was impleadable, was the proper court. That the Court of Exchequer being a Court of Equity, as well as the Court of Chancery, the respondent might have applied to the Exchequer, and would have had as ample relief there, as he sought in Chancery. The expedition in which business is done in the Exchequer would have sufficiently compensated for the five days he must have waited to prefer his petition there. The appellant, though honoured in right of his office with the appellation of Benchet, never sits as a judge, nor have any of his predecessors in office been known to do so; and his office, which he holds by patent, is too valuable to risk by improper conduct or neglect of duty: And wherever a party having cause of suit against an officer of a court of justice, has sufficient remedy against such officer in the court to which he belongs, he is not to sue him elsewhere. And that the proceeding in this cause being a summary one, and not by bill, the appellant, were he otherwise obliged to do so, could not with propriety, nor was he bound to plead his privilege specially; but officers and ministers of the Exchequer are not obliged to plead their privilege, nor to bring a writ of privilege; they may bring in the Red Book, and produce their patent (as was done in this case), and their privilege must be allowed without pleading it, or bringing a writ of privilege.

On behalf of the respondent it was contended (J. Madocks, M. A. Taylor), that no privilege of the Court of Exchequer can be set up against the summary jurisdiction given by this act to a Court of Equity: And as the act contains in it no exception in favour of officers of any particular courts, it must be deemed general, and extending to all persons whatever; and as the appellant was a mortgagor, he clearly fell within the description of the act, and was subject to the provisions contained in it. That privilege cannot be taken advantage of, but by plea; and no plea, in the present case, could be put in, there being no cause in court, nor any suit depending between the appellant and respondent. That privilege can be claimed by an officer of the Exchequer in a personal action only; and the petition presented in the present case, could never be construed to be a personal action. That in all cases where privilege is insisted on, the party complaining must have an equal, speedy, and beneficial remedy in the court where it is insisted such suit should have been instituted. That act provides, that in all cases where a year and a half's interest becomes due, a receiver should be appointed; in the present case, the party complaining might not have an equal [324] remedy in the Exchequer. If the year and a half's interest fell due soon after the Exchequer rose after Trinity term, the party complaining could not apply there until the Michaelmas term following, whereby three months interest more might be due; whereas the Court of Chancery is always open. That by the nature of the appellant's office in the Court of Exchequer, he, either in person, or by his deputy, taxes costs, states accounts, signs the orders, and performs such like necessary acts: This would make the appellant, as it were, a judge in his own case; he would tax the costs of the matter in dispute: And if any question arose about the amount of interest, the appellant would pass his own accounts, and report the balance due by himself; a circumstance which might prove very injurious to the respondent. But supposing the appellant could claim his privilege, notwithstanding the reasons urged against it, it was presumed that he had lost the advantage of so doing, by not shewing cause within the time limited by the order of the Chancellor, and not till after the register's certificate of no cause shewn was obtained. And if the appellant was entitled to any privilege, the claim was not made in the due and regular way, no Baron of the Court of Exchequer having brought the Red Book into court, nor attended to claim privilege for the appellant, as is usual and customary in all claims of privilege by officers of the Exchequer.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the orders therein complained of affirmed. (M. S. Jour. *sub anno* 1781. p. 223.)

[325]

## NAVIGATION.

CASE 1.—JOHN CARY,—*Appellant*; JOHN WHITE and others,—*Respondents*  
[28th March 1710].

[Mew's Dig. xiii. 61. Distinguished in *Webster v. Seekamp*, 4 B. and Ald. 352, and see *The Riga*, L. R. 3 Ad. and E. 516.]

By the custom of merchants, if the master of a ship be supplied with necessaries for the ship, by the order or on the credit of any freighter, the owner of the ship is liable to pay such freighter: and on this ground it is customary for freighters to furnish the masters, of the ships they take to freight, with letters of credit for whatever money they may happen to want, for the necessary service of the ship.

DECREE of the Irish Chancery, made on the re-hearing, REPEALED.

The point of this case is thus more accurately stated in 15 Vin. Abr. 348. c. 4. and 2 Eq. Ab. 722. c. 1. both taken from the MSS. Table so often cited.

"In a voyage the Master of a ship is the Owner's servant, and his duty requires him to provide necessaries for the ship, and it is the Owner's interest that they should be provided: therefore what the Master *necessarily* takes up (though not upon bottomry) and employs for that purpose, the Owners must pay."

Viner, vol. 15. p. 348. ca. 4; 2 Eq. Ca. Ab. 722. ca. 1.

Sir Humphry Jervis was the sole owner of a ship called the *Mary*, which, in the year 1688, was lying in the port of Bristol, commanded by one Stephen Symons, and intended to be freighted from thence to Dingle harbour in Ireland, but being disappointed in that voyage, Symons informed Sir Humphry, who lived in Dublin, that a freight could be got for the West Indies, if he approved of it; whereupon Sir Humphry wrote to Symons to accept such freight, and to take up as much money on *bottomry* as would fit out the ship for the voyage, and provide a stock for port-charges.

The appellant, being a merchant at Bristol, entered into a charter-party with Symons, for the hire of this ship for a voyage to the islands of Tercera, Madeira, Barbadoes, and Jamaica, and from thence back to Bristol; and, by the terms of the charter-party, the owner was to pay the seamen's wages, and provide all necessaries for the ship; but Symons not being in cash for this purpose, borrowed £200 of the appellant on *bottomry*, and also obtained a letter of credit from him, to his correspondents in Jamaica, for whatever money he might further want, either to repair the ship, or furnish her with provisions, or to pay the seamen's wages.

The ship proceeded successfully in her voyage to Jamaica, where, by virtue of the appellant's letter of credit, Symons took up several sums, amounting to £789 13s. 1d. for repairs, and [326] other necessary purposes, and the whole of the money was applied accordingly; but on the ship's return from Jamaica to Bristol, she was unfortunately lost.

By this accident the £200 which the appellant had advanced on *bottomry* was lost; and he having repeatedly applied to Sir Humphry Jervis for payment of the £789 13s. 1d. which had been taken by Symons at Jamaica, on the appellant's credit as aforesaid, without being able to obtain any satisfaction; the appellant, in January 1702, exhibited his bill against Sir Humphry in the Court of Chancery in Ireland, in order to compel payment of this demand. To which bill the defendant put in an answer; and thereby insisted, that he gave no authority to Symons to take up any money but on *bottomry*; that the loss of the ship was enough for him to bear; and, that no act of the master could bind the person or estate of the defendant, or any thing but the ship only.

On the 11th of November 1706, the cause was heard before the Lord Chancellor, assisted by the Lord Chief Justice Doyne, and Mr. Justice Dolben; and on the 19th of that month, the Court decreed, that the plaintiff should recover against the defendant the several sums of money taken up for the use of the ship, upon the said letter of credit, and referred it to a Master to state the account.

The Master, by his report of June 1707, certified, that the above sum of £789 13s. 1d. had been paid to the master of the said ship out of the plaintiff's effects, by virtue of the said letter of credit; and that the same was expended on the ship for sailors wages, and other necessaries. And the cause being heard upon this report, on the 26th of November following, the Court directed an issue at law to be tried in the Court of Common Pleas in Ireland, whether any and what sums were paid for the use of the ship.

The defendant being dissatisfied with this direction, applied to have the cause re-heard, which was accordingly ordered; but before it came on he died intestate; and the suit being thereupon revived against the respondents, as his administrators, the cause was re-heard on the 6th of June 1709; when the Court declared, that the plaintiff was not entitled to any relief, and therefore ordered his bill to stand dismissed, but without costs.

From this order of dismissal, and also from the former order of the 26th of November 1707, the plaintiff appealed; insisting (J. Jekyll, T. Parker), that the same ought to be reversed, and that the respondents ought to have been decreed to pay him the said sum of £789 13s. 1d. which was expended on the ship, together with interest and costs; because it was admitted, that if the master of the ship had laid out his own money for these necessary purposes, the owner must have repaid him; and therefore any other person, who advanced the money for the same purposes, ought as well to be repaid; the care and direction of all being still in the master, the charge upon the owner equal, and his benefit the same. That at *common law*, [327] whatever is done by a servant, which is for the benefit of his master, and within the *trust* and *duty* of his place, binds the master as if done by himself; and in a voyage, the master of a ship is the owner's servant, whose duty requires him to provide necessaries for the ship, it being the owner's interest that they should be provided; so that whatever the master necessarily takes up and employs for that purpose, the owner is bound to pay. And that, by the *custom of merchants*, it is well known, and was so proved in the cause, that if the master be supplied with necessaries for the ship, by the order or credit of any freighter, the owner is liable to pay such freighter; and, on that ground, it is customary for freighters to furnish masters of the ships they take to freight, with letters of credit for whatever money they may happen to want, for the necessary service of the ship.

On the other side it was contended (T. Powys, J. Pratt), that it would be of most dangerous consequence for the master of a ship, to charge the person or estate of his owner, with what money he should take up, on pretence of providing for the ship, without an express power or authority for that purpose; for that the law of merchants had never carried it farther, than to invest the master with a power of mortgaging, or charging the ship or cargo with such money. That in the present case, the money could not be laid out by the appellant, or his factors, upon the credit of Sir Humphry Jervis; not only because he was a total stranger to them, but principally because he had, for two years before, failed in his circumstances and lost his credit; nor was it even pretended, that Sir Humphry ever gave any authority to the master to take up money, otherwise than on *bottomry*. That if Sir Humphry's person or estate was in all events liable to make good this £789 13s. 1d. besides the £200 advanced on the *bottomry* bond; and which, in case the ship had returned safe to Bristol, he would have been answerable for; he must of necessity have been a very great loser, as the ship cost at first but £700, and her freight, in that event, would not have brought above £600; and therefore, if Sir Humphry himself had been at Jamaica, he never would have consented to take up money for preserving that which would have been so much to his loss. And that the appellant's interest in the ship, by having £200 on *bottomry*, at a large interest, to be paid on her return, was much greater than Sir Humphry's; and therefore, whatever money was laid out in Jamaica, ought to be considered as laid out on account of the appellant, but yet to be discounted out of the ship and freight, so far as it would extend on its return.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the orders or decrees therein complained of should be reversed; and that it should be tried on a feigned issue, in the Court of Common Pleas in Ireland, when, and as the Court of Chancery in Ireland should direct and appoint; whether any, and what sums of money were necessarily laid out by, or by the order of, the appellant, for the pay-

ment of seamen's wages, pro-[328]-visions, or otherwise, for the necessary repairs and use of the ship in the appeal mentioned, during the voyage mentioned in the charter-party in proof in this cause; which sums so advanced or laid out, were to be paid by the respondents to the appellant: And it was further ordered, that in order to the trial of the issue above directed, the said Court of Chancery in Ireland was to give the necessary orders for that purpose. (Jour. vol. 19. p. 130.)

CASE 2.—VOLKERT HENDRICKS and others,—*Appellants*; WILLIAM CUNNINGHAM and others,—*Respondents* [2d May 1783].

By the treaty of 1674, between Great Britain and Holland, the subjects of either are permitted to carry the property of the enemy of the other, with the exception of certain articles therein specified as contraband. It is now established by repeated determinations, that neither ships nor cargoes, the property of subjects of Neutral Powers, either going to trade at, or coming from the French West India Islands, with cargoes purchased there, are liable to capture: and therefore, where a ship and cargo so circumstanced are seized and condemned, the seizure and condemnation shall be reversed, and the value of the ship and cargo accounted for and paid to the owners by the captors.

INTERLOCUTORS of the Court of Session in Scotland REVERSED.

The question at issue in this cause related to the capture of the ship *Katharina* and her cargo, belonging to the appellants, subjects of Holland, made by the *Bellona* privateer, belonging to the respondents; commissioned, by letters of reprisal, against the ships and goods of the subjects of France, prior to the commencement of hostilities with Holland: And was not more important in its consequences to the appellants, in point of pecuniary interest, than to the public in point of precedent. The appellants contended that this capture was unlawful, and that they were entitled to restitution of their ship and her cargo, and full reparation for the injury they had sustained, agreeably to the law of nations, and the subsisting treaties of alliance between Great Britain and Holland, particularly the Marine Treaty of 1674.

On the 31st of August 1779, when this treaty subsisted in full force, the appellant Captain Hendricks, sailed from the Texel in the ship *Katharina*, of which he was master and supercargo, bound for the Dutch Island of Curaçoa, in the West India, where he arrived upon the 18th of November following. The vessel carried out a cargo of linen goods, besides some articles of provisions; part of which was consigned to merchants at Curaçoa, the remainder being shipped on account of Mr. Van Lankern and the other appellants, all merchants of Amsterdam. It was the intention of the voyage to dispose of this part of the cargo at Curaçoa, and to [329] invest the net proceeds of the sale in a homeward cargo of West India produce, on account of the appellants. With these views Mr. Hendricks, at clearing out from the Texel, obtained a passport, or sea brief, from the burgomasters of Amsterdam, in terms of the fifth article of the treaty of 1674; and a licence from the directors of the Dutch West India Company, granting to him permission to sail to Curaçoa, and there to carry on trade; with the usual proviso, that in the event of his taking in a cargo at that island, he should bring home the whole of it to Holland, so as the Company should not be deprived of any part of the duties upon the exports of the island. He also received from Mr. Van Lankern, a set of instructions adapted to the same event. But it was understood, agreeably to what is implied in the nature of the transaction, and to the meaning of parties in all similar cases, that Mr. Hendricks, who was both part-owner and supercargo of the vessel, should have a power of making such lawful alteration afterwards, in the original plan of the voyage, as might become necessary, from circumstances then unforeseen, for the interest of the parties concerned.

On arriving at Curaçoa, Mr. Hendricks landed the consigned goods, and opened a sale for the remainder of the cargo belonging to the other appellants; but finding the market glutted with commodities of the same kind, he was under a necessity of looking out for some other port in the West Indies, where he might dispose of these goods



on such terms as might enable him to accomplish the purpose of the voyage. With this view, he avoided purchasing or taking in any goods at Curaçoa; because, by doing so, he would have been obliged, by the standing regulations of the Dutch West India Company, to return directly to Holland, without touching at any other port; and knowing that the trade with the French Colonies was laid open to all neutral nations, he resolved to attempt a sale of his goods in the island of St. Domingo; and this he was warranted to do by the treaty of 1674, which permits the ships or vessels belonging to the subjects of Holland to trade "from a neutral port or place, to a place in enmity with the other party, or from a place in enmity to a neutral place." But before proceeding on this part of the voyage, on 14th December 1779, Mr. Hendricks applied for, and obtained from the governor of Curaçoa, a clearance "for the French Colonies, and from thence to Amsterdam." This clearance ascertained the kinds, quantities, and values of the whole goods on board, the relative invoice having been solemnly authenticated by Mr. Hendricks' oath, taken in the presence of the governor and secretary of Curaçoa.

With these goods, whereof about a third in value consisted of provisions, the *Katharina* (Dec. 16, 1779) sailed for Cape François, and there delivered her cargo; which was sold, by the assistance of Mons. Lambert, a French broker, whom Mr. Hendricks found it necessary to employ, as he himself was unacquainted with the market, as well as with the language of the people he had to deal with. And upon the sale being closed, Mr. Hendricks, in pursuance of the intention of his voyage, purchased, with the nett proceeds, a cargo [330] of sugar, coffee, and hides, which he shipped in the *Katharina*, paid duty as a foreigner, and sailed from Cape François, bound for Amsterdam, on 17th of April 1780. Several ships, some of them of force, happening to sail from that port at the same time, Mr. Hendricks endeavoured to keep company with them for a part of the way, in order to be protected from the piratical vessels which then infested those seas. But having separated from the other ships, he was met, on the 30th of April, by the *Guadaloupe*, an English frigate, who, after taking a French ship in sight, brought him to, in order that the captain might examine him and his papers. Mr. Hendricks, willing to give full satisfaction, produced not only his passport from the government of Amsterdam, together with the other papers before mentioned, but also an extract from the records of the Admiralty Court at Cape François, of the entry of his cargo at that port, with the account of the sale thereof, and the account current with his broker Lambert; and likewise the invoice of the homeward cargo, docketed and signed at Cape François, by Mons. Lambert, and Jean Boisson, sworn interpreter of the Dutch language; and the cockpit, under the hand of the officer of the customs at the Cape, which fully satisfied the captain of the *Guadaloupe*, that the *Katharina* and her cargo were the property of the appellants, subjects of Holland, not liable to capture; he therefore left her to proceed on her voyage, after putting on board some Spanish and French prisoners, to be conveyed to Amsterdam.

The *Katharina* continued her voyage without interruption, until the 22d of May, when, being in latitude 40 degrees, and longitude 334, she fell in with the *Bellona* privateer belonging to the respondents, commanded by James M'Lean, who had been out on a long and fruitless cruise. On coming near, he fired a gun at the *Katharina*; and having boarded her without opposition, carried the mate, two sailors, and all the ship's papers on board the *Bellona*; where, after examining these papers, and making large promises, ineffectually, to the mate and sailors, to induce them, falsely, to affirm that the cargo was French property, he dispatched the boat of the *Bellona*, with eleven of her crew, armed with pistols and cutlasses, who seized the command of the *Katharina*, and sent the whole of her men on board the *Bellona*, except the master, mate, cook, and a boy; carried off part of her cargo and cordage, and on the 14th of June 1780, brought the *Katharina* into Port-Glasgow.

Immediately on the ship's arrival at Port-Glasgow, a petition, in the name of the owners of the privateer, was presented to the Judge Admiral Substitute at that port, setting forth, that the privateer had taken the snow *de Katharina* from St. Domingo, loaded with sugar and coffee; which snow the said ship *Bellona* took and made "prize of as the property of the enemies of Great Britain, and sent her into the port of Glasgow."

Mr. Hendricks, before being an hour on shore, was carried before the Judge, examined, and proceeded against as a criminal; on [331] which occasion every

undue advantage was taken of his ignorance of the language. His crew too were tempted with the offer of large sums of money falsely to swear, That the cargo was French property, bound to Bourdeaux. They were severally examined, and their declarations taken down in English, though they understood little or nothing of the language, and the most unjustifiable means were ineffectually used to induce them to betray the interests of the appellants, their employers. The whole papers necessary to prove the property of the ship and cargo, and particularly those papers which, according to the stipulations of the treaty of 1674, must, when produced, be held as full evidence of the property, were actually produced by Mr. Hendricks, and examined by Captain M'Lean at sea, and he retained them in his possession. A bill of lading is not of the number of such papers, the production of the cockets, with the passport or sea-brief, being declared sufficient. A bill of lading therefore was never asked for, either by the Captain of his Majesty's frigate, or by M'Lean, the Captain of the privateer. In many cases a bill of lading is useless, and on these occasions none is made out. The present case is an instance of this. Mr. Hendricks, being not only master of the vessel, but a considerable owner of the cargo, and supercargo, had no occasion for a bill of lading, which could only be granted by himself deliverable to himself, and therefore he judged it unnecessary to make one before he sailed from Cape François; but after the unwarrantable capture by the *Bellona*, and when he was on his passage to Port Glasgow, it occurred to him, that although the account of sales of the outward, and the invoice of the homeward cargo, certified by Messrs. Lambert and Boisson, would satisfy the owners in Holland, yet there might be occasion for a bill of lading also, in case his vessel should be recaptured by a French or American ship, when in possession of the British seamen, and carried into a French or American port. In order therefore to guard against that event, he made out three duplicates of a bill of lading, with the date of his clearing from the Cape, containing a genuine state of the fact, which he produced in the course of his examination before the Admiral Substitute, candidly giving their history; whereupon the captors immediately accused him of having committed a forgery. When he was with some difficulty made to comprehend, as he understood little or no English, the accusation made against him, he lost his temper, and tore the bill of lading, which he then held in his hands, in pieces; and naturally suspecting that his declaration might be as falsely taken down, as his motive for making out the bill of lading was construed, especially as such unjustifiable means had been practised on his crew, he refused to sign it.

This incident, though the mere effect of the unjust provocation and maltreatment of his persecutors, was made a handle of to the prejudice of the appellants. At the end of Mr. Hendricks unsigned declaration, (which was dictated by the respondents, and taken down in their own words, not in his,) they were pleased to add, "Immediately after the said Captain Volkert Hendricks had made [332] the foregoing declaration, and when he found he had committed a forgery, as to the bill of lading which he produced in presence of the Judge, he tore it in many pieces, and put these pieces in his pocket, and refused also to sign his declaration." It had been argued, by a strange kind of reasoning, that this incident shewed Mr. Hendricks had a purpose of concealment; whereas it was evident that it arose entirely from his anxiety to make the fullest disclosure, and from the abuse that was made of his candour.

Mr. Hendricks, after his examination, took formal protests against the Captain and owners of the *Bellona*, and all others concerned therein, "That they should be liable to him and the owners of the *Katharina* and her cargo, for all costs and damages that the said ship has already sustained, or shall sustain, or that he or they have sustained, or may anywise sustain and incur, in and through his said vessel's being so illegally and unwarrantably captured, brought into Clyde, and detained in manner aforesaid, by the loss of markets or otherwise, and obtaining redress and for remedy by law."

Though the evidence arising from the examination of Mr. Hendricks and his crew, and the papers found on board his vessel, ought to have satisfied the owners of the privateer that the capture was unlawful, yet these gentlemen brought an action before the Judge of the High Court of Admiralty in Scotland, in order to have the *Katharina* and her cargo condemned as lawful prize. And the appellants, on their part, brought a counter action for restitution and damages.

These two actions being consolidated, the Judge Admiral, September 22, 1780, pronounced the following interlocutory decree: "Having advised the process and writs produced, and particularly the declaration emitted by the said Volkert Hendricks, defender, upon the 14th of June last, before the Judge Admiral Substitute at Port Glasgow, etc. found and hereby finds it proven, That in the month of May 1780, the said ship the *Katharina* libelled, the said Volkert Hendricks then master of her, was taken and made prize of upon the high seas, by the ship or letter of marque called the *Bellona* libelled, the said James M'Lean then master or commander of the said ship *Bellona*, and thereafter sent in by the captors to the port of Port Glasgow, where she arrived upon the 14th of June 1780; and found and hereby finds, That the said ship the *Katharina* libelled, and her pertinents, and the whole of her cargo of sugar, and coffee, and hides, etc. and everything on board of her when she was taken and made prize of, as said is, is lawful prize; and found and declared, and hereby finds and declares, That the said ship the *Katharina* and her pertinents, and the whole of her cargo of sugar, coffee, and hides, etc. and every thing on board of her when she was taken and made prize of, as said is, do all appertain and belong to the said James M'Lean and William Cunningham, pursuers, and other owners of the said ship or letter of marque the *Bellona*, to be divided by them amongst [333] themselves and the officers and crew of the said ship the *Bellona*, and that in terms of their agreement relative thereto; and therefore decerned and adjudged, and hereby decerns and adjudges, the said ship *Katharina* and her pertinents, and the whole of her cargo of sugar, coffee, and hides, etc. and every thing on board of her when she was taken and made prize of, as said is, to appertain and belong to the said James M'Lean and William Cunningham, pursuers, and the other owners of the said ship or letter of marque the *Bellona*, to be divided by them, as said is; and assoilzied and hereby assoilzies the said William Cunningham and others, from all the conclusions of the libel at the instance of the said Volkert Hendricks and others against them, and decerned and hereby decerns."

The Judge Admiral of the same date granted warrant for unloading the cargo, which was immediately carried into execution, in direct violation of the twelfth article of the treaty of 1674, which provides, "That it shall not anywise be lawful to sell or unload the goods in controversy, either before the sentence given, or after it during the review thereof, on either side, unless it be with the consent of the parties interested."

The appellants presented a reclaiming petition for a review of this judgment; and also stated, that not only was the cargo thereby confiscated, but also the ship, as well as the private property of the captain, and that of his mate and seamen, though the respondents had never alleged that these were French property; and they contended, that it is laid down by every writer in the law of nations, treating of the property of the enemy seized in neutral bottoms, That the neutrals are in such cases not only entitled to their ships and private property, but the master is also to be paid freight for the cargo belonging to the enemy. The Judge Admiral however was pleased to refuse this petition without answers.

The appellants complained of the interlocutors of the Judge Admiral to the Court of Session, by bill of suspension, which was passed of consent, and they at the same time brought an action of reduction of his decree, and prayed "for restitution of the said ship or ship the *Katharina*, with the whole of her cargo and stores, in as good order and condition as when captured by the said James M'Lean and his crew, on the 23d and 24th days of May last; or otherwise to make payment to the appellants of the sum of £12,000 sterling, as the value of the said ship and cargo, with interest from the said 24th of May last until payment; and further in either event to make payment to the appellant of £5000 sterling *nomine damni*, on account of the unlawful capture and detention of the said ship and cargo, and disappointment of the voyage; as also to make payment to them of £1000 sterling for provisions, stores, and others, wasted on board the said ship, with the further sum of £1000 sterling as the expence of process."

[334] Pending these suits the respondents presented a petition to the Court of Session, praying their Lordships for a warrant "to sell and dispose of the said ship *Katharina* and her cargo, by public roup (auction) at the sight of the collector of his Majesty's customs at Port Glasgow, and of any person to be named by the pur-

suers (appellants) or their attorneys, the petitioners finding sufficient security to make the proceeds forthcoming to all concerned." The chief pretence for this application was, That as the coffee, of which the cargo partly consisted, was of a decaying nature, and as the cellars where it was deposited were damp, the value of it would be greatly diminished, unless it should immediately be sold.

This petition having been ordered to be answered, Mr. Hendricks and Mr. Stirling, his attorney, went immediately to Port Glasgow in order to see what condition the ship and cargo were in; but the respondents refused to allow them admittance into the warehouse where the cargo was lodged. The appellants by their answer contended, That if the cargo should be hurt by lying in a *damp* cellar, the respondents who put it there were answerable for the consequences, and that the remedy was easy, by removing it to a dry one. That the appellants had the strongest reasons to oppose the sale of their goods in Scotland, they had occasion for them at home, where the prices of such commodities were higher; that being strangers, they were unable to find security to any large amount in Scotland, therefore they themselves could not become purchasers; and they had reason to fear that devices might have been fallen upon to make the goods sell below their real value, in order, as far as possible, to disappoint the claim of damages, which the appellants might have in the event of their prevailing in their suit. That in questions respecting an acknowledged common property, or a joint interest, between persons inhabitants of that country, the contested property might be sold at common law, if it appeared to be for the advantage of both parties to do so: but the case here was widely different; there was here nothing which had the least resemblance to a joint interest; the subjects of one state were complaining of being robbed of their property by the subjects of another state: if the robbery should be established, the goods unquestionably ought to be restored; but if the goods should be disposed of or consumed, during the dependance of the action for restitution of them, the claimants would thereby be deprived of the right of vindicating their property. That the acts of Parliament passed since the commencement of the American war, and during the war with France and Spain, show in what light that matter has been viewed by the legislature. By the statutes of the 16th, 17th, and 18th years of the reign of his present Majesty, powers were given to the courts of law to authorize the landing and selling of American prize goods and vessels, in the circumstances and according to the forms thereby prescribed. When the French war broke out, and even after [335] general reprisals were granted against the ships, goods, and subjects of France, an express act of Parliament was found necessary in order to extend the regulations contained in the prior statutes respecting American prizes, and make them applicable to cases of French prizes. Accordingly this was done by acts 19 Geo. 3. cap. 5. and 67, the last of which however contains a saving clause (sec. 27.) shewing, that it was not the intention of the act to take away any privilege reserved to the claimant, "by any treaty subsisting between his Majesty and foreign powers," and the privilege reserved by the treaty of 1674 in favour of the appellants expressly was, that the ship and cargo in controversy could not lawfully be sold, pending the suit, without their consent, which for solid reasons they had uniformly withheld. In like manner, the provisions of the last mentioned statutes were extended to the case of Spanish prizes, by act 20 Geo. 3, and to Dutch prizes, by act 21 Geo. 3. cap. 5.

The letter of reprisal, founded on as the respondent's title, supported the plea here maintained by the appellants; for besides that this privateer had thereby no authority to seize any Dutch vessel, their power of selling even lawful prizes was expressly limited to the case of prizes being *finally* condemned.

The Court however, on the 23rd December 1780, pronounced the following interlocutor: "The Lords having advised this petition with the answers, they grant warrant and authority to the petitioners (respondents) to sell and dispose of the said ship *Katharina* and her cargo by public roup, at the sight of the Admiral Depute of the district of Glasgow, the petitioners finding sufficient caution to make the proceeds forthcoming to all concerned." And this order having been made by the Court the day before the commencement of the Christmas recess, the appellants were precluded from applying for a review of it, and therefore the sale took effect.

The process of suspension having been remitted to Lord Braxfield, was consoli-

dated with the suit of reduction; and the merits of the case having been stated in mutual memorials, his Lordship ordered informations to be given in, and reported the cause to the Court for their determination.

The respondents, (the original plaintiffs,) before the Judge Admiral, endeavoured to support the legality of the capture, upon the ground, "That the *Katharina* and her cargo were *the property of the French King or his subjects*; at least, that the cargo on board the said ship was the *produce* of the island of Hispaniola, or of one or other of the French West India islands; and that the said ship *Katharina* had been unlawfully employed, in aiding and assisting the subjects of the French King, by furnishing them with provisions, etc. and otherwise acting contrary to that strict neutrality which, by the law of nations, ought to be observed towards his Majesty and his subjects by a *neutral state*, in *which predicament* the States General of the United Provinces, and their subjects, *stood at present*, with respect to his Majesty and his [336] subjects." But afterwards, finding that the fact would not support them in this plea, they changed their ground, and, by their information, acknowledged that the papers produced *ex facie*, proved both the ship and cargo to be *Dutch property*. Though they alleged that these papers might have been manufactured for the purpose of concealment, and that circumstances occurred which rendered this conjecture probable. 1mo, By the *ostensible instructions* from the owners at Amsterdam, and the licence from the Dutch West India Company, the Master was appointed to proceed on a voyage to the Dutch settlement at Curaçoa, and to *return directly from thence*, without touching any where *except at Curaçoa*. The respondents therefore alleged that the Master, though owner of part, and supercargo of the whole goods on board, would not of himself have carried the vessel on a different voyage, where she was to run such hazard, unless he had been furnished with some *secret instructions*, which had not appeared; and the declaration of Mr. Van Lankern and other appellants, of the 29th of June 1780, rendered this matter still more suspicious; for they there declared, That the outward cargo was consigned to Captain Hendricks, with orders to sell the same at Curaçoa, or at the island of St. Domingo, and to vest the proceeds of the sales in sugar, coffee, etc. If these instructions were in *writing*, they ought to have been produced; and if they were not in *writing*, it showed an intention to cover the transaction, and to make it appear different from what it really was. 2do, The unaccountable conduct of Captain Hendricks in manufacturing, which they at first called forgery, two bills of lading after the vessel was seized, and bearing a false date: that a bill of lading was necessary, and is never dispensed with, except where some concealment is intended; and accordingly, one of the articles of the ostensible instructions to Hendricks was "to dispatch two manifestos of the cargo, and the bills of lading, with the ship's journal, as soon as the vessel should return to the Texel from Curaçoa." That in all questions of this kind, it has been universally received as a rule of evidence, that any concealment or destruction of such papers as were or ought to have been on board the vessel seized, must be presumed fraudulent; and if any false document is detected, this, of itself, shall be held a sufficient ground, without further enquiry, for condemning both ship and cargo. In support of this doctrine, the respondents cited a letter from King Charles II. of the 11th December 1680, recorded in the books of Sederunt of the Court of Session, where it is provided, that "the having of double or concealed documents, or the offering to the Court any false or double writing, is in itself a sufficient ground of confiscation of the ship and goods, whether they belonged to allies, friends, or neutrals." That in the present case, there occurred strong grounds for presuming a fraudulent concealment of papers and instructions; and there was produced one document (*i.e.* the bill of lading) which was admitted to bear a false date; so that in every view, the ship and cargo ought to be condemned. That [337] without entering into any discussion with respect to the *property* of the cargo, the respondents contended, That during hostilities between France and Britain, any vessel sailing *directly* from a French West India island, loaded with the produce of that island, whether shipped on account of Frenchmen, Dutchmen, or other foreigners, was liable to seizure and condemnation both of ship and cargo. And in support of this, they referred to the sentences of the Court of Admiralty of England, confirmed by the Lords of Appeal, condemning certain Dutch ships last French war, and cited the opinions of Dr. Wynne and Sir James Marriot to the same purpose; and they appealed to the authority of the legislature itself,

which, upon the application, and to remove the fears of those interested, thought proper (20 Geo. 3. c. 29) to make a law "to protect goods and merchandises of the growth, produce, or manufacture of Grenada and the Grenadines, on board neutral vessels bound to neutral ports, during the hostilities with France," upon a mistaken idea of the produce of Grenada, and of every other West India island, under the dominion of France, coming to Europe in neutral vessels, bound to neutral ports, being liable to capture and condemnation as lawful prize, without distinguishing to whom the property belonged. And they further contended, that the *Katharine* having gone to St. Domingo under a French *licence*, and sailed from thence under French convoy, fell to be considered as *adopted* French; besides her having carried *provisions*, which, in respect of her destination to St. Domingo, they alleged were contraband, as if that island had been under a blockade.

The appellants, by their information, contended, That there was here no false or double voucher, no fraud, or concealment, but every thing open, fair, and honest; that they had produced the most satisfactory proof that both the ship and her cargo were neutral property, and they referred to the sundry papers and vouchers exhibited in the cause, as incontrovertible evidence of the fact. That this fact being established, the question was, Whether or not Dutch property of the growth of a French island, found on board a Dutch ship, bound to a Dutch port, together with the ship itself, be liable to capture and condemnation as lawful prize? The appellants contended that they were not; and even, supposing the produce of the French colonies to be lawful prize, yet it did not thence follow that a Dutch ship, in which that produce was found, should be also lawful prize. By the 8th article of the treaty of 1674, it is expressly stipulated, that *enemies' property* seized in neutral bottoms does not subject the vessels to capture; and surely the *produce* of an enemy's colony belonging to an ally seized in a neutral ship, could not have a more penal effect. But the appellants, without arguing these questions separately, contended, that neither ship nor cargo were liable to capture, both being secured by the treaty of 1674. That independent of that treaty, and considering the appellants as subjects of a neutral state only, not allied to Britain, and secured by no treaty whatever, yet they must be protected in their property, on the [338] principles of natural justice, and under the law of nations. It is a received, and established maxim, that a war between two states ought not and does not alter the situation of a neutral power, with relation to the states at war. The neutral state retains the same privilege of commerce and freedom of intercourse with the other states, during the war, that could be enjoyed before its commencement consistently with strict neutrality. That the outward cargo, in the present case, did not contain a single contraband article, and could not have been lawfully captured, though the vessel had been cleared out from Holland for St. Domingo; therefore the outward cargo was *lawfully* exported to and disposed of at St. Domingo, and converted into an equal value of coffee, sugar, and other articles of commerce, which composed the homeward cargo, and which became the property of the appellants, from the moment it was put on board their vessel, and which could, on no principal of law or justice, be considered as liable to capture. Suppose the proceeds had been taken in cash or bills of exchange, and the ship had returned with these to Amsterdam in ballast; in that case, could the captors have seized the money or bills? Certainly not; and the present case was materially the same; the only difference was, that the appellants took one commodity in place of another, in exchange for their outward cargo, in place of gold and silver or bills of exchange, they took coffee, sugar, etc. and the one article of exchange was no more seizable than the other. In short, the capture of this vessel, with the *net proceeds* of the outward cargo on board, was essentially the same as if the capture had been made of the ship and her cargo on her outward voyage. The respondents were pleased to allege, that the treaty of 1674 had been suspended previously to the capture, by his majesty's proclamation in April 1780, and that it would be inexpedient to allow the French to export their property, and to carry on their commerce in Dutch bottoms free from capture, while British property would be open to it. But the appellants contended, that neither of these arguments could aid the respondents. The proclamation clearly shewed, that the treaty was *then* in force, as it required a positive act to do it away, and at any rate the proclamation could not affect the appellants, as it contained the following declaration: "That his majesty's order shall take place at the following

terms, viz. *Three months* from the Canary Islands as far as the Equinoctial Line or Equator;" within which space the capture in question was made, on the 23d of May, little more than one month after the date of the royal proclamation. In answer to the cases of last war, founded on by the respondents, the appellants contended, that these cases did not apply, not being similar to the question at issue, and they denied that they had any *licence* from, or commerce or connection with France, that could in any shape make the ship and cargo French by adoption; they only availed themselves of the liberty that was given to them, as subjects of Holland, in common with every other nation in the world, not at war with France, in consequence of [339] an edict published at Paris the 31st July 1779, laying open the French West India trade "to all foreigners and neutral nations." That the circumstance of Mr. Hendricks' accidentally sailing from Cape François in company with a French fleet, could not have any effect upon the case; he could not avoid it, unless he had imprudently chosen to sail alone, and thereby hazard the capture of the ship and cargo, by the piratical cruizers in those seas. If the convoy, which happened to sail at the time of his departure, had been Danish, Russian, or any other nation, he would in the same manner have been glad to put himself under their protection; there certainly could not have thence arisen any presumption of his ship and cargo being Danish or Russian property; and as little ground was there in the present case for presuming, that the ship and cargo was French property. It was not pretended that any resistance was made by the convoy, or that Captain Hendricks either made or intended to make any other use thereof, than for the purpose of protection from pirates; for it was admitted, that he left the convoy as soon as that danger was over, many days before the capture.

On the 31st of January 1781, the Court of Session pronounced the following interlocutor: "On report of the Lord Braxfield Ordinary, and having advised the informations *hinc inde*, the Lords find the letters orderly proceeded (*i.e.* the Judge Admiral's decree well founded) and assolzie (acquit) the chargers (respondents) from the conclusions of the process of reduction, at the suspenders' (appellants) instance, and decern."

The appellants, conceiving themselves much aggrieved by the interlocutors of the Judge Admiral of the 22d September and 20th October 1780, and by the interlocutors of the Lords of Session of the 23d December 1780, and 31st January 1781, appealed therefrom, insisting (W. Scott, J. Morthland), that the ship was clearly proved to be Dutch property, and to have been furnished with a regular passport or sea brief, agreeably to the treaties between Great Britain and the States General; and which treaties were subsisting, and in full force, at the time and place of the capture in question; and that therefore the cargo was free, and not liable to capture on board a ship so owned and documented. That if any doubt should be entertained as to the protection of the cargo on board a Dutch ship at the time and place of the capture in question; still such cargo was not liable to capture and condemnation, inasmuch as by the evidence in the cause, it was clearly proved to be the property of the appellants, subjects of the States General, then at peace with Great Britain. That the whole proceedings respecting the unlading and sale of the cargo *pending the suit*, and before *final* condemnation, were most unwarrantable, even upon the supposition of the capture being legal, That it is now established that neither ships or cargoes, the property of subjects of neutral powers, either going to trade at, or coming from the French West India islands, with cargoes purchased there, are liable to capture; for in many recent instances, particularly the *Tiger*, a Danish ship, [340] with a cargo purchased at Cape François, proceeded to St. Thomas; the *Copenhagen*, a Danish ship, from St. Thomas to Guadaloupe; the *Jonge Jan*, a Dutch ship, with a cargo taken in at Port au Prince, and bound to Curaçoa; and likewise in the cases of the sloop *Nancy*, and six other Danish vessels, with cargoes taken in at Guadaloupe in the year 1780, and bound therewith to the island of St. Thomas, under convoy of a Danish frigate; all which were captured by British cruizers, and condemned in the Vice Admiralty Courts in the British West Indies; the Lords Commissioners of Appeal reversed the sentences of condemnation, and restored the ships and cargoes.

On the other side it was said (W. Wynne, H. Dundas, J. Wallace), that the appellants, by delaying to bring their appeal in due time, and thereby inducing the respondents to believe they were to acquiesce in the judgment below (whereupon the prize

money was divided among all concerned) had barred themselves from relief, even if otherwise entitled. And though his Majesty's proclamation in December 1780, limiting the time for appeals in prize causes, might not strictly apply to this case, and though, by their Lordships' standing order, appeals from decrees made in the courts of Scotland are allowed to be entered at any time within five years, yet it was apprehended to lie with their Lordships, whether an appeal under all the circumstances ought to be entertained; and the present seemed to merit no favour. That the ship's papers, upon which the appellants relied as evidence that the homeward cargo of the *Katharina* belonged to subjects of Holland, were delusive, unsatisfactory, and incomplete; while, on the other hand, there was cover and concealment in the case, and strong ground for believing that the cargo was the property of the enemy. 1. There was no passport from the States of Holland on board. 2. The licence from the Dutch West India Company, as well as the owner's instructions to the master found on board, restricted the voyage to Curaçoa, and from thence back to the Texel, though it was now avowed that the intention from the beginning was to go to St. Domingo. 3. The reports of the French officers at Cape François bear, that the appellant Hendricks was in the employment of M. Lambert, a subject of France. 4. There were no orders from Van Lankern, the pretended owner to Lambert; and without orders, it was incredible that the latter would have purchased and shipped so valuable a cargo on the sole account of the former. 5. The ship sailed from St. Domingo under French convoy, and *the master took sailing orders from the French Admiral*; for which it was plainly a lame and occasional excuse to say, it was for security against piratical vessels; for it was not merely protection he sought, but he submitted to *command*, and continued under it as long as he could. 6. No true bill of lading was found on board, and it was pretended there was none; a circumstance peculiarly suspicious, when it was considered, that by the French ordinances made with respect to Dutch ships, it is laid down as a rule without exception, that vessels wanting such bills signed by the masters, and distinguished from [341] invoices, shall be lawful prize. Upon the whole it was evident, that papers had been concealed or destroyed, and that the conduct of the voyage throughout bespoke disguise and a consciousness of being engaged in an illicit trade. That the detection of false documents has been universally received as sufficient ground for condemning both ship and cargo. Here a forged bill of lading had been discovered; the master's conduct in fabricating and antedating it as if made at Cape François, was only to be accounted for by an intention to supply the want of another which he had destroyed, and to aid the other papers concealing the true owners. That the ship in question was engaged in carrying provisions to the enemies of Great Britain, contrary to an article of the treaty made between England and Holland in February 1673-4, renewed by subsequent treaties, and in force at the time of the capture in question. That the subjects of all other nations being absolutely prohibited to trade to or from the French West India islands, by the fundamental laws of France, the ship in question coming *directly* from St. Domingo with a cargo taken in there (be the property whose it might) must be considered as French, and as such both ship and cargo were lawful prize, agreeably to many decisions in the Courts of Admiralty, and by the Lords of Appeal last war, founded upon the clearest principles. (Adjudged by the Lords of Appeal, *De Juffrow Maria*, March 6, 1760. *Maria Agnes*, March 26, 1760. *De Vryheidt*, June 12, 1760. *De Dagaraad*, June 19, 1760. *Archibald Adrian Galle*, May 1, 1764, etc. etc.)

But it is objected, that by an edict of the French King, dated in July 1779, the trade to his colonies was laid open to all neutral states. To this it is answered, that during the last war, Dutch ships engaged in this fraudulent trade, obtained special licences from the French government; but these were constantly disregarded when urged as obviating the allegation of their being engaged in a trade open only to French subjects, and even were taken as conclusive evidence of their being adopted French ships. During the present war, it is said a general licence has been given which cannot vary the case when the views and consequences are precisely the same. The opening a trade to the colonies of France, *flagrante bello*, is a transaction to the prejudice of Great Britain, and a mere device and cover for fraud. A Dutchman, who trades under a privilege of this kind, is not in the ordinary situation of a neutral subject, continuing his own commerce with the warring nations as in time of



peace, he is to all intents and purposes carrying on the trade of France, being admitted to a participation *ad hunc effectum*, in the exclusive rights of a French subject; and, as the government of France considers such persons as temporary subjects to the effect of being allowed to trade with the French West Indies, the subjects of Great Britain, on the other hand, must, according to every principle of justice and sound reasoning, be entitled to consider them in the same light, and to seize as lawful prize, both ships and cargoes employed in this extraordinary commerce. No person can possibly believe that the licence to other states will be continued by France after the peace. It has been shewn, in a variety of instances, that the Dutch do not understand that it will; and till such a licence has been granted, or [342] continued in time of profound peace, no regard can be paid to it when issued in time of war.

It is further objected, that by the treaty of December 1-11, 1674, between Great Britain and the States General, the subjects of either were permitted to carry the property of the enemy of the other, with the exception of certain articles therein specified as contraband; and therefore supposing the cargo of the ship in question to belong to Frenchmen, it could not be made prize of because it was in a Dutch bottom. That treaty, however, went no farther than to secure to the subjects of Holland the right of continuing their commerce *as in time of peace*, notwithstanding any quarrel or hostilities which might take place between Great Britain and other nations, but not to give a more extensive privilege of trade to the Dutch during the subsistence of such hostilities, than they enjoyed at any other time. So the matter is explained by the second article of the treaty, which bears, "Nor shall this freedom of navigation and commerce be violated or interrupted by any war, but such freedom shall extend to all commodities *which might be carried in time of peace*, those only excepted which are described under the name of contraband goods in the following article." The cargo of the ship in question consisted of commodities which the Dutch *could not carry in time of peace*, and was therefore not protected by the treaty. That the trade to French colonies was not in view at the time of making the treaty 1674, it could not therefore be opened, *ex post facto*, in time of war to the subjects of Holland, to enable them to carry it on *as under, or by virtue of engagements between England and Holland, made prior to the existence of this object*. It never was and never could be the intention of any contracting parties to allow their particular contracts to be taken advantage of by the enemy, granting a licence to trade in an unusual manner, and a temporary dispensation with his own fundamental laws. The treaty 1674, therefore, could not be set up as permitting either of the contracting parties to carry the produce of the American colonies belonging to the enemy of the other.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the interlocutors therein complained of should be reversed, and that the value of the ship and cargo should be paid by the respondents to the appellants. (Jour. *sub anno* 1783. p. 478.)

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[343] CASE 3.—Major MICHAEL FALLIEFF and another,—*Appellants*; WILLIAM ELPHINSTONE and another,—*Respondents* [14th August 1784].

Whoever seizes and detains a ship belonging to the subjects of a neutral power, does it at his peril; and unless he proceeds in the regular stated form to the condemnation of ship and cargo, and prevails in it, or gives legal and sufficient reasons to justify his conduct, he must, as matter of course, pay the costs, damages, and demurrage.

INTERLOCUTORS of the Court of Sessions in Scotland REVERSED.

By the tenth article of the treaty of commerce concluded between Great Britain and her Imperial Majesty on the 20th of June 1766, it was agreed, "That the subjects of the two high contracting parties should be at liberty to go, come, and trade freely with the States, with which one or other of the parties should then or at any future period be engaged in war, provided they did not carry warlike stores to the enemy."—And by

the eleventh article of the same treaty, it is declared, "That all cannon, mortars, fire arms, pistols, bombs, grenades, bullets, balls, fuzees, flint stones, matches, powder, saltpetre, sulphur, breastplates, pikes, swords, belts, cartouch bags, saddles and bridles, beyond the quantity that may be necessary for the use of the ship, or beyond what every man serving on board the ship, and every passenger ought to have, shall be accounted ammunition, or warlike stores; and if found, shall be confiscated, according to law, as contraband goods, or prohibited effects; *but neither the ship, nor passengers, nor the other merchandizes found at the same time, shall be detained or hindered from prosecuting their voyage.*"

The subjects of the Empress of Russia had, in the course of the late war, been interrupted in their trade, notwithstanding the king's general instructions to privateers, an additional instruction to the commanders of all his majesty's ships of war, and private ships having letters of marque, was issued on the 20th November 1780, enjoining them the strictest observance of the stipulations of the tenth and eleventh articles of the treaty of commerce before mentioned; which articles were inserted in the said instructions, that they might be accurately known to all the commanders, and observed by them as an inviolable law.—And by the fourteenth article of the general instructions, it is directed, "That all persons who shall violate these or any other of our instructions, shall be severely punished, and also required to *make full reparation to persons injured, contrary to our instructions, for all damages they shall sustain by any capture, imbezzlement, demurrage, or otherwise.*"

Notwithstanding these general and special instructions, the respondent Gardiner, commanding the privateer *Paisley*, belonging to the other respondent, being on a cruise in the North Seas, and [344] meeting with the ship *Vorst Potomskin*, upon the 10th of January 1781, did not scruple to board her, though under Russian colours. The vessel belonged to the appellant Fallijeff, and was in the course of her voyage from Saint Petersburg to Cadiz, loaded with sail cloth, ravenduck, alims, linen, hemp, pitch, and cordage, also the appellant's property. She was then under the command of Jacob Jorgans List, a Dane, taken in at Elsinore, to navigate her to Cadiz. The ship's papers, which clearly shewed the property, were delivered to the privateer's people immediately, but not one of them understood the Russian language. Had they examined the cargo, they must have seen that it was not contraband, but they confessed they did not, assigning for reason that the weather was too stormy to open the hatches. They made sail for the Frith of Forth in Scotland, where they arrived the 25th of January; and in carrying the vessel into the harbour of Methell, there she was run aground, and lost a great part of her false keel. After remaining at Methell for nineteen days, they thought proper to carry her from thence to Leith, where it was discovered that the cargo had received damage, and must be unloaded, which was done accordingly.

By his Majesty's instructions to the masters of privateers, and letters of marque, they are strictly enjoined (agreeably to acts of parliament), "after taking and bringing into port any ship, vessel, or goods, to bring or send, as soon as possibly may be, three or four of the principal of the company (whereof the master, mate, or boatswain to be two) of every ship or vessel so brought in, before the judge of the High Court of Admiralty of England, or his surrogate, or before the Judge of some other Admiralty Court within his Majesty's dominions, lawfully authorized, to be sworn and examined upon such interrogatories, as may tend to the discovery of the truth, concerning the interest or property of such ships or vessels, and the goods, merchandizes, or effects found therein. And the taker is further required, at the time he produces the company to be examined, to bring and deliver into the hands of the judge, all such papers, passes, sea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings as shall have been delivered up, or found on board the ship, and to make oath that the said papers and writings are brought and delivered in as they were received and taken, without fraud," etc.

The respondents, setting at nought the law, and their instructions, never sent or brought any of the company of the *Vorst Potomskin* before a judge to be examined, nor did they ever bring or deliver the ship's papers into any Court. But the respondent, Elphinstone, thought proper to carry off all the papers, and they remained in the private custody of him and his agents for a considerable time. Having examined them at his leisure, and being convinced that the capture was illegal, he

delivered back certain writings to List, the master, affirming these to be all he had taken away, and telling List that he was at liberty to proceed on his voyage.

[345] It was impossible for the vessel to proceed till she was repaired, and the cargo reloaded; and the appellants' agents insisted, that before she sailed, the respondents should pay the damages, costs, and demurrage. The vessel and cargo had been insured in Holland, from St. Petersburg to Cadiz, *but with a condition* (usual in Holland during the late war), *that the policy should be void in case of capture*; so that a high premium was in this case lost, and a new insurance, from Leith to Cadiz, obliged to be made; whereby, and by the unloading and reloading at Leith, the repair of the vessel, agency, etc., the costs to which the appellants considered themselves as clearly entitled, amounted to a large sum.

The respondents not having proceeded to the legal adjudication of the said ship and cargo, or either of them, as prize, and refusing positively to pay any costs, the appellant was advised to bring his action against them in the Court of Admiralty in Scotland, which has an exclusive jurisdiction in the first instance in all maritime matters affecting persons and property in that kingdom, libelling upon the circumstances, and concluding for damages and costs, which he stated generally at £3000, but at the same time referred to a condescence or specification.

After instituting this action (the repairs of the ship being completed and the cargo reloaded), the appellant moved the court for a licence to pursue the voyage to avoid further detention from the respondents, or any one else, and the respondents not objecting, the judge pronounced the following interlocutory: "Having considered the foregoing minute for Major Michael Fallijeff, merchant in Petersburg, owner, and Jacob Jorgans List, master of the ship called the *Vorst Potomskin* of Petersburg, mentioned in the said minute, finds and declares, that the said ship and her cargo are free of all claims made against the same by Captain John Gardiner, commander of the ship or brigantine called the *Paisley* of Carron, and the Honourable Captain William Elphinstone, and the other owners of the said ship the *Paisley*; and that the said ship the *Vorst Potomskin* of Petersburg, and her cargo are neutral property, and cannot be lawfully stopped or detained during her intended voyage to Cadiz in Spain, by any ships or vessels of force, or others belonging to his Majesty the King of Great Britain, or any of his Majesty's subjects; and that the said ship the *Vorst Potomskin* of Petersburg, and her cargo, are at full liberty to proceed in and follow forth her original intended voyage to Cadiz in Spain, as if she had never been brought into Leith, and decerns."

To this action of damages the respondents put in the following defence or plea: "By the instructions delivered along with letters of marque, dated the 15th of December 1778, his Majesty does strictly charge and enjoin the commanders and crews of all vessels, having letters of marque, that they do not, under any pretence, seize or detain any ships or goods which, being met by them at sea, shall appear to be the property of any Prince or Potentate in amity with us, or of the subjects of such Prince [346] or State, such goods not being warlike or naval stores, *unless they shall have just and probable ground to suspect the evidence then offered to them, that the property of such ship or goods is fraudulent and untrue*. On the 18th or 19th of January 1781, the defendant's ship fell in with the pursuer's vessel, then under the command of Captain List, a Dane, who, together with the whole crew, excepting two, had been put on board the vessel at Elsinore; and the Russian sailors who had navigated her from Petersburg, discharged. When the Captain and second mate of the defender's ship came to examine the papers, they found reason, from the general face of them, to have just and probable grounds to suspect that the evidence arising therefrom of the property of the cargo being Russian, was fraudulent and untrue, and therefore seizable under the above instructions; a fact of which they were afterwards satisfied by positive information received from persons on board the pursuer's own ship, that the cargo was such as to make it a lawful prize."

The appellant objected to this defence as general, vague, and irrelevant; but the Judge was pleased, nevertheless, on 30th November 1781, to pronounce the following interlocutory: "Having advised process, and the defences for the Honourable Captain William Elphinstone defender, with the answers made thereto for Major Michael Fallijeff and Jacob Jorgans List, pursuers, and replies, allows the said defender a proof of all facts and circumstances tending to shew that the master or commander of

the ship or privateer called the *Paisley* of Carron, had just and probable grounds for seizing, and thereafter bringing into Leith, the ship called the *Vorst Potomskin* of Petersburg; and in general allows to the said defender a proof of all facts and circumstances which he may think material, and allows to either party a conjunct probation."

Against this interlocutory the appellant presented a petition to the judge, insisting that the proof ought not to be allowed, for that the respondents had stated nothing to justify the capture, though proved: that as the captors had not procured the examination of the captain or crew of the alleged prize, nor brought the ship's papers into a Court of Admiralty, as required by law, but allowed the ship and cargo to be released as neutral, and the papers to go with her, it was too late to pretend to prove any thing concerning the property, or to shew what appeared from the papers; and that even supposing it proved or admitted, that the cargo was enemy's property, it was protected by the terms of the treaty above mentioned, and the privateer by her instructions discharged from making a capture of it, the bottom being confessedly Russian, and no military stores on board.

The office of Judge having become vacant about this time, occasioned a delay in the proceedings, and it was not till the 5th of July 1782, that the new judge pronounced his interlocutor in the same terms with that of his predecessor quoted above.

[347] The appellant then presented his bill of suspension to the court of session, complaining of the said orders of the Judge Admiral; but his bill was refused by interlocutor of the Lord Ordinary on the 31st of October 1782, and that interlocutor affirmed by the whole Court on the 23d of November following.

The appellant was then advised to let the proof proceed, entering his protest that his acquiescence should not prevent his seeking relief against the several interlocutors above recited, as well as any thing else he might be aggrieved by at the issue of the cause. And the respondents having closed their proof which the appellants took no concern in, by cross-questioning the witnesses, or otherwise, the parties by appointment gave in memorials. In that for the appellant it was maintained, That the proof was altogether idle and irrelevant: That even if it could be considered, nothing was proved to justify the capture; and that the Russian treaty, and his Majesty's instructions to the privateer, took away every excuse the captors could make for their conduct, founded upon the idea of the cargo being Spanish property. But the Judge of the Admiralty nevertheless, on the 28th February 1783, gave the following sentence or decree: "Having considered process the proof adduced, memorial for the pursuers, as also memorial for the defenders, circumduces the term against both parties, and assoilzies (acquits) the defenders from all the conclusions of the pursuers precept (libel) against them, and decerns."

The appellant being advised, he could not appeal to their Lordships directly from the decree of the Judge Admiral, but must bring the question previously before the Court of Session, brought an action in that Court against the respondents; concluding that the Judge Admiral's decree should be reduced or set aside, and the respondents should be decreed to pay costs, damages, and demurrage, in the same way as had been concluded for in the action before the Admiralty Court.

This new action having, according to the usual course, come before the Lord Kennet Ordinary, his Lordship was pleased, on the 11th July 1783, to pronounce the following interlocutor: "Having heard parties procurators upon the import of the Admiralty decret, under reduction, and reasons of reduction, repels the reasons of reduction, and assoilzies (acquits) the defenders (i.e. the respondents) from the process, and decerns." And his Lordship refused two representations put in against his said interlocutor.

The appellant Fallijeff afterwards presented his petition to the Court, reclaiming against the said interlocutors of the Lord Ordinary; to which petition answers being put in for the respondents, and they having insisted, that some person resident in the country should appear as attorney for the appellant Fallijeff, to answer costs in case they should be awarded; the other appellant, Sir William Forbes, assisted himself in that character by a minute in process; and the Court, upon advising the whole matter, upon the 10th of February 1784, pronounced the following interlocutor: [348] "The Lords having advised the said petition and answers, with what is above set forth, they adhere to the interlocutor of the Lord Ordinary reclaimed against, and refuse the desire of the petition, find the petitioner and his attorney liable in the expence of

process, and allow an account thereof to be given into Court:" which interlocutor was signed the 12th of February 1784.

The appellants, conceiving themselves to be greatly aggrieved by the said interlocutors of the Judge Admiral of November 30, 1781, July 5, 1782, and February 28, 1783, by the said interlocutors of the Lord Ordinary of October 31, 1782, July 11 and 29, and November 13, 1783, and by the said interlocutors of the Lords of Session of November 23, 1782, and February 12, 1784, appealed therefrom. And in their behalf it was insisted (W. Wynne, J. Anstruther), that the ship was unduly and illegally taken, in violation of the treaties subsisting between Great Britain and Russia, and expressly contrary to his Majesty's instructions to privateers. Whoever seizes and detains a ship belonging to the subjects of a neutral power, does it at his peril, and unless he proceeds in the regular stated form to condemnation of the ship and cargo, and prevails in it, or gives legal and sufficient reasons to justify his conduct, he must, *as a matter of course*, pay the costs, damages, and demurrage. That the respondents, not having brought or sent the Master or any of the crew of the captured vessel to be examined, on the standing interrogatories in a Court of Admiralty lawfully authorized, nor brought the ship's papers into such Court, as directed by the acts of Parliament, and his Majesty's instructions to privateers, but having redelivered the ship papers, and acquiesced in the release of the ship and cargo as neutral property, upon the action instituted in the Court of Admiralty of Scotland, by or on the part of the appellant, did thereby, in fact, admit that there was not just cause of seizure; and consequently they were by law liable to the payment of demurrage, and of all costs and damages sustained by the appellant. That the only legal evidence in the first instance of a prize cause, is the preparatory depositions, and the ship papers, and no other evidence can be regularly admitted or received. And as the captors in this case neglected to lay such evidence before the Court below, and actually consented to the restitution of ship and cargo, without having taken any legal steps towards a justification of their conduct, they were not afterwards at liberty to introduce a new species of evidence to the prejudice of the appellants, when by the departure of the vessel he was deprived of the benefit of her papers, and of every other means of counteracting their most irregular and indecent proceedings. But supposing it to be proved, that List the Master, at the time of the capture, did say, *the cargo was lawful prize*, which is the sum of the respondents plea and evidence, it would not justify the seizure and detention of the vessel: had the captors examined the ship's papers and cargo, as it was their duty to do, they must have been convinced that List was misleading them. It was admitted, that [349] the captors discovered immediately that he was a Dane, put in at Elsinore, (for that was pleaded as one ground of their suspicion of the cargo not being Russian,) consequently he could know very little about the property. It was not proved, that he ever said *the cargo was the property of the enemies of Great Britain*. If he said *the cargo would be good prize*, as was alleged, his meaning must have been evident, and was plainly no more than that, consisting partly of naval stores, it would be detained for the use of his Majesty, the value and freight being paid for, according to a custom which then prevailed, respecting the ships of many neutral powers, but which could never warrant the seizure of a Russian vessel. This was the aim of List, who wished not to prosecute his voyage to Spain; and on the whole, the respondents had themselves established, That List, from the moment of the capture, behaved in a manner *that shewed him to be a fool or a madman, to whom no credit was due*; he was constantly drunk, and for those reasons the appellant was afterwards obliged to dismiss him, and employ another master to navigate the ship from Leith to Cadiz.

On the other side it was said (I. Campbell, W. Adam), that it appeared that the Captain of the privateer had just and probable grounds for seizing this ship, the *Potomskin*, and detaining her till her cargo should be inspected and examined; and that in order to examine her cargo it was necessary to bring her into port, it being impossible to examine the cargo of such a vessel in the northern seas at that season of the year. That no damage was done to the ship or cargo; and when they were delivered up to the appellant, the respondent offered to give security to pay whatever damages might be given against him, either by a court of law or on arbitration. And that if Jorgans List, the Captain of the *Potomskin*, had been examined, it would have clearly appeared from his evidence, that the cargo was enemies property; but he was sent out of the country by the appellants, to avoid such examination.

After hearing counsel on this appeal, it was DECLARED, That notwithstanding the cause of seizure afforded by the demeanour and express declaration of the pursuer, (the master of the vessel in question,) that the cargo was good prize, but that the vessel was not so; yet in respect that, in the said Court of Admiralty, it was declared and adjudged, that the said ship and cargo are neutral property, and free of all claims made against the same by the defenders; which order was not reclaimed against:— And also, in respect that the defenders took upon them to detain the said ship and cargo, claiming the same or one of them, as prize, without proceeding in any manner to obtain condemnation thereof; or bringing or sending any part of the company of the said ship before the Judge of the Admiralty Court, to be sworn and examined upon such interrogatories as might tend to the discovery of the truth concerning the interest and property of such ship and cargo; or bringing and delivering to such Judge, all the papers, documents, and writings delivered up or found on board the said ship: It was further declared, That the defenders (respondents) [350] were liable and responsible to the pursuers (appellants) respectively, and according to their rights, for the demurrage of the said ship; and also for such damages as the said ship and cargo might have sustained by reason of the detention thereof, from the day of the capture, to the said 8th day of May 1781, on which day it appeared the said ship was ready to depart; unless the defenders could instruct that the said ship and cargo had been before that time delivered up to the pursuers, or so tendered; and, in that case, to such time as the said ship and cargo might have been made ready to depart after such surrender or tender thereof: And it was therefore ordered and adjudged, that the said several interlocutors complained of in the said appeal, should be REVERSED, so far as the defenders were thereby absolved: And it was further ordered, that the said cause should be remitted back to the Court of Session in Scotland to proceed accordingly. (MS. Jour. *sub anno* 1784. p. 492.)

Several proceedings were accordingly had, in the Court of Session, to determine the *quantum* of damage and the sum to be allowed for demurrage; which depended upon intricate statements and accounts, uninteresting to all but the immediate parties. Several interlocutors were made; and an appeal and cross appeal, against the same, came on to be heard before the House of Lords, on the 12th of March 1794, when it was ORDERED and ADJUDGED, That the respondents should pay to the appellants the sum of £890 8s. 3d., being the amount of the different sums mentioned in the report of the Register of the Court of Admiralty as due for demurrage and damage: And further, that the parts of the interlocutors complained of, by which the respondents were decreed to pay to the appellants the sums of £82 and £63, (the expenses in the Court of Admiralty and Court of Session previous to the last appeal,) and £140 (the expenses subsequent to the remit,) together with the expence of extracting the decree, be affirmed; and that the said interlocutors be in all other respects reversed. (MS. Jour. *sub anno* 1794.)

[351]

## NOTICE.

CASE 1.—ROBERT ROCHFORD,—*Appellant*; RIDGELY NUGENT,—*Respondent*  
[15th May 1717].

[Mew's Dig. xiv. 1358.]

A purchaser for a valuable consideration, without notice of an old settlement shall not be affected by that settlement; especially if it appears to have been voluntary, and not made in pursuance of articles.

Evidence not read in the Court of Equity below, allowed to be read on the appeal before the House of Lords.

The deposition of a person concerned in interest, not allowed to be read.  
DECREE of the Irish Chancery REVERSED.

The effect of the determination is thus stated in the MS. Table, and thence copied into 18 Vin. Abr. and 2 Eq. Ab.

“Purchaser for a valuable consideration without notice shall not be impeached, especially where a settlement has been since made in his favour.”

Viner, vol. 18. p. 155. ca. 1: 2 Eq. Ca. Ab. 679. ca. 3.

Walter Nugent, of Portlomon, Esq. being seised in fee of the lands of Portlomon, Frewinmore, Frewinbegg, Grangegeeth, Balrath, Monroe, and Bally-Edwards, by indenture of lease and release, dated the 21st and 22d of May 1674, in consideration of £30 conveyed the lands of Bally-Edwards to Leonard Hatfield and his heirs; and he soon afterwards suffered a common recovery.

On the 1st of May 1675, the said Walter Nugent assigned part of the said lands to Mrs. Katherine Salisbury, his father's widow, for her dower.

In January 1676, Walter Nugent, for a valuable consideration, conveyed the lands of Monroe to the said Leonard Hatfield and his heirs. And, in October following, he demised the lands of Portlomon, Frewinmore, and Frewinbegg, to one Walter Nugent, an attorney, for 21 years, at the yearly rent of £27 for so many years of the term, as the said Katherine Salisbury should live, and £36 per ann. for the residue.

By indentures of lease and release, dated the 27th and 28th of October 1680, Mr. Nugent, in consideration of £212, conveyed the reversion of all the said lands of Portlomon, Frewinmore, Frewinbegg, Grangegeeth, and Balrath, to the said Leonard Hatfield and his heirs.

In March 1695, Leonard Hatfield, by lease and release and fine, in consideration of £600, conveyed all the said lands to the appellant and his heirs.—In November following, John Salisbury and Katherine his wife, in consideration of £80 and of £16 per ann. during Katherine's life, conveyed the lands assigned for her dower to the appellant and his heirs.—And soon afterwards, Walter Nugent, the attorney, in consideration of £180, assigned the above lease, in trust for the appellant.

[352] Walter Nugent, of Portlomon, was afterwards outlawed for high treason; and, upon his death in 1700, the respondent, as his son and heir, exhibited his claim to all the said lands, before the trustees of the Irish forfeitures; and thereupon the appellant exhibited a counter-claim.

On the 15th of January 1700, both these claims were heard; when the trustees decreed, that, as the appellant had produced and proved the several deeds and conveyances above stated, and the payment of the consideration-money, he appeared to be lawfully and rightfully seised of, and entitled to all the said lands, to him and his heirs for ever; and therefore they dismissed the claim made by the respondent, and decreed, that the said lands should be held and enjoyed by the appellant and his heirs.

By an act of parliament made in England, 11th and 12th William 3. intitled, *An act for granting an aid to his Majesty, by sale of the forfeited and other estates and interests in Ireland*, it is among other things enacted, "That if such claim shall not be allowed by the said trustees, or any seven or more of them, the party claiming, his heirs, executors, administrators, or assigns, or any claiming by, from, or under them, shall be for ever debarred and without remedy; and, if the party claimant shall, upon hearing any claim, prove the same by good and sufficient proof, upon oath, or otherwise, as the nature of the case shall require, to the satisfaction of the said trustees, or any seven or more of them, the said trustees, or any seven or more of them, are required to allow such claim; and every judgment, determination, or decree, which the said trustees, or any seven or more of them, shall make, shall be final, and conclude and bind all and every person and persons, their heirs, successors, executors, administrators, and assigns; notwithstanding any disability of coverture, infancy, non-sanity, or other matter or thing whatsoever; and all persons shall be bound and concluded by such judgment, determination, or decree, any law, statute, or custom, or other matter or thing to the contrary notwithstanding."

The appellant, being thus seised of the premises, and having been in possession thereof for upwards of nine years; he, in January 1704, in consideration of a marriage between George Rochfort Esq. his eldest son and heir, and the Lady Elizabeth Moore, one of the daughters of the Earl of Drogheda, and of £3000 her marriage-portion, settled all the said lands, immediately after his own death, upon the said George his son, and the issue of that marriage: and he afterwards levied a fine, *sur convauance de droit come ceo*, etc. with proclamations, to the uses of the marriage-settlement.

But, in Trinity term 1713, the respondent thought proper to exhibit his bill in the

Court of Chancery in Ireland, against the appellant and the said Leonard Hatfield; stating, that by virtue of a settlement of the 8th of May 1638, the said Walter Nugent, his late father, was tenant in tail of the premises; and, that upon [353] his marriage with Abigail Hatfield, he made a settlement thereof, by indentures of lease and release, dated the 6th and 7th of May 1675, whereby the same were limited to himself for life, with remainder to the respondent; that Hatfield had notice of this settlement, and obtained his conveyances by fraud; and therefore the bill prayed, that those conveyances, and also the deeds executed to the appellant, might be set aside, and that the plaintiff might be let into possession.

To this bill the appellant put in a plea and answer; by his plea, he stated the several deeds and fines, and other matters above mentioned, under which he derived his title; and by his answer, he denied any notice of the settlement, under which the plaintiff claimed.

This plea was over-ruled; and, on the 8th and 9th of May 1716, the cause was heard; when the Court decreed, that the appellant should convey, and procure those claiming under him to convey the premises to the respondent; that an injunction should issue, to put him into possession; and that the appellant should account for the rents and profits, as to so much as was in jointure to Mrs. Salisbury, and in lease to Walter Nugent, the attorney, from the time that their respective rights determined; and, as to the residue, from the time of his purchase.

From this decree, the appellant *immediately* sent over his petition of appeal to England; but the respondent having got the decree passed by surprise, and before their Lordships order on the petition was returned, the appellant, in order to save his possession, applied for a re-hearing of the cause; and accordingly, on the 4th of June 1716, the same was re-heard by the Lord Chancellor, assisted by both the Chief Justices, the Chief Baron, and all the other Judges then in Ireland; when they were pleased, unanimously, to affirm the former decree: in consequence whereof, an injunction was immediately issued; and, notwithstanding the pendency of the appeal, the appellant was stripped of his possession.

In support of this appeal it was said (S. Cowper, C. Phipps), that the depositions of Walter Nugent, the attorney, (who was a party interested, by having a remainder in the lands in question, under the settlement set up by the respondent,) were read against the appellant; and yet the answer of this same Walter, wherein he confessed his title to the estate, was not suffered to be read for the appellant. That the answer of Walter Nugent, the respondent's father, to a bill filed in the Court of Exchequer in the year 1682, was not suffered to be read for the appellant, although the answer of Walter Nugent, the attorney, who was a party in the same cause, was read against the appellant; whereas, it was more agreeable to justice and the rules of equity, that the answer of the respondent's father, under whom he derived title, should be read against the respondent; than that the answer of Walter Nugent, the attorney, should be read against the appellant, who did not derive under him. That it was denied by the appellant in his answer, and not proved in the cause, that he had notice before his purchase, of the respondent's pretended settlement of 1675; which, upon the face of it, appeared to be a voluntary deed, made after marriage; and it was not so much as pretended by the bill, that there were any articles or agreement before marriage. That the appellant was a purchaser, for the valuable consideration before stated; which amounted to the full value of the lands, at the time they were so purchased. That if the respondent had any title, it was a legal one, for which he had a legal remedy; and therefore he ought not to have been relieved by a Court of Equity, nor ought the appellant to have been decreed to account, until the respondent had established his title at law.

The printed case, on the part of the respondent (R. Raymond, N. Lechmere) contains no reasons in support of the decree; but concludes with hoping, that after the appellant's pretensions had been so solemnly heard and determined, their Lordships would see just cause for affirming the decree, and dismiss so vexatious an appeal with full costs.

At the hearing of this appeal, on the 14th of May 1717 (Jour. vol. 20. p. 455), the appellant's counsel produced a common recovery, suffered by Walter Nugent, of Portlomon, esq. in Easter term 1675; which being read, they offered to read deeds of lease and release, declaring the uses of that recovery; but the counsel for the



respondent opposed the reading thereof, alleging, *that the same were not read in the Court below*: whereupon the counsel were directed to withdraw, and a debate arising in relation to this matter, the question was put, "Whether the said deeds of lease and release should be permitted to be read?" *And resolved in the affirmative.* The counsel being then called in, and acquainted with the opinion of the House, the said deeds were accordingly read, as also several proofs in the cause; and the appellant's counsel having been fully heard, and the counsel for the respondent beginning to plead in answer thereto, they were directed to withdraw; and being withdrawn, it was ordered, that the House would proceed to the further hearing of the cause to-morrow morning.

Accordingly, on the next day (Journ. vol. 20. p. 457.), the respondent's counsel proceeded; and desiring that the answer of Walter Nugent, the attorney, might be read, it was objected to by the appellant's counsel, *the same not having been read in the Court below*: whereupon they were directed to withdraw, and being withdrawn, a debate arose, and the question was put, "Whether the answer of the said Walter Nugent, to prove the identity of the person mentioned in the settlement made by Walter Nugent, of Portlomon, esq. in the year 1675, be permitted to be read?" *It was resolved in the affirmative.* The counsel being then called in, and acquainted with the opinion of the House, that the said answer might be read; the same was read accordingly.—Then it was proposed by the respondent's counsel, that the deposition of the said Walter Nugent, the attorney, might be read; and the same being likewise objected to by the appellant's counsel, *he being concerned in interest*, they were directed to withdraw; and being withdrawn accordingly, the question was put, "Whether the deposition of the said [355] Walter Nugent should be read?" *And was resolved in the negative.* Then the counsel were again called in, and acquainted with the opinion of the House, "That the deposition of the said Walter Nugent should not be read, *he being concerned in interest*;" the respondent's counsel then desired, that the answer of the said Walter Nugent might be read in evidence against another defendant, Leonard Hatfield; which being opposed by the appellant's counsel, they were directed to withdraw; and being withdrawn accordingly, the question was put, "Whether the answer of the said Walter Nugent should be read in evidence?" *And was resolved in the negative.* The counsel being then called in again, and acquainted with the opinion of the House, "That the said answer should not be read;" proceeded to read some proofs in the cause, on behalf of the respondent; and the appellant's counsel having replied;

It was ORDERED and ADJUDGED, that the several orders and decree of the Court of Chancery in Ireland, complained of in the appeal, as also the order of the said Court, made upon rehearing the cause, affirming the said decree, should be reversed; and that the respondent's bill should stand dismissed; and that the said Court of Chancery should cause possession of the estate in question, to be restored to the appellant; and that the mesne profits of the same, if any had been received under the said decree, should be accounted for and paid to the appellant; but the respondent was at liberty to proceed at law, as he should be advised.

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CASE 2.—CHIDLEY COOTE and another,—*Appellants*; SARAH MAMMON and others,—*Respondents* [3d February 1724].

[Mew's Dig. x. 145, 148. See Conv. Act. 1882, s. 3.]

- A. agrees to take a lease of certain lands, but previous to his signing the articles, he has notice that B. has a prior agreement for a lease of the same lands. A. disregards this notice, and procures the lease to be granted to his son. Held, that this notice to the father affected the son, and the prior agreement being established, he was decreed to deliver up the possession.

Decree of the Irish Court of Exchequer AFFIRMED.

See *Merry v. Abney*, or *Abney v. Kendal*, Ch. Ca. 38: Freem. 151: 1 Eq. Ab. 330. c. 1. S. P.

Notice of the plaintiff's title to the agent or purchaser for another is notice to the party himself, because a presumptive notice to the party. Thus in the case

spondents, when lands were of a low value, to execute a new lease, agreeable to that of 1698, it would be hard, after the possession was quitted and given up as aforesaid, so much to the appellant Coote's loss, and after so great a length of time had passed, without making any demand; that when the respondents saw the lands rise in value, they should have the aid of a Court of Equity, to compel the appellant Coote to do what it was not in his power to do, and much less to oblige the appellants to account for the profits of the lands for so long a time. That the appellant Godsell, by virtue of the articles entered into with his father Amos, and of the lease [359] executed by himself, was now actually possessed of the legal estate in the lands; and as there was no sufficient proof in the cause, that either he or his said father had any notice of the respondents title, previous to their said several agreements, it was humbly apprehended, that a Court of Equity ought not to have decreed the appellant Godsell to release his right to the respondents, or to account for the profits.

On the other side it was contended (C. Wearg, T. Lutwyche), that there was no proof that Pritrich ever took a lease for a year from Coote; and if he had waived his title to a new lease, it was most probable, that he would have given up possession, and not have held the farm from 1702, when he surrendered his old lease, till his death in 1708; nor would he have continued to improve the lands at £200 expence, as was proved in the cause, without having a view of reaping the benefit of such improvements. That as to the alleged waiver of Catherine the widow, there was no proof of it; but there was proof which controuled such an allegation, viz. that she gave notice of the lease to Amos Godsell, and warned him not to take the farm; and that after Coote had let it to him, she refused to give up possession of the house, until he threatened to take it from her by force; and the appellant Coote's keeping the original lease in his hands uncanceled, and never requiring the agreement for a new lease to be delivered up to him, was a farther evidence that the widow never waived the title: besides, as Pritrich died in possession of the premises under the lease, and intestate, the respondents became entitled thereto as his coheirs; and, consequently, the widow had no power to waive or relinquish their right, by any act or consent of hers, and more especially as they were then infants. As to the objection, that the acquiescence from the time of the widow's having quitted possession, to the time of the respondents exhibiting their bill, being about nine years, was a confirmation that all right or pretension to a new lease was waived; it was answered, that the melancholy condition under which the widow and children so long laboured, together with the infancy of those children, and the agreement being mislaid, might very well account for that lapse of time; for if the respondents had presumed, that they could have recovered without the agreement, and had been in circumstances to sue, or of years to act, it was not to be imagined, that they would have delayed what was so apparently their interest; for it was proved in the cause, that the lands were worth eight shillings per acre in 1709, the year after Lewis Pritrich died, and had continued rising in value ever since. And as to the other objection, that the appellant Coote got nothing by letting the farm to Godsell, and that the appellant Godsell was a purchaser, without notice of the lease in force to Pritrich; for that though Amos Godsell had notice, yet his son the appellant had none; it was answered, that though Godsell might pay the same rent per acre as Pritrich did, yet he paid rent for about forty acres of common, which Pritrich had rent-free, and had the farm only for three lives, by which there [360] arose a considerable advantage to Coote; and as to notice, if any were material, there was full proof of it to Amos Godsell, which was insisted on as good notice to the appellant James, who was his son and heir, and actually named lessee by him: and therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed: and it was further ORDERED, that the appellants should pay to the respondents the sum of £40 for their costs, in respect of the said appeal. (Jour. vol. 22. p. 404.)

## PAPIST.

CASE 1.—EDWARD ROOPER,—*Appellant*; The Hon. T. RADCLIFFE and others,—*Respondents* [1st May 1714].

Where lands are devised in trust to be sold, in the first place for the payment of debts and legacies, and then to pay the surplus to J. S. a papist. J. S. is rendered incapable of taking the surplus, because it is not a *personal interest*, but a profit arising out of land, and not only within the express words of stat. 11 and 12 W. 3. c. 4., but within the mischief which that statute was intended to prevent.

DECREE of Lord Keeper Harcourt REVERSED.

Since the passing the stats. 18 Geo. 3. c. 60. 31 Geo. 3. c. 32., by which nearly all the disabilities imposed on Papists by former statutes are either taken away or greatly modified; and the stat. 23 Geo. 3. c. 28., confirming the independence of Ireland, and putting an end to appeals from the Courts of Judicature there to the English House of Lords, the cases on this subject are becoming in a great measure obsolete, and afford precedents chiefly by the analogy they may casually bear to other subjects.

See Mr. Butler's very learned note on 1 Inst. 391. a. (8vo. edit. or additional Notes in folio,) as to the effect of all the former and present statutes relating to Papists.

9 Mod. 190. 10 Mod. 237: 18 Vin. 261. ca. 2. in n.

John Rooper esq. being seised in fee of several manors, lands, and hereditaments in the counties of Cornwall, Gloucester, and Monmouth, of about £700 per ann. by indentures of lease and release, dated the 17th and 18th of January 1708, in consideration of 10s. granted and conveyed all the said manors and premises to the respondents Constable, Hickman, and Snow, and their heirs, in trust, to sell the same for the best price, and out of the monies arising from such sale, and by the rents and profits in the mean time, to pay, in the first place, a debt of £4000 due to the respondents Elizabeth and Hester Walden, on a mortgage of [361] the premises in Cornwall, with the interest thereof; then to pay the several debts specified in the schedule annexed to the release, and afterwards to apply the overplus, as the said John Rooper by his last will or other attested writing should appoint; and for want of such appointment, in trust for and for the benefit of the said John Rooper and his heirs.

On the 5th of March following, Mr. Rooper made his will; and thereby, after reciting and confirming the settlement, he bequeathed several pecuniary legacies out of the surplus of the monies to arise by sale of the settled estate, amounting to about £1000, and particularly to the respondents Hewett and Hickman, £50 a-piece for their trouble; and he gave the residue of his real and personal estate to the respondents Constable, Radcliffe, Hewett, and Hickman, their heirs and assigns, and made them joint executors.

The testator afterwards, by a codicil to his will, dated the 2d of April 1709, gave several other legacies; and devised all the remainder of his estate, whether real or personal, to the respondents Radcliff and Constable. And by another codicil, dated the 20th of the same month, the testator gave all his household goods, and the renewal of the lease of his house to the respondent Radcliffe; and all his books to the respondent Constable. The testator soon afterwards died.

By an act of the 11th and 12th of William 3., intitled, *An act for the further preventing the growth of popery*, it is, *inter alia*, enacted, "That from and after the 29th day of September 1700, if any person educated in the popish religion, or professing the same, shall not, within six months after he or she shall attain the age of 18 years, take the oaths of allegiance and supremacy, and also subscribe the declaration, set down and expressed in an act of parliament made in the 30th year of the reign of the late King Charles 2., intitled, *An act for the more effectual preserving the King's person and government, by disabling papists from sitting in either House of Parliament*; every such person shall, in respect of him or herself only, and not to or in respect of any of his or her heirs or posterity, be disabled and made incap-

able to inherit or take by descent, devise, or limitation, in possession, reversion, or remainder, any lands, tenements, or hereditaments, within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed; and that from and after the 10th day of April 1700, every papist or person making profession of the popish religion, shall be disabled, and is hereby made incapable to purchase, either in his or her own name, or in the name of any other person or persons, to his or her use, or in trust for him or her, any manors, lands, *profits out of lands*, tenements, rents, terms, or hereditaments within the kingdom of England, dominion of Wales, and town of Berwick upon Tweed; and that all and singular estates, terms, *and any other interests or profits whatsoever out of lands*, from and after the said 10th day of April, to be made, suffered, or done, to or for the use or behoof of any such person or persons, or upon [362] any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person or persons, shall be utterly void, and of none effect, to all intents, constructions, and purposes whatsoever."

Two of the executors, namely, Radcliffe and Constable, were professed papists, and above the age of 18 years and six months, on the 29th of September 1700; the other two executors, Hewett and Hickman, were professed protestants.

The testator's real estate, devised by his will and codicils, was greatly more than sufficient to satisfy all his debts and legacies; and therefore, in Easter term 1710, the executors Radcliffe and Constable exhibited their bill in Chancery against the appellant, as heir at law, and the other respondents; praying a sale of the trust-estates, and that after payment of the debts and legacies, the surplus might be equally divided between them, according to the first codicil.—The other executors, Hewett and Hickman, in Michaelmas term following, also exhibited their bill against the other parties; insisting, that as they were protestants, the surplus of the trust-estate belonged to them, the executors Radcliffe and Constable being incapable, as papists, to take.—And, in Michaelmas term 1711, the mortgagees brought their bill, to have a receiver appointed of the trust-estate, and the rents and profits thereof applied in satisfaction of their demand.

To these bills the defendant, the heir at law, by his answer insisted on the benefit of the above mentioned statute, whereby the executors, Radcliffe and Constable, were rendered incapable of taking any thing by the devises in the testator's will or codicils; and that, though the devise in the first codicil was not sufficient to vest an estate in them, yet it was a good revocation of the former devise to Hewett and Hickman, as it plainly indicated the testator's intention, that they should not take the premises; and, that the will being revoked by the codicil, and the codicil void by reason of the incapacity of the devisees therein named, the defendant Rooper, as being the testator's heir at law, and a protestant, was become entitled to the whole estate, subject to the incumbrances really affecting the same.

On the 27th of June 1712, these causes were heard before the Lord Keeper Harcourt, who was pleased to declare, that he would have the opinion of the Judges, before he pronounced any final judgment; and therefore ordered a case to be stated for that purpose, with the following *queries*: "1st, Whether a papist be disabled, by the act made in the 11th year of the late King, *for the further preventing the growth of popery*, from conveying or devising his real estate, upon trust to sell the same, and dispose of the money arising by sale to a papist? 2d, Whether Thomas Radcliffe and William Constable, being professed papists, are disabled by the statute to take by the codicil, the surplus of the money arising by sale of the said real estate, pursuant to the said deed of trust? 3d, Whether a papist, or person making profession of the Popish religion, who was above the age [363] of eighteen years and six months on the 29th of September 1700, be disabled by the said statute to take lands by a devise made after that time?"

This case was accordingly argued by counsel, at the Lord Chief Justice Parker's chambers, before his Lordship, the Lord Chief Justice Trevor, and Mr. Justice Powell; but they not giving any opinion thereon, the causes were again heard in the Court of Chancery on the 28th of October 1712, when Lord Harcourt (then Chancellor) was assisted by the Lord Chief Justice Parker, the Master of the Rolls, the Lord Chief Justice Trevor, and Mr. Justice Powell; who having taken time to consider, the heir at law applied by petition for the final judgment of the Court.

And accordingly, on the 25th of February following, the Lord Chancellor, with

the concurrence of all his great and learned assistants, except the Lord Chief Justice Parker, declared, "That the devise of the surplus of the purchase-money, after debts and legacies paid, to Radcliffe and Constable, who were papists, was a good devise, notwithstanding the said statute; the surplus being a *personal interest* in them, consequently not made void, either by the words or intention of that statute." It was therefore decreed, that an account should be taken of the testator's personal estate (not specifically devised) come to the hands of his executors, or any of them, and that the same should be applied in a course of administration; but the real estate should be sold to the best purchaser, and that the heir at law, on being paid his costs, should join in such sale; that a receiver should be appointed; that the monies arising from the sale, and the rents and profits in the mean time, should be applied in discharge of the £4000 mortgage, with interest and costs; and then, in paying such of the schedule debts, as the personal estate would not extend to satisfy; and, that after payment of the debts, legacies, interest, and cost, the surplus should be paid to Radcliffe and Constable, the devisees. As to Hewett and Hickman's bill, the Court declared, that the first codicil, whereby the testator gave all the remainder, whether in land or personal estate, to Radcliffe and Constable, was a revocation of the devise in the will, of the residue of the real and personal estate to Radcliffe, Constable, Hewett, and Hickman; and, that this bill being therefore unnecessary, it ought to be dismissed without costs, to be paid by Hewett and Hickman; but with costs to be paid to the defendants in that suit, out of the testator's estate, and decreed the same accordingly.

From this decree the defendant, the heir at law, appealed; and the 11th of July 1713, was appointed for the hearing the appeal; but application being, on that day, made to the House, to adjourn the hearing to some further time, it was thereupon ordered, that the said appeal should not be heard until the next parliament; and that the Court of Chancery should, in the mean time, direct the decree to be carried into execution; and if the real estate should be sold, in pursuance of the decree, before the appeal should be heard, the Court of Chancery should thereupon order [364] satisfaction to be forthwith made, to the mortgagees for £4000, and to the schedule and other creditors, and to the legatees, of what should be due to them respectively, with interest and costs, and other costs of the suit, to be paid according to the decree; but, that the surplus of the money (after such satisfaction as aforesaid) decreed to be paid to the respondents Radcliffe and Constable, should be secured as the said Court should think most proper; the same being to wait the determination of the House, on hearing the appeal. (Jour. vol. 19. p. 606.)

Pursuant to this order, the estate was sold; and the surplus of the money, after payment of all the debts, legacies, etc. amounted to near £10,000.

In support of the appeal it was insisted (J. Jekyll, N. Lechmere), that although the testator's codicil, devising the remainder of his estate, whether real or personal, to his popish executors Radcliffe and Constable, was a good revocation of the former devise to his protestant executors Hewett and Hickman; yet, it did not pass the surplus of the estate to Radcliffe and Constable, because, being papists, they were incapable of taking it. For, if lands are to be sold, the surplus devised is an *interest arising out of lands*; and not only within the express words of the statute, but within the mischief which that statute was intended to prevent. Besides, it was in the power of these popish devisees, by paying the debts and legacies, to have enjoyed the lands as a real interest, as long as they pleased; and they might do so still, if the other parties should not think fit to carry that part of the decree, directing a sale, into execution; wherefore it was hoped, that the decree would be reversed, and the appellant declared to be well entitled to the surplus of the trust-estate, after payment of the debts and legacies, as being the heir at law of the testator, and a protestant.

On the other side it was contended (R. Raymond, J. Pratt), that the devise of the surplus of the purchase-money to the respondents Radcliffe and Constable, was a good devise, notwithstanding the statute for disabling papists from purchasing lands; because this surplus money was a *personal interest* in them, and therefore not made void, either by the words or intention of that statute. That these devisees were above the age of eighteen years, at the time of making the act, and were under no manner of conviction whatsoever. That the testator might have sold the estate

in his life-time, and given the residue of the money to Radcliffe and Constable; consequently had power to dispose of such residue by his will. And, as the estate was, in fact, sold and converted into money, the appellant, as heir at law, could have no pretence of title to any part of the money arising from such sale. The decree, therefore, being just, founded on good reason, and consonant to the rules of law and equity, ought to be affirmed, and the appeal dismissed with costs.\*

But, after hearing counsel on both sides, and the Judges (who were ordered to attend) having severally delivered their opinions; [365] it was ORDERED and ADJUDGED, that so much of the decree, whereby it was declared and decreed, "That the surplus of the money arising by sale of the trust-estate, after debts and legacies paid, was a *personal interest* in the respondents Constable and Radcliffe; and, that the devise of such surplus to them, being papists, was a good devise, and that the same should be paid to them accordingly;" should be reversed: and it was further ordered and adjudged, that the surplus arising by any sale made, or to be made, of any of the trust-lands, after payment of the debts and legacies affecting the same, with interest and costs, according to the decree, should be paid to the appellant; and that if any of the said trust-lands should remain unsold, after such debts, legacies, interest and costs should be satisfied, such lands should be conveyed by the trustees, to the appellant and his heirs, at his and their costs: and, as to the payment of any of the simple-contract creditors, out of the money arising by sale of the trust-estate, in case the personal estate should be deficient for the payment thereof, no direct complaint being made thereof by the appellant, the decree was to stand; but without prejudice to the appellant's applying to the Court of Chancery, if he conceived himself aggrieved thereby, to vary the directions in the said decree, touching the payment of the simple-contract creditors, as he should be advised; and the said Court of Chancery was to give all such directions, in pursuance of this order, as should be just. (Jour. vol. 19. p. 672.)

CASE 2.—RICHARD BURKE,—*Plaintiff*; RICHARD MORGAN,—*Defendant*  
(in Error) [31st January 1717].

[See 1 Vict. c. 26. s. 24.]

A papist in Ireland cannot make a will, but his lands shall descend to all his sons equally; yet if the heir conforms within a year after he attains his age of 21, he may enter.

The point of this case is thus more accurately stated in 8 Vin. and 2 Eq. Ab.—"A will shall have relation only to the testator's death; for till his death he is master of his own will; and therefore a will of a papist in Ireland was held to be avoided by a subsequent statute made in that kingdom, enacting that the lands of papists there should not be devisable, but descend in gavel-kind." In the *MSS. Table*, so often cited, both points are stated as above—See this work, tit. *Statutes: Will.* [6 Bro. P. C. 486: 7 ib. 433].

By a statute made in Ireland, 21st Sept. 1703, the heir of a papist must file the Bishop's certificate of his conformity within a year after his age of 21; yet he may conform and file the certificate before his age of 21; the act being meant only as an encouragement for persons to renounce popery.

JUDGMENT of the Irish Exchequer, and Exchequer Chamber, AFFIRMED.

Viner, vol. 8. p. 273. ca. 7: vol. 18. p. 253. ca. 3: vol. 19. p. 528. ca. 164:  
2 Eq. Ca. Ab. 767. ca. 3.

On the trial of an ejectment, brought by the defendant Morgan in the Court of Exchequer in Ireland, for recovering certain lands in the county of Mayo; the jury found a special verdict, to the effect following, viz. That Henry Blake sen. had issue Patrick Blake his eldest son, and John his second son; and that Patrick died in 1693, in the life-time of his father, leaving issue Henry [366] (the lessor of the plaintiff) his only son and heir, then a minor.—That the said Henry Blake sen. being seised in fee

\* The arguments of counsel at the bar of the House, on hearing this appeal, seem to be stated pretty much at large in 10 Mod. 237. *et seq.*

of the premises in question, duly made his will, dated the 26th of January 1702, whereby he devised the said premises to one Anthony Browne, a papist, and his heirs, to the use of his daughter Catherine for life; with remainder to the use of the said John Blake for life; remainder to the use of all and every the sons of the said John Blake, for their lives successively, remainder to their several sons in tail male successively, with several other limitations over; wholly disinheriting the said Henry Blake, his grandson and heir-apparent, and leaving him only £200 to be raised out of the rents and profits of the premises, and to be paid to him at his age of 22 years, and not before; *declaring, that if his said grandson should molest any person to whom any estate was thereby limited, by claiming the same or any part thereof, then the said devise to him of the said £200 should cease.*—That by an act of Parliament made in Ireland the 21st of September 1703, intituled, *An act to prevent the further growth of popery*, it is enacted, “That all lands, tenements, and hereditaments, whereof any papist then was, or should thereafter be seised in fee-simple or fee-tail, should be of the nature of gavelkind; and if not sold, aliened or disposed of, by such papist in his lifetime, for good and valuable consideration of money, really and *bond fide* paid, should, for such estate, descend to, and be inherited by all and every the sons of such papist, in any way inheritable to such estate, share and share alike; and should not descend to the eldest, being a papist, as heir at law only; and for want of such issue, should go to all and every the daughters, etc. and not otherwise; notwithstanding any grant, settlement, or disposition by will or otherwise, that should be made by such papist, other than such sale, alienation, or disposition as aforesaid. *Proviso*, That if the eldest son, or heir at law of such papist, should be a protestant at the time of the decease of such papist, the lands whereof such papist should be so seised, should be decreed to such eldest son, or heir at law, according to the course of the common law of that kingdom; so as the certificate of the Bishop of the diocese wherein he should inhabit, testifying his conformity to the church of Ireland, as by law established, should be inrolled in Chancery, within three months after the decease of such papist. And if the eldest son, or heir at law of such papist, who should, at the time of the decease of such papist, whose heir at law he was, be of the age of 21 years, should become a protestant, and conform himself to the established church of Ireland, within one year after the decease of such papist; or being then under the age of 21 years, should, within one year after he should attain that age, become a protestant, and conform himself as aforesaid; that then, from the time of the inrolment in Chancery of the Bishop's certificate, testifying his being a protestant, and conforming himself in manner aforesaid, such inrolment being made within such year, he should be entitled unto, and should [367] have and enjoy from thenceforth, the whole real estate of such papist, as he might have done, if he had been a protestant at the time of the decease of such papist, as aforesaid.”—That by another act of Parliament, made in Ireland the 5th of May 1709, intituled, *An act for explaining and amending an act*, intituled, *An act to prevent the further growth of popery*, it is enacted and declared, “That the said gavelkind clause should take effect from the first day of that session of Parliament, wherein the same was made, which was the 21st of September 1703. And that no person or persons, who had turned or should turn from the popish to the protestant religion, as by law established, should be deemed or taken to be a protestant, within the intention of that act, or should take any benefit thereby, notwithstanding such convert should procure the Bishop's certificate; unless such person or persons should, within the space of six months next after declaring himself or themselves a protestant or protestants, or within six months after such person or persons should attain the age of 18 years, take and receive the holy sacrament of the Lord's Supper, according to the order and usage of the church of Ireland; and make and subscribe the declaration, pursuant to the said act to prevent the further growth of popery; and should also take the oath of abjuration, and file in the said Court of Chancery, or in some other of his Majesty's four courts at Dublin, a certificate or certificates thereof, in like manner as the Bishop's certificate was to be filed.”—That the said Henry Blake sen. on the 3d of March 1703, died seised in fee of the premises, and was all his life-time a papist; and that the said John Blake, at the time of his father's death, was a papist; that the said Henry Blake jun. at the time of the decease of his said grandfather, was a papist; and that all the legatees in the said will named (except the said Henry Blake jun.) were, at the time of finding the

verdict, papists.—That the said Henry Blake jun. on the 15th of July 1713, conformed himself before his Grace William, Lord Archbishop of Dublin, to the church of Ireland, as by law established; and, on the 17th of the same month, filed a certificate thereof in the Court of Chancery.—That on the 4th of October following, he took the sacrament of the Lord's Supper, according to the usage of the established church of Ireland; and, on the 6th of the same month, took the oath of abjuration, and made and subscribed the declaration; and, on the 16th filed a certificate thereof in the said Court of Chancery; and, that the said Henry Blake jun. conformed himself to the church of Ireland, as by law established, at the times in the said certificates mentioned, and as by the said several acts of Parliament was required.—That the said Henry Blake jun. was grandson and heir of the said Henry Blake sen. viz. son and heir of the said Patrick Blake, who was eldest son and heir-apparent of the said Henry Blake sen.; and that the said Henry Blake jun. at the time of the verdict, was within the age of 21 years, viz. of the age of 20 years.[368].—The jury then find the demise, etc. and conclude in the usual manner.

On arguing this verdict in the said Court of Exchequer, judgment was unanimously given for the lessor of the plaintiff; and that judgment was affirmed, on a writ of error in the Exchequer Chamber. The defendant therefore brought the present writ of error against both judgments; insisting (N. Lechmere, W. Peere Williams), that as the will of Henry Blake, the grandfather, was made before the first act of Parliament; and as the will must be admitted to be a good one, at the time it was made, neither of the acts of Parliament, which were both subsequent to the will, ought to be construed, so as to make that will void, which before was good. That it was very hard, in any case, for the law to have a retrospect, and especially in the case of a penal and disabling law; and it was contrary to such constructions, as had been put upon acts of Parliament of the like nature. That if such a construction was now to take place, so as to set aside the will, the act of Parliament ought to have very plain and express words for the purpose; whereas such words were not only wholly wanting in the present act, but, as it was penned, it seemed rather to import the contrary. But, supposing this point to be against the plaintiff in error, and that the lands in question were, by virtue of the act, to descend in gavelkind; yet the lessor of the plaintiff had not, by his pretended conversion, entitled himself to these lands; for, by the first act, the protestant convert ought to file the certificate of his conversion, within a year after his attaining the age of 21, which in the present case was not done; the lessor of the plaintiff being, at that time, and long afterwards, an infant; consequently, he had not complied with the act; the words of which were plain and positive, and its meaning undoubtedly was, to engage a steady and sincere conformity, and not such a one as an infant might, under the temptation of gain, be induced to make, and afterwards retract, even during his infancy.

In support of this judgment it was argued (T. Powys, R. Raymond), that though the testator's will was made before the first act took place, yet he did not die until five months afterwards; and it is well known, that no estate can be said to be disposed of by will, until the testator dies. That in this case, the testator might have revoked his will, and, either by deed or otherwise, have given the estate to whom he pleased; as he continued to be seised in fee, and in possession, and had all possible power over the estate during his life. That the act says, "When the papist dies seised in fee-simple, the estate must descend in gavelkind; *ergo*, to the protestant heir;" and therefore, as the testator died seised in fee, *after* the act was made and had acquired the force of a law, (which in itself was a revocation of the will,) the circumstance of the will being made before the act took effect, ought not to be construed such a disposition of the estate, as to prevent the protestant heir from having the benefit, which the Parliament clearly intended for such heirs, [369] as should renounce popery, and conform themselves to the protestant religion. That the whole design of the act, was to give encouragement to persons professing the popish religion, to renounce the errors of that persuasion, and conform to the established church; and, for which purpose, upon complying with the forms of the act, they were to be exempted from the disabilities which, without such a compliance, they would unavoidably incur. That the purport of the act made it absolutely necessary, to limit a certain time for the conversion of a popish heir, and the enrolment of his certificate, in order to prevent the many inconveniencies which might otherwise



arise; but the act in giving such heir a year for his conformity, after he should attain 21, designed him a favour, namely, that he should have a reasonable time to conform, before he should be deprived of the inheritance; which, but for this act, he would by law have been entitled to: but it could never be the design of the legislature, that persons conforming *within* the time limited for their conversion, should not at least be equally entitled to the benefit and encouragement of it, with those who conformed at the time; and thereby persevered in their errors, to the utmost period of their being able to do it, with impunity.

ACCORDINGLY, after hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the said Court of Exchequer, and the affirmation thereof in the Exchequer Chamber, should be affirmed; and that the said writ of error, with the transcript of the record, should be remitted to the said Court of Exchequer in Ireland, to the end, the said Richard Morgan might have execution of the said judgment, as if no such writ of error had been brought into the House: and it was further ordered, that the plaintiff in error should pay to the defendant in error, the sum of £40 for his costs in the House. (Jour. vol. 20. p. 590.)

CASE 3.—ROBERT CUSACK & Ux.,—*Appellants*; WILLIAM BULKLEY,—*Respondent* [8th March 1719].

[Mew's Dig. xii. 98.]

By the Irish acts of Parliament, for preventing the growth of popery, papists are disabled from holding leases of lands for any term exceeding 31 years, and under a rent of not less than two thirds of the improved yearly value, at the time of making such lease. The Court of Chancery may, upon evidence, determine the question of value, without sending it to a jury; and may also give full relief to a protestant discoverer, under those acts, without putting him to his remedy at law.

DECREE of the Commissioners of the Irish Chancery AFFIRMED.

By an act of Parliament made in Ireland, 2 Ann. intitled, *An act to prevent the further growth of popery*, it was enacted, "That every papist, or person professing the popish religion, [370] should, from and after the 24th day of March 1703, be disabled and made incapable to buy and purchase any manors, lands or tenements, or any rents or profits out of the same, or any leases or terms thereof, other than any term of years not exceeding 31 years, whereon a rent not less than two thirds of the improved yearly value, at the time of making such lease of the tenements leased should be reserved; and that all estates, terms or interests, other than such leases not exceeding 31 years, from and after the 24th of March, to be bought and purchased by or for the use of any papist, or person professing the popish religion, should be utterly void and of none effect, to all intents, constructions and purposes."

By another statute made in that kingdom, 8 Ann. for explaining and amending the former act, it was enacted, "That all collateral and other securities, by mortgages, judgments, statutes-merchant, and of the staple, or otherwise howsoever, which had been made or entered into, to support or make good any bargain, sale, confirmation, release, feoffment, lease or other conveyance, contrary to the said former act, should be null, void, and of no effect to such person or persons so purchasing any of the said lands or tenements, in trust for, or for the benefit of any papist or person professing the popish religion, as likewise to any such papist or person, his, her, or their heirs and assigns respectively: and that all such lands, tenements and hereditaments, so conveyed or leased, or to be conveyed or leased to any papist, or to the use of, or in trust for, any papist; and all such collateral securities, to secure and make good the same, *might be sued for by any protestant or protestants, by his, her, or their proper action real, personal or mixed, founded on that act, in any of her Majesty's Courts of Law, or in any Court of Equity, if the nature of the case should require it*: and the plaintiff or defendant in such suit, upon proof that such purchase or lease was made in trust for any papist, or under any confidence to or for any papist, or for his, her, or

their benefit or advantage, by receiving the rents, issues or profits thereof, or otherwise, should obtain a verdict and judgment, or a decree thereupon, and should recover the same, and have execution to be put into the seisin and possession thereof, to hold and enjoy the same according to the estate, use, trust, interest or confidence, which such papist should have had therein, had he, she, or they been qualified to purchase, hold or enjoy the same." And for the better discovery of such trusts for papists, it was thereby further enacted, "That it might be lawful for any protestant or protestants, to prefer one or more bill or bills in her Majesty's high Court of Chancery, or Exchequer, against any person or persons concerned in any such sale, lease, mortgage or incumbrance, and against all persons privy to such trust and confidence, and compel them to discover and detect the same, to which no plea or demurrer should be allowed; and that such answer should be good evidence against the defendant in actions to be [371] brought upon that act, and all issues in actions and suits founded upon that act, should be tried by none but known protestants."

Maximilian Grindon, being seised in fee of the lands of Philpott's Town and Dunderry, in the county of Meath in Ireland; by indenture of lease, dated the 6th of May 1696, demised the same to Patrick Cusack, a papist, (the appellant Robert's father,) for 21 years, at the yearly rent of £50, over and above quit-rent and taxes.

By articles, dated the 18th of May 1704, made on the marriage of the appellants, (which was after the first act against popery took effect,) the said Patrick Cusack covenanted, to demise to his said son the appellant Robert, the said lands of Dunderry, among others, for the then unexpired residue of the said Patrick's term; and, accordingly, by deed under his hand and seal, dated the 20th of the same month, he did demise the said lands to the appellant Robert for 13 years, being the remainder of his said term. And under this lease, the appellant Robert entered and enjoyed accordingly.

On the 29th of November 1707, the appellant Robert obtained from the said Maximilian Grindon a lease of the said lands of Philpott's Town and Dunderry, for a term of 31 years, to commence from the expiration of the former lease to Patrick Cusack, (which was not till May 1717,) at the like yearly rent of £50, over and above quit-rent and taxes: so that the appellant Robert, who was likewise a papist, had then a subsisting interest in the said lands of 41 years.

In 1711, Grindon conveyed the inheritance of these lands to one Bruen Worthington; to whom the appellant Robert attorned tenant, and paid his rent accordingly.

But in Trinity term 1714, the respondent exhibited his bill in the Court of Chancery in Ireland, against the said Patrick Cusack and Margaret his wife, and the appellant Robert; stating, that the said lease for 31 years made to Robert, was taken in trust for the said Patrick Cusack and his wife, who were both papists; but that if it had been made to Robert, for his own use, yet, as he was also a papist, and as the lease itself was to commence in reversion, and the rent reserved was less than two thirds of the improved yearly value, he the said Robert was not capable of taking the benefit thereof; and therefore the bill prayed, that the plaintiff might have the benefit of the said lease, as a protestant discoverer, according to the said acts of Parliament.

The defendant Robert, by his answer to this bill, denied, that the lease in question was in trust for his said father or mother, or any other person; and insisted, that he was capable of taking the same, notwithstanding the said statutes; for that the rent reserved, was more than two-thirds of the improved yearly value of the lands, at the time of making the said lease.—The other defendants answered to the same effect, and, soon afterwards, the defendant Patrick died.

[372] On the 3d of February 1718, the cause was heard before the Lord Chief Baron Gilbert and Mr. Justice Macartney, two of the Lords Commissioners for hearing and determining causes in the Court of Chancery in Ireland; when it was ordered and decreed, that the said 31 years lease should be in trust for the plaintiff, as a protestant discoverer, upon the said acts of Parliament; and that he, his executors, administrators and assigns should have and enjoy the full benefit, term and interest in the said lands, as the defendant Robert was, by the said lease, to have done; and that the said defendant Robert should account with the plaintiff for the rents and profits of the premises, from May 1717, when the said lease commenced, and it was referred to a Master to ascertain the same; and an injunction was awarded, to establish and quiet the plaintiff in the possession of the said premises during the said term.

The defendant, being dissatisfied with this decree, applied for a re-hearing, upon the ground of the Court's having determined, without a trial at law, that the rent reserved on the lease was, at the time of granting it, less than two-thirds of the improved yearly value of the demised premises; and had founded their decree singly on that position, though the contrary was proved in the cause, by persons well acquainted with the value of lands in general, and the nature and condition of that farm in particular.

Accordingly, on the 14th of February 1718, the cause was re-heard before the Lord Chief Justice Foster and Mr. Baron St. Leger, two other of the Commissioners for hearing and determining causes in the said Court of Chancery in Ireland; when the Court was of opinion, that, by the first act of Parliament, papists were disabled from taking leases in reversion for 31 years, even at two-thirds of the improved value; resembling it to the case of a tenant for life, with power to make leases for 31 years, where it has been held, that the power extends only to make leases in possession; but this point being much debated, the court took time to consider; and, on the 25th of the same month, affirmed the former decree *in toto*.

The Master, by his report of the 27th of April 1719, certified, that there was due to the plaintiff for the profits of the said lands, for two years from May 1717, at 8s. per acre, which was the lowest that even the defendant's own witnesses had proved the same to be worth, the sum of £226 8s. And this report was afterwards confirmed.

But, instead of paying the money so reported due, the defendants appealed from both the decrees; insisting (S. Cowper, C. Phipps), that the Court of Chancery had no jurisdiction or authority by the said acts of Parliament, to make such decrees or orders; the nature of the case not requiring relief in a Court of Equity, in regard there was no trust, or executory agreement to be performed; and therefore, if the respondent, as a protestant discoverer or informer, had any colour of right or title to the premises, he ought to have sued for the same by a proper action at law, according to the directions of [373] the act 8o Annae; and the utmost he could have hoped for in a Court of Equity, was a discovery on oath, to be made use of as evidence at law. That, where there was a variety of evidence, touching the yearly value of the lands, (as in the present case there was,) the Court of Chancery ought not to have made a decree on that foundation; unless the real yearly value had been first ascertained by a verdict. That, notwithstanding any thing contained in the said acts of Parliament, it was apprehended, that papists were as well qualified to take and buy leases for 31 years, either in possession or reversion, at two-thirds of the improved yearly value, as they were before the making of the first act; in regard the exception out of the disability was not confined to leases in possession; and therefore papists, as to leases for 31 years, whether in possession or reversion, were left as much at large, as they were before the making of the statutes, provided two-thirds of the improved value was reserved. And, if the legislature had meant to exclude papists from taking leases for 31 years, to commence *in futuro*, they would have expressed themselves in the same manner as other disabling statutes are penned; by saying, *other than any term, not exceeding 31 years, from the time of making or granting such lease*. That the case of a tenant for life, with a power to make leases for 31 years, (so much relied on at the hearing,) bore little or no resemblance in point of reason with the present case; for there, the tenant for life, by reason of the narrowness of his estate, wanted an express power to enable him; and, as that power tended to charge the reversion or remainder of a third person, it was of course to be construed strictly, and restrained as much as the words would bear: whereas, in this case, it was not pretended that there was any want of power in the lessor, but a new disability was supposed to be brought upon the lessee; which, being against common right, ought to be construed strictly, and the exception out of it, was, by necessary consequence, to be expounded most beneficially for the lessee, and extended as far in his favour, as the words in the exception could possibly admit. And that, without straining the proviso relative to leases, papists were effectually disabled to make any acquisitions that might be prejudicial to the protestant interest of that kingdom; they being, by another clause in the said act, utterly excluded from enjoying the estate of a protestant; and their own estates being descendible in *gavel-kind*, unless sold to a protestant.

On the other side it was contended (T. Lutwyche, R. Raymond), That the whole scope and tendency of the two acts, was for the better settling, supporting and en-

couraging the protestant interest in Ireland, and for reducing the power and influence of papists, by lessening their estates and interests in lands in that kingdom; and therefore, those acts ought to be construed in the most liberal sense, in favour of that religion and interest, for whose encouragement they were made. That, if upon the construction of the acts, papists should be allowed to take leases for 31 years, to commence in reversion; they might, by parity of reason, take reversion upon reversion, so as at once to [374] settle the lands of Ireland in the hands of papists, for any number of years to come. That it was plain from the leases and writings, produced and read at the hearing of the cause, that the appellant Robert, a papist, had in him at one and the same time, an interest for *forty-one years*, which made the lease for *thirty-one years* void. And that all the witnesses, on both sides, agreed in their testimony, that the rent reserved on the lease for 31 years, did not amount to two-thirds of the yearly value of the lands; and therefore, to direct an issue at law, as the appellant would have had, would have been to give him an opportunity of supplying the defect of his former evidence; which might possibly prove an inlet to perjury, and consequently was not to be permitted by a Court of Equity.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the several decrees therein complained of, affirmed. (Jour. vol. 21. p. 259.)

CASE 4.—JOHN THORNBY,—*Plaintiff*; THOMAS FLEETWOOD and others,—*Defendants* (in Error) [25th February 1720].

A tenant in tail, educated in a popish seminary, is capable of suffering a common recovery.

JUDGMENT of the Court of Common Pleas AFFIRMED.

10 Mod. 113. 356. 406: Viner, vol. 3. p. 174. ca. 17; 239. note to ca. 5: vol. 13. p. 445. ca. 6: vol. 14. p. 270. ca. 1; 583. note to ca. 4: vol. 18. p. 222. note to ca. 4. 6: Com. 207: 1 Stra. 318: Lill. Ent. 524: 11 Mod. 355.

The plaintiff brought an ejectment against the defendants, for divers lands and tenements in the county of Stafford; and in Hilary term 1711, on a trial at bar in the Court of Common Pleas, a special verdict was found; by which it appeared,

That Charles Lord Gerrard, being seised in fee of the premises in question, on his marriage with the Lady Jane Digby, made a settlement of them, dated the 28th and 29th of November 1660, to the use of himself for life; then, as to part, to the Lady for life; remainder, as to the whole, to the first and other sons of that marriage successively in tail male; remainder to the heirs male of the body of Lord Charles: remainder to the heirs male of the body of Thomas, the first Lord Gerrard, his great grandfather; remainder to his own right heirs.—That Lord Charles and his Lady left issue Lord Digby, their only son, who died in 1684, *sans* issue male, leaving Elizabeth Duchess of Hamilton, (the lessor of the plaintiff,) his only daughter and heir at law.—That Thomas, the first Lord Gerrard, had issue two sons; Gilbert, the grandfather of Lord Charles, the settlor, and John, who had issue Richard; which Richard had issue four sons, namely Charles, (hereafter distinguished by the name of the second Lord Charles,) [375] William, Philip, and Joseph, and one daughter Frances, married to the defendant Thomas Fleetwood.—That John, and Richard his son, died before Lord Digby; that the second Lord Charles, Lord William, and Lord Philip, the sons of Richard, were sent out of England to be educated in a popish seminary at St. Omers, where they resided several years, and were bred up in the popish religion; that upon the death of Lord Digby, the second Lord Charles returned to England, claiming to be next heir male; and, during the infancy of the Duchess, suffered two common recoveries of the premises, and declared the uses thereof to himself in fee: he then made a settlement thereof on his marriage, and afterwards died a papist, without male issue.—That William and Joseph, his brothers, died in his lifetime, without issue; that Philip, his other brother, was living, but was a profest papist; and that one Roger Owen was his nearest protestant relation.

Upon arguing this verdict in the Court of Common Pleas, the defendants obtained judgment; but on a writ of error in the Court of King's Bench, the Judges were equally divided in opinion, the Lord Chief Justice and Mr. Justice Fortescue being of opinion, that the judgment below was erroneous, and ought to be reversed, Mr. Justice Powis and Mr. Justice Eyre being of the contrary opinion; and therefore, upon the request of the plaintiff's counsel, the Court was pleased to affirm the judgment, in order to expedite the determination of the matter in the House of Lords upon the present writ of error; and, in the rule for judgment, that was declared to be the reason of their affirmance.

The counsel for the plaintiff (P. Yorke, T. Reeve) said, the only question upon this verdict was, Whether any title could be found for her Grace the Duchess of Hamilton, under the settlement of the first Lord Charles, to whom she was grand-daughter and heir, and also heir-general of her family?

And, in arguing this question they insisted, that it was evident, beyond all contradiction, that the Duchess was right heir of the first Lord Charles, and would be entitled by virtue of the limitation in the settlement to his right heirs; and that nothing could stand in the way of this limitation, if none could take as heir male of the body of Thomas, the first Lord Gerrard, the former limitations being all spent. That there were none who could pretend so to take, unless the second Lord Charles, who suffered the recoveries, or Philip, who was living at the time of the verdict; but it was found by the jury, that both of them, in the life-time of Lord Digby, were sent out of England, with an intent to be educated in a foreign popish seminary, where they resided for several years, and always continued in the profession of the popish religion. That by the statute 1st James I. c. 4. it was enacted, "That all and every person and persons, under the King's obedience, which should pass or go beyond the seas to the intent, to enter into, or be resident in any college, seminary, or house of jesuits, priests, or any other popish order, profession, or calling whatsoever, or repair in or to the same to be instructed, persuaded, or strength-[376]-ened in the popish religion, or in any sort to profess the same, should, by authority of the said act, *as in respect of him or herself only, and not to or in respect of any of his heirs or posterity*, be disabled and made incapable to inherit, purchase, take, have, or enjoy, any manors, lands, tenements, annuities, profits, commodities, hereditaments, goods, chattels, debts, duties, legacies, or sums of money, within the realm of England, or any other of his Majesty's dominions; and that all and singular estates, terms, and other interests whatsoever, to be made, suffered, or done to or for the use of any such person or persons, or upon any trust or confidence mediately or immediately, to or for the benefit or relief of any such person or persons, should be utterly void and of none effect, to all intents, constructions, and purposes." That the intent of this act was plainly to discourage and prevent a foreign education in the popish religion; a religion which teaches all its proselytes obedience to a foreign power, but those who receive their instructions in it in foreign seminaries from the discipline of jesuits, generally return with principles more adverse to civil government, than others of the same profession, and more pernicious and destructive to the monarchy established, and the peace and welfare of their native country: the penalties thought necessary, therefore, for preventing so great inconveniencies were, that the person who went abroad for such evil purposes, should be capable of no estate at his return, whereby he would have less ability of doing mischief. That the words were express, *he shall be disabled, and made incapable to inherit, purchase, take, have or enjoy, any manors, lands, etc. within this realm*; and the consequence was manifest, that, if the second Lord Charles and Philip his brother could not take, then the recoveries suffered by Charles must be void, and the estate could never vest in Philip; and no person being capable to *take, have, or enjoy*, under the limitation to the heirs male of the body of Thomas Lord Gerrard, the estate must devolve to the Duchess, as right heir of Lord Charles the settlor.

The plaintiff's counsel then proceeded to state (for the purpose of answering) some objections made on the part of the defendants; as 1st, That the statute did not induce any absolute *disability* to take the estate, for it was said, he should, in respect of himself only, and not in respect of any of his heirs or his posterity, be disabled to *inherit, purchase, take or enjoy*, etc. and it contained a clause, that on his conformity to the church of England, he should be discharged from such disability;

from whence it followed, that the estate must vest in the ancestor, in order to transmit the same to his heir or posterity, and that the offender against the act, should only forfeit the profits of the estate until conformity. 2dly, That a contrary construction of the statute, would not answer all cases which might happen; for an estate might be vested before the offence committed, and then the party could only be disabled to *have and enjoy*; and that the penalty should be uniform in relation to all offences against the act. 3dly, That the act [377] being silent, how or to whom the estate should go if the offender could not take it, it must go, as in other cases of forfeiture, to the Crown. 4thly, That the statute 3 Car. I. c. 2. had ascertained this matter, by giving the forfeiture of the estate upon conviction, to the Crown, whereby the statute of 1 Jac. I. was altered, or at least in this respect, explained. 5thly, That during the life of Philip, the estate tail must have continuance; and till the determination of it, the limitation to the Duchess could not take place. 6thly, That several acts of pardon had pardoned the offence of Philip. And 7thly, That protestant purchasers might suffer, by reason of the disabilities inflicted on persons sent abroad to be educated in the popish religion, if the act 1 Jac. I. should be construed to prevent any estate from vesting in such offender.

To the first of these objections it was answered, that the construction thereby contended for, eluded the act, and rendered it vain and of no force; for if the estate should vest in the offender, and the profits only be forfeited, it would be easy for him, whenever any attempt should be made to take advantage of the forfeiture, to convey away the estate, and thereby render any such attempt ineffectual; besides, it seemed very extraordinary to say that a disability to *inherit, purchase, take, have or enjoy*, should signify no more than the word *enjoy* alone would signify; nor was it probable, that the legislature would use so many words of known and remarkable force and import in the law, if they intended nothing by them. That the same Parliament, in their next session, used very different expressions, where they meant to deprive the party only of the profits of the estate; for, in the statute of 3 Jac. I. c. 5. which inflicts a penalty on children going, or being sent beyond sea without licence, of losing the profits of their estates till conformity, the words are, "That such child or children shall take no benefit by any gift, conveyance, descent, devise, or otherwise, of any lands, etc. until they take the oaths therein prescribed; and that, in the mean time, the next of kin, not being a recusant, shall have and enjoy such lands, etc. till conformity, and then account for, and restore to the party conforming, the profits so received." Therefore, it could not well be conceived, but that something more was intended, when the legislature enacted, that the offender should be disabled, and made incapable to *inherit, purchase or take*, as well as to have *benefit of, or enjoy*, etc.; and that, upon conformity, the party offending should be freed and discharged from all disabilities and incapacities, without any mention at all of the profits throughout the whole act. And though the disability was personal only in respect of the offender, and not of his posterity, it did not follow but that the estate might cease in respect of one, and revive in respect of another, by force of an act of Parliament; when the rules of law will admit as great variations or changes of estates, to answer the exigence and justice of the case, or the convenience [378] of the parties; as in the cases of a posthumous heir, moveable inheritances, partitions, exchange, or the like.

To the second objection it was answered, that it would be a harsh exposition to say, that the words which made the offender incapable to *inherit, purchase, or take*, should be rejected, or made useless in all cases, because some cases might happen wherein they could not take effect. It was probable, that in most cases the offence would be committed, before the estate vested; but if in some cases it should happen otherwise, the most natural construction was, that the words *have and enjoy*, were added for that reason, that all cases might be comprised; that the offender should be disabled to *inherit, purchase or take*, when the inheritance or estate was not yet vested; and where it was, that he should be disabled to *have or enjoy*: by this construction, all the words of the act would have their force; but by the other, the words *inherit, purchase, take*, were useless and insignificant, and must be rejected.

To the third objection it was answered, that when an act of Parliament punished an offence by forfeiture of estate, or sum of money, without saying who should have the penalty; it was but reasonable, that the King, as head of the state, should punish

the offence, and take advantage of the forfeiture: but there was great difference between a forfeiture and a disability; for where the offender was disabled from taking the estate, he could not forfeit what he had not; and in such case, the estate would of course devolve to the next person who was capable to take it, in the same manner as if the person disabled were not in being; and that it was a constant and known rule of law, that where a man dies, leaving his wife *privement ensient* with a son, the next heir, or next in remainder shall take, till the son be born; and if the next heir be an alien, monk profest, or otherwise incapable to take, the estate shall go over to the next that is capable of taking.

To the fourth objection it was answered, that the statute of 3 Car. I. c. 2. did not intend to alter or repeal the statute of 1 Jac. I.; for it begins with directing that *both* should be put in execution; and, upon comparing both laws together, they appeared very consistent. The statute 1 Jac. I. extended to such persons as went with an intent to be educated in a foreign popish seminary; whereas the statute of 3 Car. I. extended only to such as went and were there instructed, and likewise carried the prohibition to a foreign education in any private popish family, to which the former law did not extend. That this latter statute inflicted a heavier punishment, to discourage offences of this pernicious consequence to the public, by subjecting the person *sending*, as well as the person *going* abroad, for the evil purposes before mentioned, to the forfeiture of all his lands and goods; and disabled him to sue, be guardian, executor or administrator, or to have any legacy, deed of gift, or office; and if it should be admitted, that by force of the words *have* and *enjoy* in the former statute, [379] the offender was disabled from taking the profits of the lands actually vested before the offence committed; then the latter statute provided a further penalty, by enacting a forfeiture of the estate during his life.

To the fifth objection it was answered, that Philip, being a person who had such foreign education, as was prohibited by the statute of 1 Jac. I.; if he was thereby disabled to take, the estate would go over to those next capable of taking it, in the same manner as if Philip was not in being.

To the sixth objection it was answered, that though it deserved very little regard, yet, if it should happen that any act of pardon extended to Philip's offence, which did not appear; yet it was not so much as pretended, that in such act of pardon, there were any words of restitution, which would be necessary to re-instate him in the estate, that was before vested in another, for want of his ability to take it.

And to the last objection it was answered, that the mischief supposed by it, was sufficiently provided against by the act 3 Geo. I. c. 20. which enacted, That no sale to any protestant purchaser should be avoided or impeached, by reason of any of the disabilities inflicted by the said act, and incurred by any person making or joining in such sale; unless before such sale, the person intitled to take advantage of the disability, should have actually recovered the lands, or given notice of his claim to the purchaser, or entered his claim at the Quarter Sessions for the county, and *bond fide* pursued his remedy in a Court of Justice. It was therefore prayed, that the said judgment might be reversed, and judgment given for the plaintiff.

On the other hand, the defendants counsel (R. Raymond, T. Lutwyche) argued the three following points, viz.

1st, Whether any and what estate was vested in the second Lord Charles, by the construction of the statute of 1 Jac. I.

2d, Whether any and what alterations of that statute were made, by the subsequent statutes of 3 Jac. I. and 3 Car. I.

3d, What effect the life of Philip would have, upon the title of the lessor of the plaintiff.

As to the first point it was insisted, that immediately after the disabling clause in that act, followed a proviso, "That if any person or child so passing, sent, sending, or then being beyond the seas, should become conformable and obedient to the laws and ordinances of the church of England; every such person or child, during such conformity, should be freed and discharged from all and every such disability and incapacity." That this was the only act relied upon by the plaintiff, and the construction contended for was, that the second Lord Charles was thereby so far disabled to take the estate tail by descent, that the recovery suffered by him was void; and that the same disability being still upon Philip, and there being no person *in esse*, who could

take the estate tail, the plaintiff's lessor must be entitled to take, as if the estate tail was actually spent: but there were no express words, or even [380] apparent intention in the act to support this construction; on the contrary, the most material words of the act were altogether dropt, viz. that the offender should be disabled *as in respect of himself only, and not to or in respect of any of his heirs or posterity*; which words going through the whole clause, qualified and restrained the disability. That the intention of the act did not extend the penalty beyond the person offending, nor beyond the time of his disavowing his principles, and conforming to the church of England; but only to punish the offender, so long as he should continue obstinate, without prejudice to his innocent posterity; and an uniform construction in all cases to answer these ends, seemed most agreeable to the words and intention of this law. That, before this act was made, such persons as are mentioned therein, had ability to *inherit, or purchase, to take and enjoy* estates in land, both for the benefit of themselves and posterity; and therefore so much of that ability as was not taken away by this act, remained in them as it did before; and how much that was, the very words of the act plainly declared, by disabling offenders to inherit, purchase, take, have or enjoy, as *in respect of themselves only*, but not *in respect of any of their heirs or posterity*; so that, in some respects, the act had not taken away, but preserved the ability to inherit, etc. To say otherwise, would be to *contradict* the very words of the act; and it would be absurd to call that a *construction* of them. That, though the act had preserved in the offender an ability to inherit, etc. *for the benefit of posterity*, so that the estate in the land must be in him for that purpose; yet, he was disabled to inherit *for his own benefit*: the end of which disability was sufficiently answered by the loss of the profits of the estate, which was designed by the act. That, though the act had made no particular application of the profits during the disability, yet, as this was a penalty inflicted for a public offence, the King might be entitled to the penalty; in the same manner as in all other cases, where penalties are given by acts of Parliament for public offences, without any particular application of them. That, by this construction, the offender would have ability to take and hold for the benefit of his posterity, in all the instances of the act, but for the benefit of himself in none; whereas, to create in him a total disability, in the case of an inheritance, it would be difficult to know when, or in what manner, the heir should take or claim: should he take in the lifetime of the ancestor, that would be repugnant to the rule of law, for no man can be the heir of a person living; and the rule of law is always the surest guide in the construction of an act of Parliament, where the act has not expressly given a contrary direction. If there was a son under no disability, it would be very extraordinary, without express words, but merely by construction, to carry the estate over his head for the benefit of a remainder-man, who was never intended by the original grant to take, as long as there was any issue male of a prior tenant in tail: and, as it was difficult to know by the plaintiff's construction, when the heir was to take, so it was as difficult to know, in what man- [381] ner he was to entitle himself, in order to recover the estate; since the act of Parliament had prescribed no method, but left the heir to do it as he could, by the rule of law; and it is the known rule of law, that no heir can entitle himself, but only through such ancestors as were inheritable; for if there be any stop in an ancestor, occasioned either by corruption of blood, estoppel, or any other means, all the posterity deriving descent under such ancestor, are barred for ever. That the next disability in the act related to purchasers, in which case it was impossible the heir could ever take, unless something vested in the ancestor; but, however it might be in these two instances, yet it had been admitted by the plaintiff, that in the case of lands vested in the offender, before the offence committed, the estate must remain in him; nay, it had been admitted in argument on that part of the question, that the act did not extend to that case, though the words as much disabled the offender to *have and enjoy*, as to *inherit or purchase*; but the foundation of such distinction was not easily discoverable; for it was equally dangerous and inconvenient to the public, to permit an offender to enjoy any estate in land, whether it was vested in him before the disability incurred, or whether it came to him afterwards by descent or purchase; and therefore it seemed most natural, to guard against all these instances in one and the same manner, and which could only be done, by the construction contended for by the defendants; by which construction, it would rest in his Majesty,



as having the care of the public peace and safety, to put the law in execution at his discretion. That the *proviso* seemed intended as an encouragement, both to the offenders to conform, and also to prevent any mischief which might happen to children of tender years, sent abroad by the authority of a parent or guardian; for their being *sent* and *going*, is one of the offences within the act; and it would be hard, that a person sent, perhaps against his will, or when not of age, to judge for himself, should suffer so great a loss, without any hopes of redress; although, when he became of riper judgment, he should entirely disapprove the fact, which, by force, he had been obliged to commit; and yet an infant, under these circumstances, must for ever lose any estate, that might descend to him during the disability, if the plaintiff's construction should prevail. That the present case, on behalf of the plaintiff, was compared to the case of a Monk, but was not at all like it; for the disability in the case of a Monk, or person profest, is grounded on the maxim, that in times of popery a Monk was civilly dead; but it could not be said, that a person disabled by this act was to be taken as dead in law; for it was not an absolute disability, but only a temporary one, during non-conformity; and if he was to be considered as a dead person, he could not purchase for the benefit of his heirs, which the act allows.

As to the second point, it was said, that the words of the act 3 Jac. I. were to this purpose, viz. "That if the children of any [382] subject (not being soldiers, mariners, merchants, etc.) to prevent their good education in England, shall be sent, or go beyond the seas, without licence; every such child or children so sent, shall take no benefit by any gift, conveyance, descent, devise, or otherwise, of or to any lands, tenements, hereditaments, leases, goods, or chattels; and the next of his or her kin, which shall be no popish recusant, shall have or enjoy the said lands, etc. till such time as the person so sent shall conform; and the person so sending, shall forfeit £100." That the plaintiff in error only endeavoured to shew, that the act of 1 Jac. I. was not repealed, or any way altered by this act of 3 Jac. I.; but did not insist (nor was there any foundation to insist) that this latter act would give any title to the plaintiff; for the permanency of the profits is thereby given to the next of kin that is no popish recusant, and that could not be the plaintiff's case, because the verdict had found Roger Owen to be the next protestant relation. In the next place it was to be considered, how the case stood on the act of 3 Car. I. which (after reciting, that divers persons had sent their children into foreign parts, notwithstanding the statute 1 Jac. I.) enacts, *That the said statute shall be put in due execution*; and further, "That if any person under the king's obedience, should, at any time, after the end of that sessions of parliament, pass or go, or convey or send, or cause to be sent or conveyed, any child out of the king's dominions, into any parts beyond the seas, out of the king's obedience, with intent and purpose to enter into, or be resident or trained up in any popish college or school, and shall be there instructed in the popish religion, or in any sort to profess the same; or shall convey or send, or cause to be conveyed or sent, any money or other thing for or towards the maintenance of such child; every person so sending, and every person passing or being sent, being thereof lawfully convicted upon any information, presentment, or indictment, shall be disabled from thenceforth to sue, or use any action, etc. and shall forfeit all his lands during his natural life." Then follows a proviso, "That upon conformity, he shall have his lands restored to him again." That though this act had not repealed the act of 1 Jac. I. yet it appeared, both from the title, the preamble, and the body of it, that as the act of 1 Jac. I. was not effectual to answer all the ends proposed by it, this act was made to explain, amend and enforce it, as to all subsequent offences; and so it really did in several particulars, for the act 1 Jac. I. was silent how the penalties of that act were to arise; but this act had expressly provided that it should be upon conviction, and made a forfeiture for life, and a restitution, in case of conformity, in which the former act was silent; so that, if the former act was to be put in execution under the explanation of 3 Car. I. there being no conviction in the case, the lessor could have no title, but the land, on conviction, would be expressly forfeited for life, which must be to the king; and [383] therefore it was apprehended, that the direction for putting the act of 1 Jac. I. into due execution, could relate only to those offences that were precedent to the act of 3 Car. I.

And as to the third point it was argued, that unless it appeared from the case,

that there was a good title in the Duchess to the present possession of the lands in question, the plaintiff could not recover, whether the defendants had any title or not: and this was apprehended to be so plain, that it could not be controverted, the plaintiff being to recover on the strength of his own title, and not by the weakness of the defendants. It seemed very strange, and repugnant to all the rules of law, that there being an estate tail created to all the heirs of the body of Thomas, the first Lord Gerrard, the Duchess should claim by virtue of the remainder to the right heirs of Charles Lord Gerrard, the settlor, whilst that estate tail had a continuance; her remainder being to take on the death of Lord Thomas, and all his issue male. And it seemed much more difficult for her to take under an act of parliament which gave nothing to her, but preserved expressly the right of the offender's posterity, by the very clause that laid the disability on the ancestor; and though there was a personal disability in Philip, yet it was but *personal*, and the estate tail must continue in him for the benefit of the issue; if he had issue born, nobody could pretend that the Duchess could enter, and though he had not, he might have issue. That the offence found in Lord Philip was in passing and going to St. Omer's, which was in the year 1676: and (if a pardon was necessary to remove any disability, which he might thereby incur) after that time several general acts of pardon were passed, even before the death of the second Lord Charles, viz. 2 Will. and Mary, sess. 1. c. 10. and 6 and 7 Will. III. c. 20. whereby all offences are pardoned; that the passing to St. Omer's was an offence, appeared from the very act, 1 Jac. I. which created it, and consequently it came within the express words of the general pardon; and if the offence was pardoned (it not being excluded by any exception) all the dependencies, penalties, and disabilities incident to it, were gone in consequence of that pardon.

That besides the points on the construction of the statutes, and the general act of pardon, it was observable, that the second Lord Charles was in the peaceable possession of the estate in question twenty-eight years; and exercised all acts of ownership, such as making a settlement upon his marriage, and selling and leasing of divers parts of the estate to several of the defendants and others, innocent purchasers for valuable considerations; who would be defeated of their purchases, and his Lady (who was still living) of her jointure, should the judgment be reversed: which, it was humbly hoped, could only be from a forced construction of this statute in the first instance; and that, for an offence committed in the infancy of the last Lord Charles, in obedience to his father, forty-four years ago; and from a fact found after his death, whereof he was never convicted. That Lord Philip might [384] conform, or he might marry, and have issue male; and yet, in either case, should the construction of the statute 1 Jac. I. be a total disability of Philip to take in all events, as contended for by the plaintiff, there would be no remedy for the person conforming, or his issue male afterwards, to recover the estate back from the Duchess; which was repugnant to the express words of that statute, as well as to the proviso, in case of conformity: and without such hard construction, to the total disinherison of the heirs and posterity, against the very letter of the statute, which was express, not to hurt the heirs or posterity of the person so educated, nor even himself, if he should afterwards conform; the Duchess could have no pretence of title, till the estate tail was spent, which still subsisted in the person of Philip, supposing no recovery had been suffered. But, as by the recoveries which had been suffered, the remainder to the Duchess was barred; so the same were not to the prejudice of the heirs and posterity of the second Lord Charles, who suffered these recoveries, (the uses thereof being declared to himself and his heirs,) but only to the prejudice of the remainder to the Duchess; for the preservation whereof, there was no provision in the statute: and therefore, upon the whole matter it was hoped, that the judgments given below for the defendants would be affirmed.

ACCORDINGLY, after hearing counsel on this writ of error, and the opinions of all the Judges (except Mr. Baron Page, who was absent) having been severally delivered, with their reasons at large; it was ORDERED and ADJUDGED, that the said judgment given in the Court of Common Pleas, and the said judgment of affirmance in the Court of King's Bench, should be affirmed; and that the record should be remitted, to the end, execution might be had thereupon, as if no such writ of error had been brought into the House. (Jour. vol. 21. p. 447.)

CASE 5.—THOMAS BLAKE,—*Appellant*; Sir WALTER BLAKE and others,—  
*Respondents* [22d January 1724].

[Mew's Dig. xii. 99.]

Lands leased to a papist at less than two-thirds of the improved value, or for any term above 31 years, are forfeited to the discoverer, being a protestant.

DECREE of the Irish Chancery VARIED. See *ante*, Case 3. S.P. [5 Bro. P. C. 369].

Viner, vol. 18. p. 253. ca. 4: 2 Eq. Ca. Ab. 621. ca. 5.

The respondent Sir Walter, the appellant's father, being seised of the real estate of £1700 per ann. whereof £1400 per ann. had, in the year 1687, been settled upon his first marriage with Ann, the daughter of Sir John Kirwan, the appellant's mother, in [385] the issue male of that marriage, and being also possessed of a personal estate amounting to above £10,000; a treaty was, about August 1716, set on foot between him and Francis Cormick Esq. for a marriage to be had between the appellant, Sir Walter's eldest son and heir apparent, and Mr. Cormick's daughter; on which occasion, Sir Walter gave in a rent-roll of his real estate, and an estimate of his personal estate, amounting to the respective sums before mentioned, and proposed to settle on the appellant £500 per ann. for his present maintenance, and £900 per ann. more after his the said Sir Walter's death.

This treaty was afterwards broke off by Sir Walter, in such a manner, that there was no probability of reviving it; and the appellant being then about 19 years of age, and having been educated under the Rev. Mr. Scott, a clergyman of the established church of Ireland, and inclined to be a protestant, and to marry a protestant, for which reasons, he never liked the former proposed match with Mr. Cormick's daughter, though he submitted therein to his father,) did, in December 1716, marry the daughter of Ulicke Burke Esq. a protestant, but without the consent of the parents on either side; and soon afterwards, he renounced the errors of the church of Rome, and was publicly received into the established church of Ireland, by his Grace the Lord Archbishop of Tuam.

The respondent Sir Walter was so incensed at this conduct, that he took out a writ *le homine replegiando*, to force the appellant away from his wife, and made use of several artifices and incitements, to persuade him to return again to popery, and to quit his wife; though Sir Walter neither did nor could pretend, that the appellant's marriage was any disparagement to his family; but finding all such endeavours ineffectual, he threatened to disinherit the appellant, and refused to allow him anything for his support or maintenance.

The appellant being hereby reduced to great difficulties, and despairing of all hopes of a reconciliation, and knowing that Sir Walter, his father, who always was a rigid papist, had made several purchases from the Earl of Clanricarde and Lord Dunkellin, in the names of protestant trustees, in elusion of several acts of parliament; and knowing also, that he was entitled to a maintenance, as the protestant son of a popish father, by virtue of an act of parliament made in Ireland, in the second year of her Majesty Queen Ann, intitled, *An act to prevent the further growth of popery*; and finding, that Sir Walter intended to sell and dispose of his said new purchased lands, in order to disinherit the appellant thereof; he was advised, and accordingly did, on the 21st of February 1716, file his bill in the Court of Chancery in Ireland against the respondents, founded on the said act *anno secundo Annæ*, for a maintenance, and on an act of parliament made in Great Britain, *anno septimo Annæ*, intitled, *An act for the relief of the Earl of Clanricarde, lately called Lord Lophin, etc.* and on an act made in Ireland, *anno octavo Annæ*, to explain and amend the said [386] act of the 2d of Queen Ann, to prevent the further growth of popery, as a protestant discoverer, to recover the following purchases made by the respondent Sir Walter, contrary to the said acts; viz. a long term of years obtained by the said Ulicke Burke, of a farm called Clare, from the said Earl of Clanricarde and Lord Dunkellin, which the said Ulicke for £750 sold and conveyed to the respondent Taylor, in 1707, in trust for Sir Walter; the lands of Ballindola and Gortechalla, purchased by the said Lords, or their trustees, in the name of Anthony Atkinson, in

trust for the respondent Taylor, and by Taylor, in trust for the respondent Sir Walter; and a purchase made in October 1713, by Sir Walter, jointly with two other persons, of the lands and woods of Clonmoylane and Kelbrack, and other woods, in the name of Patrick French Esq. from the Earl of Clanricarde and Lord Dunkellin, for £8140; which, as to a third part, was in trust for Sir Walter.

The respondent Sir Walter, and the other respondents, having answered this bill, Sir Walter, though he had no sort of demand on the appellant, did merely for delay, and to put him to great and unnecessary expences, file a cross bill against him, to which the appellant put in his answer; and Sir Walter, being apprehensive of the appellants bringing such bill, did, before the same was filed, in order to prevent and defeat the appellant of the benefit of his suit as a protestant discoverer, procure two bills to be filed against himself and his trustees, in the said Court of Chancery, in the name of one John Murrey, a friend and relation of the respondent Taylor; the one for the recovery of Sir Walter's share, viz. a third part of the said lands and woods of Clonmoylane and Kelbrack; and the other, for the recovery of the said lands of Ballindola and Gortechalla, on the said acts of Parliament, as a protestant discoverer: To which bills, Sir Walter and his trustees appeared, without being served with process, and answered the same, so as to give the said Murrey room to recover on such bills and answers; but the appellant's counsel, seeing the said causes in the paper, moved the Court, that the said Murrey's causes, being brought by collusion with Sir Walter and his trustees, merely to elude the said acts, might be stayed till the hearing of the appellant's cause, who was a real discoverer, which was ordered accordingly.

The appellant having thereupon brought an interpleading bill against the said Murrey and the respondents, and they having put in their answers, and issue being joined in all the causes, and witnesses examined, the same were heard before the Lord Chancellor of Ireland, on the 18th of February 1719, when his Lordship made the following decree; viz. As the said Murrey's bills, his Lordship declared, that they appeared to be brought in trust for the respondent Taylor, and by him in trust for the respondent Sir Walter Blake, in order to cover the said estates from any other discoverer, and therefore dismissed the same.—As to the lands and woods of Clonmoylane and Kelbrack, and other woods, his Lordship declared, that the same, as to a third part thereof, were purchased in trust for the respondent Sir Walter, a papist, contrary [387] to the said acts; and therefore decreed the said third part thereof to the appellant, as a protestant discoverer, with an account of a third part of the profits, since the filing his bill; but that the respondent Sir Walter should thereout be allowed his part of the purchase-money, with interest for the same.—As to the farm and lands of Clare, his Lordship declared, that the assignment of the lease thereof, taken by the respondent Taylor, was taken in trust for the respondent Sir Walter; and therefore decreed the same to the appellant as a protestant discoverer, with an account of the profits thereof from the time of filing his bill.—As to the lands of Ballindola and Gortechalla, his Lordship declared, that the same were conveyed to the said Atkinson, in trust for the respondent Taylor, and by Taylor, in trust for the respondent Sir Walter; but directed an issue, to be tried in the county of the town of Galway, whether such conveyance was made before the 24th of March 1703, being the time of the commencement of the act of the 2d of Queen Ann.—And as to appointing the appellant a maintenance, his Lordship was pleased to declare, that he would not appoint him any, until he should be informed of the clear yearly value of the purchases decreed to the appellant, and of the value of Sir Walter's real and personal estate, what debts he owed, and what children he had unprovided for; and therefore referred it to a Master to examine and report those matters. And he decreed costs to the appellant in the original cause, but dismissed the respondent's cross bill without costs.

The appellant being advised that this decree was erroneous in several particulars, and being not able, for want of money, to apply to his Lordship to have the cause reheard before the decree was enrolled, which the respondents had speedily got done, to prevent a re-hearing; the appellant therefore brought a bill of review and reversal to review, reverse, and rectify the said decree in those particulars: To which bill the respondents, after several affected delays, filed several demurrers; and the said cause, upon the bill of review, coming to be heard before his Lordship on the 9th of July 1723, he was pleased to affirm his former decree, dismiss the said bill of review, and allow the said demurrers with separate costs.

From this decree the appellant appealed, insisting (T. Lutwyche, J. Hungerford), that having been decreed to a third part of the lands and woods of Clonmoylane, Elbrack, etc. as a protestant discoverer, there was no just reason for decreeing the respondent Sir Walter Blake, his purchase-money and interest; nor was decreeing to the appellant an account only of the profits of the said third part, since the filing his bill, agreeable to the rules of law or equity; for it appeared in the cause, that Sir Walter after his purchase, and before filing the bill, received about £5000 for his own share, by the fall of wood and timber; so that if he should be reimbursed all his purchase-money and interest, and receive all the profits made by him of this estate, antecedent to the filing of the bill, he would, in all events, be very much benefited by the said purchase; and which could never be intended by the said acts of Parliament, they being made to [388] prevent popish purchases, and in favour of protestant discoverers. That the directing an issue to be tried, as to the time when the lands of Ballindola and Gortechalla were purchased, was wholly improper, since this was a matter no way in issue in the cause, nor mentioned either in the pleadings or proofs; but the respondents having absolutely denied the trust, which was fully proved to the satisfaction of the court, those lands ought to have been decreed to the appellant, without directing any such issue: and if there had been any reason for directing it, that the ordering it to be tried in the county of the town of Galway, where the respondent Sir Walter had his mansion-house, and a considerable estate and interest, and where protestant freeholders were scarcer, and the popish interest stronger, than in any other county or corporation in Ireland, was a great hardship and disadvantage to the appellant; when in the usual course of the Court of Chancery's directing issues to be tried, this issue might have been in any county of Ireland. That it fully appeared, both by Sir Walter's answer, and the proofs in the cause, that his real estate was worth above £1400 per ann. and his personal above £10,000 more than all his debts, and that he had but one son and one daughter by his former wife now provided for, besides the appellant, and only one daughter by his present Lady; and therefore, according to the rules of justice and equity, the Court might have decreed the appellant a suitable maintenance, without referring it to a Master to enquire into these particulars; and more especially, since nothing decreed to the appellant as a protestant discoverer, could be supposed to be of any effect to him, for the maintenance of himself, his wife and three sons, save only the farm of Clare; and even that, by the instigation and contrivance of Sir Walter, had been rendered wholly ineffectual for that purpose; for he had been forced to expend the whole rents and profits of that farm, in defending several suits brought against him, in law and equity for the same; and therefore, as the benefit of what was decreed to the appellant was so precarious, some temporary provision ought at least to have been appointed for him, until the Master should have made his report. And as the cross cause was dismissed, as being improper and unnecessary, the appellant ought in justice to have paid his costs in that cause; and more especially, as his poverty was so apparent.

On the other side it was contended (C. Wearg, C. Talbot), that the respondent Sir Walter had only an equitable estate in the woods, after the purchase-money and interest was discharged; before which was done, he could neither take any of the profits, nor compel the trustees to convey to him. That the appellant, in order to make himself entitled to the lands of Ballindola and Gortechalla, should have set forth in his bill of discovery, that they were purchased by Sir Walter, since the 24th of March 1703, when the first popery act in Ireland took effect; and as to the county where the issue was directed to be tried, it was the proper county because the land in question lay there. That though the cross bill was dismissed, yet the court saw there was some colour for such a bill; and that part of the appellant's bill, which prayed an execution of his mother's marriage articles, was likewise dismissed without costs, though improperly brought. That the respondent Sir Walter had lately been much reduced in his circumstances, by loss of cattle and law-suits, and particularly by the appellant's maintaining an unnatural suit against him for so many years: And the court saw no necessity of making an immediate order for a maintenance for the appellant, without having the present circumstances of Sir Walter and his family, which must be the measure of such maintenance, first fully stated by the Master's report: nor until it appeared, whether Sir Walter had forsaken the appellant, on account of his becoming a protestant.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree of the 18th of February 1719, as ordered, adjudged, and decreed, "That the lands and woods of Clonmoylanemore, Clonmoylanebogg, Kelbrack, and Kelclinegan, alias Duniry Wood, were purchased in trust for the respondent Sir Walter Blake; and that the third part of the said lands and woods should be decreed to the appellant Thomas Blake, as a protestant discoverer, upon the popery act; and that the assignment of the lease taken by the defendant Taylor, of the farm and lands of Clare, was taken in trust for the respondent Sir Walter Blake, and should be decreed to the appellant Thomas Blake, as a protestant discoverer; and that the appellant Thomas Blake's bill should be dismissed, without prejudice as to the demand of the execution of the marriage-articles, there not being proper parties before the court; and that Sir Walter Blake's cross bill should be dismissed;" should be affirmed; and that all the rest and residue of the said decree, and also the decree of affirmance of the 9th of July 1723, should be reversed:—The judgment then goes on in the following words: "And it is hereby further declared, ORDERED and ADJUDGED, that the lands of Ballindola and Gortechalla, were conveyed in trust for the respondent Sir Walter Blake; and the same being so conveyed, are hereby ordered and decreed to the appellant Thomas Blake, as a protestant discoverer, according to such estates and interests as the same were respectively purchased by or in trust for the said Sir Walter Blake; and the Court of Chancery in Ireland, are forthwith to put the said appellant Thomas Blake, into the quiet and peaceable possession of the said lands and woods of Clonmoylanemore, Clonmoylanebogg, Kelbrack, and Kelclinegan, alias Duniry Wood, and of the said farm and lands of Clare, and of the said lands of Ballindola and Gortechalla; and that the respondent Sir Walter Blake do convey, and procure all persons to whom any conveyances were made of the premises, or of any part thereof, in trust for him, to convey the same to the appellant Thomas Blake, by such conveyances, and in such manner, as the Master shall direct and approve; and also shall assign over, and procure to be assigned over as aforesaid, for the benefit of the said protestant discoverer, by the direction of the Master, any subsisting incumbrances or securities taken in by [390] any of them, or in trust for them or any of them, to protect or cover the premises, or any part thereof; and the respondents are to produce upon oath, before the Master, all deeds and writings in their custody or power, relating to the lands hereby decreed to the appellant; and such as concern the estates purchased for the sole use and benefit of the respondent Sir Walter Blake, shall be delivered to the appellant; and such as concern the estates purchased for the use and benefit of the said Sir Walter Blake and others, shall be secured and disposed of by the Court, for the use and benefit of the appellant and the other purchasers, with liberty for the appellant to have copies of the same at his own costs, and to resort to the originals as there shall be occasion: And it is hereby further ORDERED and ADJUDGED, that the respondent Sir Walter Blake, do account before the Master, unto the appellant Thomas Blake, for the rents and profits of the said lands, by fall of timber, woods, or otherwise, hereby decreed to the said appellant; and for what he the said Sir Walter Blake, or any person for his benefit, hath had, made, or received, out of or from the said lands and premises hereby decreed to the appellant, from the time that the respondent Sir Walter Blake, or any in trust for him, hath had possession of the said premises, or took any of the profits thereof, by virtue of or under the several conveyances made to him, or to any in trust for him; and that, in taking the said account, all parties are to be examined upon interrogatories before the Master; and the Master is to be armed with a commission for the examination of witnesses, if occasion be, and all just allowances are to be made to all parties; and what shall appear upon such account to have been received, had, or made, by the said Sir Walter Blake, or any in trust for him, from the time aforesaid, shall be paid to the said appellant Thomas Blake, his heirs, executors, or administrators, to his and their own use and benefit. And as to the maintenance prayed by the appellant Thomas Blake's bill, it is hereby ORDERED and ADJUDGED, that the respondent Sir Walter Blake do pay out of his estate the sum of £200 per ann. unto the appellant Thomas Blake, free of all deductions whatsoever, from the time of filing his said bill; and do continue the payment of the same half yearly, until the time that he the said Thomas Blake shall be put into the peaceable and quiet possession of the several lands and estates hereby decreed to him, and until the said rents and profits to be accounted for to him by this

agree, be answered and paid to him: and the dismissal of Sir Walter Blake's cross bill is hereby, as before, ordered to be affirmed: but it is hereby ORDERED and ADJUDGED, to be with costs, to be taxed by the said Court of Chancery, as usual in such cases: and it is hereby further ORDERED, that the said Court do give such directions for the executing this judgment as shall be just\*." (Jour. vol. 22. p. 392.)

CASE 6.—WILLIAM ERRINGTON,—*Appellant*; JOHN CARRICK and others,—*Respondents* [21st May 1728].

An estate is limited in trust to A. for life, remainder to trustees to preserve, etc. remainder to his first and other sons in tail male; remainder to B. for life; remainder to trustees to preserve, etc. remainder to his first and other sons in tail male; remainder to the right heirs of the grantor. A. is a papist, and has no son; the trust during his life shall go to the grantor's right heirs, and not to B. the next remainder-man.

The statute of 11, 12 William 3. c. 4. which disables a papist from purchasing lands, disables him also from taking by purchase, and consequently from taking by devise. 2 P. Wms. 361.

DECREE of Lord Chancellor King AFFIRMED.

Many other points relative to the statutes against papists are also involved in this case. See the [reports cited *infra*].

9 Mod. 33: 2 P. Wms. 361: Moseley, 8: 2 Eq. Ab. 623. ca. 13: 624. ca. 20: 625. ca. 21, 22, 23. Ann. 97.

Edward Errington, the cousin and heir at law of William Errington, an infant, who was entitled to and in possession of the estate in question, which was an ancient family estate of about £400 per ann. did, in the life-time of the infant, by indenture dated the 15th of October 1714, covenant to levy a fine of the said estate to the respondents Ridley and Fenwick, and their heirs; and by another indenture, dated the 14th of the same month, it was declared and agreed, that the said fine should enure to the use of the said Edward Errington for life, without impeachment of waste; remainder to a trustee and his heirs, to preserve contingent uses; remainder to the first and other sons of Edward Errington in tail male; remainder to the respondent Thomas Errington for life, without impeachment of waste; remainder to the trustee and his heirs, to preserve contingent uses; remainder to the first and other sons of the respondent Thomas Errington in tail male; remainder to the appellant for life, without impeachment of waste; with the like remainder to preserve contingent uses; remainder to the first and other sons of the appellant in tail male; with remainder to the said Edward Errington in fee.

The fine was accordingly levied, and in the year 1716 the infant died without issue; whereupon the estate descended to the said Edward Errington, as his heir at

\* On Monday the 25th January 1724, Sir Walter Blake petitioned the House, saying to be heard by his counsel to this point, viz. "Whether the petitioner should [91] account for the lands and woods decreed to the appellant as a protestant disreverer, from the time of the petitioner's purchase?" And thereupon, the standing order of the House of the 14th of February 1694, relating to petitions for re-hearing any cause, or part of a cause being read; [this order is in the words following, viz. ORDERED, by the Lords Spiritual and Temporal in Parliament assembled, that no petition which relates to the re-hearing of any cause, or part of a cause, formerly heard in this House, shall be read the same day that it is offered, but shall lie upon the table; and a future day be appointed for reading thereof, after twelve of the clock. And this order to be added to the roll of standing orders of this House." *Vide Jour. l. 15. p. 492.*] it was ORDERED, that the said petition should lie on the table, and be read on Friday next, at one o'clock; and the Lords to be summoned. Accordingly on Friday the 29th the petition was read; and, after debate, it was ORDERED, that the said petition should be rejected. Jour. vol. 22. p. 394. 400.

law, and he entered and be-[392]-came seised thereof accordingly: But being desirous to supply any defect which might be in the said settlement, and being indebted to the respondent Thomas Errington, the appellant's uncle, in three several bonds, one for £100, another for £50, and another for £20 and interest; he the said Edward Errington, by indentures of lease and release dated the 21st and 22d of April 1718, and by fine thereupon levied, in consideration of £200 therein mentioned to be paid to him by the respondents Ridley and Fenwick, (but which was really the money of the respondent Thomas Errington, then computed to be due on the said three bonds,) and for other considerations, did grant and convey the estate in question to Ridley and Fenwick and their heirs, to the use of him the said Edward Errington for life; with remainders to his first and other sons in tail male; remainder over to Ridley and Fenwick and their heirs, subject to be charged with such provision for the wife, daughters, and younger children of the said Edward Errington, as therein expressed.

The respondents Ridley and Fenwick, by indenture executed the same day, but dated the day after, being the 23d of April 1718, did declare, that the £200 mentioned in the said indenture of release to be by them paid to the said Edward Errington, for the purchase of the reversion and inheritance of the premises, was the proper money of the respondent Thomas Errington; and that their names were made use of in the said indentures of lease and release, and other conveyances of the premises, from and after the death of the said Edward Errington, without issue male, and liable to be charged as therein mentioned, in trust only for the respondent Thomas Errington and his assigns for his life, without impeachment of waste; remainder to a trustee for preserving contingent remainders; remainder to the first and other sons of the said Thomas Errington, in tail male; remainder to the appellant for life, without impeachment of waste; with the like remainder to preserve contingent uses; remainder to the first and other sons of the appellant in tail male; with remainder in fee to the said Edward Errington.

In September 1719, Edward Errington died without issue; and thereupon the respondent Thomas Errington entered on the estate. But in Michaelmas term 1719, the respondents Carrick, Lorraine and wife, and Robson and wife, exhibited their bill in Chancery against him, and also against the appellant and the respondents Ridley, Fenwick, Soulby, and Frances Errington, and others, charging, that the respondent Thomas Errington and the appellant were papists, and therefore by the statute of the 11th and 12th of William 3. were disabled to take by purchase any interest in lands: that Edward Errington was infirm and weak in body and mind, and not sensible when he executed the said several conveyances; that the £200 consideration money was not paid, but inserted only in the said indenture of release to colour the same; and that the said deeds seemed to have been gained by fraud or imposition: And therefore the bill prayed that the plaintiffs [393] might be put into possession of the premises, or at least, that they might be at liberty to try their title at law, without being prejudiced by the deeds of April 1718.

To this bill the several defendants put in their answers; and the appellant by his answer, denied that he was a papist, or that he ever professed the popish religion: but said he was a protestant, of the communion of the church of England as by law established: and insisted, that the respondents Jane Lorraine, Margaret Robson, and Frances Errington, were papists, that the respondent Carrick's mother was also a papist; and that Edward Errington was in good health, and of sound memory and understanding at the time of executing the said conveyances, and well understood the contents thereof; and therefore the appellant insisted on the benefit of such conveyances.

The cause being at issue, divers witnesses were examined on both sides, and upon hearing the same before the Lord Chancellor Macclesfield, on the 16th of June 1721, his Lordship was pleased to declare, that there was a gross imposition upon the said Edward Errington, in obtaining the said deed of settlement from him, and that the person who obtained the same ought not to have any benefit thereby: But to the end the whole case might be before the Court before further judgment given, his Lordship ordered, that it should be referred to Mr. Bennett one of the Masters of the Court to inquire and see when the said deed and the said declaration of trust from the respondents Ridley and Fenwick were executed, as also to inquire what was the consideration of the two bonds for £100 and £50 entered into by Edward Errington to



he respondent Thomas Errington, and to state these several matters specially to the Court; and after the Master should have made his report, the cause was to come again for the further direction of the Court: And, in the mean time, it was referred to the Master to appoint a receiver.

The Master appointed a receiver accordingly, and by his report, dated the 5th of February 1725, certified that the execution of the deeds of lease and release and declaration of trust, and the payment of the consideration money of the said two bonds, were proved before him.

The cause coming to be heard on the Master's report before the Lord Chancellor King, on the 17th of June 1726, his Lordship was pleased to declare, that it having been already declared upon the former hearing, that there was a gross imposition on Edward Errington, in obtaining the deed of settlement, and that the person who obtained the same ought to have no benefit thereby, the Court could not then enter into the matter of fraud; but that the said deed of settlement ought to be taken to have been fraudulently obtained, according as was declared in the said order, and did therefore decree, that the said settlement should be delivered up to the plaintiffs to be cancelled; and it was referred to the Master, to take an account of the profits of the estate in question, received by the respondent Thomas Errington, since the death of [394] the said Edward Errington, discounting thereout what was due to him for principal and interest on the said three bonds, and thereupon the said bonds were to be delivered up: And the surplus of the said profits was to be divided into four parts, and the respondents the coheirs of Edward Errington, were each of them to have one-fourth part; and the receiver of the estate was to account before the Master, and pay the money in his hands in like manner, and deliver possession of the estate to the said coheirs, and the tenants were to attorn and pay their rents accordingly.

The appellant and the respondent Thomas Errington conceiving themselves aggrieved by the said orders of the 16th of June 1724, and 17th of June 1726, petitioned for a rehearing of the cause; which being granted, the same was reheard on the 12th of November 1726, when his Lordship ordered, that both the said former orders should be reversed; and declared, that he saw no cause to set aside the settlement made by Edward Errington; but that the respondent Thomas Errington, to whom a trust for life was limited for his benefit, being a person possessing the popish religion, the trust was void by the statute of the 11th and 12th of William 3. and that during his life, the plaintiffs and the defendant Francis Errington, the coheirs of the said Edward Errington, were entitled to the rents and profits of the estate from the death of Edward Errington; and therefore referred it to the Master, to take an account of the profits of the estate received by the respondent Thomas Errington, since the death of Edward; and what the Master should certify to be remaining in his hands, after all just allowances, was to be paid by him to the respondents the coheirs of Edward Errington, viz. to each a fourth part thereof, and the receiver was also to account and pay the rents in his hands in like manner; and he was likewise to deliver possession of the estate to the said respondents the coheirs, and the tenants were to attorn and pay their rents to them.

From that part of this decree which directed possession of the estate to be delivered, and the profits to be accounted for to the coheirs during the life of the respondent Thomas Errington, the present appeal was brought; and on behalf of the appellant it was contended (P. Yorke, W. Lee), that Edward Errington having by the settlements conveyed away the whole estate, subject to the uses and trust expressly declared, his heirs at law were thereby excluded from having any benefit of this estate, till after all the particular intermediate uses were spent; and therefore to raise a trust by implication in favour of the heirs at law, during the life of the respondent Thomas Errington, out of the supposed estate of Soulby the trustee to preserve the contingent uses, was to give them a preference to the particular uses to which they were expressly postponed by Edward Errington the grantor, who had an absolute power over the estate. That where an estate is limited to a person incapable of taking, the next remainder ought, according to the rules of law, to take place immediately; and, consequently, Thomas Errington being incapable to take by the act of 11 and 12 [395] Will. 3. and having no issue, the appellant was entitled to be let into the perception of the profits immediately upon the death of Edward Errington without issue, there being no intervening equitable estate to prevent him. For

though the legal estate should be taken to be in Soulby to preserve the contingent use, which possibly might never arise, yet since the trusts annexed to that estate were void to all other purposes, it ought not to be any impediment to the appellant's enjoying the benefit of the estate; nor have any farther effect, than to preserve the legal interest in the trustee, for that contingent purpose for which alone it could be good, viz. to be in the sons of Thomas Errington, in case he should have any; and not to obstruct the limitations of the settlement in any other respect, much less to prefer the grantor's heirs at law to the appellant, contrary to his express intent declared in the deed. But supposing there was a resulting trust during the life of Thomas Errington, yet that trust arose upon the settlement of 1714, which was good by estoppel; and Edward Errington had a power to dispose of it, and accordingly did so by the subsequent settlement of 1718; consequently, that trust estate being no way necessary to preserve the contingent remainders under the settlement of 1718, would now vest in the appellant, there being no person *in esse*, capable of taking it before him. It was therefore hoped, that the decree would be reversed in the particulars before mentioned, and that the bill would be dismissed with costs.

On the other side it was insisted (W. Peere Williams), that the decree was just, and that the appellant was not by the settlement to take any estate, until the death of Thomas Errington without issue male, who might have issue male that might be protestants. That Thomas being a papist, and disabled to take by virtue of the statute, and the appellant not being entitled until Thomas should be dead without male issue, the premises during the life of Thomas, ought to go and belong to the heirs at law of Edward who made the settlement, as an estate undisposed of by him.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondent Christopher Soulby £20 for his costs sustained by reason of bringing the appeal (Jour. vol. 23. p. 274.)

[396] CASE 7.—BARNABY CARROL,—*Appellant*; RICHARD VICARS,—*Respondent* [2d April 1731].

[Mew's Dig. xii. 102.]

An Irish papist conforming any where *out of* Ireland, cannot purchase lands in that kingdom, before he has complied with the several requisites of the Irish acts of 2 and 8 Ann.

DECREE of the Irish Court of Exchequer AFFIRMED.

By an act passed in Ireland, 2 Annæ, intituled, *An act to prevent the further growth of popery*, it is enacted, "That every papist, or person professing the popish religion, shall, from and after the 24th of March 1703, be disabled and is thereby made incapable to buy and purchase either in his, or her own name, or in the name of any other person or persons for his or her use, or in trust for him or her, any manors, lands, tenements, or hereditaments, or any rent or profits out of the same. or any leases or terms thereof, other than any term of years not exceeding 31 years, whereon a rent not less than two thirds of the improved yearly value, at the time of making such lease of the tenements leased, shall be reserved and made payable during such term: and that all and singular estates, terms, or any other interests or profits whatsoever, other than such leases not exceeding 31 years as aforesaid, of, in, or out of such lands, tenements, or hereditaments, from and after the said 24th day of March, to be bought and purchased by or for the use and behoof of any such papist, or person or persons professing the popish religion, or upon any trust or confidence, mediately or immediately, to or for the benefit, use, or advantage of any such person or persons professing the popish religion, shall be utterly void and of none effect to all intents, constructions, and purposes whatsoever: and the children of papists are to be taken to be papists, till they shall by their conformity to the established church appear to be protestants; and no person can take benefit by

the said act, as a protestant within the true intent and meaning thereof, that does not conform to the church of Ireland, as by law established, and subscribe the declaration, and take and subscribe the oath of abjuration."

The general method of conformity directed and intended by this act, is to renounce, before the Bishop of the diocese in which the papist shall inhabit, the errors of the church of Rome, and inroll in the Court of Chancery a certificate thereof from the Bishop, testifying his being a protestant and conforming to the church of Ireland by law established. And at the time of passing this act, it was thought sufficient for the convert to renounce popery before the Bishop of the diocese where he dwelt, being the fittest to judge of the convert's sincerity, and inroll his certificate to show himself a protestant; but it being found afterwards, [397] that many such pretended converts had notoriously eluded the act, another act was passed 8 Annæ, to explain and amend the former act; and by this latter statute it was enacted, "that all lands, tenements, and hereditaments, conveyed or leased to any papist, or person professing the popish religion, contrary to the true intent and meaning of the said acts, shall and may be sued for and recovered by any protestant; who shall have execution to be put in seisin and possession thereof, to hold and enjoy according to the estate and interest which such papist, or person professing the popish religion, would have had therein, had he been qualified to purchase, hold, and enjoy the same: And further, that no person who hath turned, or shall turn from the popish to the protestant religion, shall be deemed or taken to be a protestant within the intention of either of the said acts, or take any benefit thereby (notwithstanding such person so professing himself a protestant shall, pursuant to either of the said acts, procure the certificate of the Bishop of the diocese) unless such person shall, within six months next after declaring himself a protestant, or within six months after he shall attain the age of 18 years, (or those who have already been converted, before the 25th of December 1709,) or within three months after he or they shall turn to Ireland, if out of it, take and receive the holy sacrament of the Lord's supper according to the usage of the church of Ireland; and make and subscribe the declaration, and take the oath of abjuration, and file in the Court of Chancery, or some other of his Majesty's four Courts in Dublin, a certificate thereof, in such manner as the Bishop's certificate is directed to be filed; any thing in either of the said acts to the contrary notwithstanding."

The appellant, on the 21st of September 1723, purchased from Thomas Vicars, for £800, several leases and interests in lands and tythes in the Queen's county, and in the county of Kilkenny; some for lives, others for long terms of years, out of which several rents were reserved: and he purchased from Lord Ross, for £158 1s. 8d. Ballylenan and 20 acres in Moncurr in the King's county, for his Lordship's use. The appellant also purchased other estates, and was, at the time of these several purchases, a papist, or person professing the popish religion, being born of popish parents, and educated in that religion.

The respondent, being of protestant parents, and educated in the protestant religion, on the 13th of February 1723, filed his bill as a protestant discoverer on the said acts, in the Court of Exchequer in Ireland, against the appellant and the said Thomas Vicars, to recover the benefit of the several estates so purchased.

The appellant, after many great and affected delays, filed two insufficient answers, but did not file his third answer, until the 8th of May 1727, being about three years and three months after the bill was filed: and by this answer he insisted, that the respondent was a dragoon in the late King James's army, and then [398] went to France, and had not since conformed to the established church; and therefore was not qualified to be a protestant discoverer.—That the appellant, about 1702, went to London, where he became, and had ever since continued, a protestant: he confessed the purchases from Thomas Vicars and Lord Ross, but denied any other purchase, except one from Thomas Short: he, however, insisted, that Owen Carrol, the appellant's father, on his intermarriage with the appellant's mother, settled the lands purchased from Short, to the use of himself for life; remainder in tail male to the issue of that marriage, of which the appellant was the eldest son. That Owen, his father, being attainted of high treason, on account of the rebellion in Ireland, his estate for life was forfeited, and sold to Short by the trustees for forfeitures, who had in him only an estate for Owen's life, which the appellant purchased; and

that Owen died a few months after: he admitted that he was born of popish parents: but insisted, that at the times of the said purchases he was a protestant, and qualified to purchase, within the intent and meaning of the said acts.

The respondent filed his replication on the 20th of November 1727, and soon afterwards, a commission to examine witnesses, as well for the appellant as for the respondent, issued and was executed in the Queen's county, where the respondent examined many witnesses, but the appellant none; though both his commissioners joined with the respondent's commissioners.

On the essoign-day of Easter term 1728, the first rule for publication was granted, and publication would, in four days after, have passed absolutely, according to the standing rules of the Court, unless the appellant could have shewn by affidavit, that he had witnesses to examine, and that he could not, for good reasons, have examined them on the former commission; but the appellant's attorney, not having any such affidavit, prevailed with the respondent's attorney to enter into the following consent, which was signed by both attorneys, viz. "By consent of plaintiff's and defendant's attorneys, plaintiff and defendant are at liberty to examine and cross examine to the essoign-day of next Michaelmas term; publication then to pass without further motion, and defendant to appear *gratis*, without service of process, or suffering a conditional decree." And this consent was, on the motion of the appellant's attorney, made an order of Court on the 14th of May following.

In pursuance of this order, the appellant examined several witnesses in Ireland, and also took out a commission and examined several others at St. Dunstan's coffee-house in London, and returned their depositions.

On the 9th of November 1728, the appellant moved to respite publication, and that he might have commissions to examine witnesses at Utrecht in Holland, and in or near Paris, and also in Ireland; alleging, that the said consent was entered into without his direction or privity, and that Cornelius Van Eck and Gulielmus Van de Water and others, living at Utrecht, and Richard Warburton of [399] the Queen's county in Ireland, (then in or near Paris,) were very material witnesses, without whose testimony, as he was advised, he could not safely proceed to a hearing: and that Warburton being in London some short time before the 13th of August, and intending to go to Paris before that day, he endeavoured to prevail on him to stay and be examined, which he refused, and went for Holland; and that one of the respondent's commissioners refused to join and examine Warburton before he went.

This motion the respondent opposed, by shewing the many affected delays of the appellant, and that whilst the cause was delayed, he received the profits of the lands, but did not pay the chief landlord's rents, or other necessary outgoings: that but for the said consent, the appellant could not, according to the practice of the Court, have examined any witnesses after the first time for passing publication, and that therefore the said consent was greatly to the appellant's advantage: that issue being joined on the 12th of February 1727, the appellant might have had a commission, and examined in Utrecht between that day and the 3d of November following, if he had thought fit; the respondent also produced to the Court an affidavit, that Warburton was in Ireland twelve months before the 12th of April 1728, and in Dublin fourteen days before that time; so that the appellant might have examined him either by commission in Ireland, or before a Baron of the Exchequer in Dublin.—And upon hearing counsel on both sides, the Court thought proper to refuse the motion, and ordered publication to pass.

On the 2d and 3d of December 1728, the cause was heard, when an attested copy of the memorial of the purchase from Lord Ross, by lease and release of the 6th and 7th of February 1722, registered in the Register's office; and an attested copy of the inrollment of a certificate from the Archbishop of Dublin, certifying, that it was on the 5th of February 1723, that the appellant renounced, before him, the errors of the church of Rome, and was, by his Grace's order, received into the communion etc. and did conform to the church of Ireland, as by law established, were read; and the respondent fully proved, by the testimony of many credible witnesses, that the appellant was born of popish parents, educated in the popish religion, went to England in 1702, and returned to Ireland in 1709; when, according to the said acts, to make him a protestant capable of purchasing, he ought, in three months after his return, to have performed all matters required by the acts, and particularly

have received the holy sacrament, according to the usage of the church of Ireland; but instead thereof, it was fully proved by many credible witnesses, that the appellant, in 1709, went frequently to mass, and publicly received the sacrament in a popish chapel from a priest of the church of Rome; and that several times afterwards, as often as he returned to Ireland, he went frequently to mass: it was also proved by two witnesses, that he was at mass in 1722, and by one witness, that he professed himself a papist, till within a few months before his [400] father's death; and by another witness, that he was a papist even at his father's death, which happened on the 27th of August 1723, though the appellant pretended he, in 1702, became a protestant, and continued so at the time of making the said purchases. On the other hand, a sheriff's bailiff and some others examined for the appellant swore, that they had seen the respondent, in the late King James's time, at mass, and that they had heard he was a dragoon, when the protestants in Ireland were under the persecution of popery; yet, the respondent proved evidently, that he was then at 14 years old, and that he was born of protestant parents, and educated in and always professed the protestant religion. But the appellant not proving that he had performed the requisites of the acts, his counsel insisted, that a papist may become protestant, and be capable of purchasing lands, without qualifying himself as the acts direct; wherefore the Court declared, that before they would give judgment, they would hear counsel on both sides to that point.

Accordingly, on the 10th of February following, the point was fully debated by many counsel on both sides, and the acts were read, and the Court took time to consider and advise, before they would give judgment.—And on the 23d of June 1729, the Court declared, that it fully appeared by the proofs, that the respondent was well qualified and entitled to bring his bill as a protestant discoverer on the said acts; and that the appellant not having performed the requisites by the said acts, or renounced the errors of the church of Rome, as the acts required, until the 5th of February 1723, he was not qualified to purchase or acquire the said several interests and estates from the said Thomas Vicars and the Lord Ross; and therefore decreed the respondent as a protestant discoverer, to the benefit of the said purchases from Thomas Vicars and Lord Ross, and an account of the profits of them since filing his bill, with costs to be taxed; but dismissed the respondent's bill with costs as to the other purchases, and ordered injunctions to put the respondent in possession of the said purchases from Thomas Vicars and Lord Ross.

The appellant therefore appealed, not only from this decree, but also from the order of the 9th of November 1728, for passing publication; insisting (P. Yorke, C. Albot), that it appeared by the proofs in the cause, that at the time of his making the said several purchases, he was a protestant of the church of England, as by law established; and therefore well qualified to purchase lands, etc. none but papists, or persons professing the popish religion, being disabled by the said acts from purchasing. That it also appeared by the proofs, that the respondent having been a dragoon in King James's army, in the Irish rebellion of 1688, and having then publicly professed the popish religion, and never since duly conformed according to the acts, was not sufficiently qualified to be a protestant discoverer or informer, or to take any such benefit by those acts, as he now sought; whereas the appellant claimed no benefit thereby, but only to preserve and defend his own property and purchases, honestly made and paid for: and therefore the court ought to have dismissed the respondent's bill with costs, on his failing to make out a title, by proving his own capacity, and the incapacity of the appellant. That the pretended agreement for publication to pass on the essoign-day, was not only procured by the artful management of the respondent's attorney, without the knowledge or consent of the appellant, who was then in London, and calculated to deprive the appellant of his right to examine his witnesses; but the same had been expressly waived, by the respondent's examining several witnesses after the essoign-day, contrary to that agreement. That the court having refused to grant commissions for examining Mr. Warburton in Paris, and the several other material witnesses at Utrecht, the appellant was thereby debarred from the benefit of their testimony on the hearing; which would have greatly strengthened the evidence of his other witnesses examined in the cause, and fully proved that the appellant was a student actually residing at Utrecht in 1709, at the very time when one of the respondent's popish witnesses

falsely swore to have seen him at mass in Ireland. That if such popish combinations against protestants, whose parents have been papists, were not discouraged, and real converts secured in their rights and properties, the several acts of Parliament made to prevent the growth of popery, would have a contrary effect; and papists would be discouraged from becoming protestants, at the same time that protestants in all popish countries, were greatly encouraged to become papists. That if taking the oaths of allegiance, abjuration, and supremacy, and making and subscribing the declaration, as by law required, should not be adjudged a sufficient proof of a papist's becoming a protestant, without a formal renunciation before a Bishop, which the appellant also made eight days before the respondent filed his bill: it would endanger the rights and properties of several protestant converts, especially among the Presbyterians, Anabaptists, Quakers, and other dissenters, who, by their principles, do not allow episcopacy, and consequently cannot make such a renunciation; and to compel them thereto, would be deemed a persecution and violation of the tolerance acts, and contrary to the true intent and meaning of the two Irish acts on which this suit was founded. It was therefore hoped, that the decree would be reversed, and the respondent's bill dismissed with costs.

On the other side it was argued (T. Lutwyche, D. Ryder), that as to the order for passing publication, it was too late to appeal from it after publication had actually passed, the proofs seen, and a decree made; and if that order should now be reversed, it would be to give the appellant the liberty of examining witnesses, contrary to the most certain and established rules of all Courts of Equity; which, to prevent perjury, never suffers the parties to examine witnesses, after the former depositions are once published and known. Besides, it was improbable that the appellant could prove in Holland his renouncing popery, and performing the other requisites of the acts in Ireland; and to prove that he renounced it in Utrecht would [402] not make him a protestant in Ireland. But further, the affidavits on which the appellant moved were insufficient, and did not, according to the rules of Equity, shew to what facts he would examine in foreign parts; so that the court might judge whether they were material or not, and if material, grant a commission, unless the respondent would agree to admit such facts at the hearing.—And as to the decree, it was contended to be well founded, because the respondent was of protestant parents, always educated a protestant, and therefore well qualified to be a protestant discoverer under the said acts; but the appellant was of popish parents, and educated in the popish religion; and being an Irish papist, and not having renounced popery, nor obtained and inrolled the Bishop's certificate, or received the sacrament according to the usage of the church of Ireland, nor performed the other matters required by the acts, to make him be considered as a protestant; he was not qualified as a protestant, when he made the purchases in question. For, by the Archbishop of Dublin's certificate it appeared, that the appellant's conformity was subsequent to the making of those purchases. That though the appellant said in his answer, that in 1700 when but 11 or 12 years of age, he went to London, and there became a protestant, and continued so at the time of his making the purchases; yet there was the fullest proof, that several years after 1702, he received the sacrament in Ireland, according to the usage of the church of Rome, and continued so to do, as often as he returned from abroad to Ireland; and that in 1720 and 1722 he went to mass, and was a papist to the time of his father's death, in August 1723. That the intent of the acts of Parliament above stated, was to strengthen the protestant and weaken the popish interest in Ireland, and thereby secure the church and state, which had been frequently in the most imminent danger, from the practices of Irish papists; it was therefore of the utmost consequence, and the direct view of those acts, to keep the lands out of their hands, that they might not have large clans, ready to rise with them in rebellion: and it being a known rule in the construction of acts of parliament, that such as are made to prevent a public mischief, should receive the most liberal construction, to answer the ends thereby intended; it was apprehended, that there could scarcely be a case, in which that rule ought to be more followed than in the present. That after passing the act 2 Annæ, the Legislature found that many elusions and evasions had been practised, to elude that law; and therefore by the act 8 Annæ they directed the several other requisites to be performed, as the strongest ties of human policy could invent, to shew the sincerity of the party; and therefore,

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 23. p. 658.)

Where a person sues as a protestant discoverer under the popery acts, he becomes entitled to the rents and profits of the estate, from the time of filing his bill; and if he dies pending the suit, having made a will, those rents and profits will belong to his devisee. But such devisee cannot regularly exhibit a bill of revivor; but must exhibit an original bill, as a protestant discoverer in his own right.

By an act of Parliament made in Ireland, 2 Ann. it was, amongst other things, enacted, That every papist, or person professing the popish religion, should, from and after the 24th day of March 1703, be disabled and made incapable to buy and purchase, either in his or their own name, or in the name of any other person or persons, or his or her use, or in trust for him or her, any manors, lands, tenements, or hereditaments, or any rents or profits out of the same, or any leases or terms thereof, other than any term of years, not exceeding thirty-one years, whereon a rent not less than two-thirds of the improved yearly value at the time of the making such lease of the tenements leased, should be reserved and made payable during such term: and that all and singular estates, terms, or any other interest or profits whatsoever, other than such leases, not exceeding thirty-one years as aforesaid, of, in, or out of such lands, tenements, or hereditaments, from and after the said 24th day of March, should be bought and purchased by or for the use or behoof of any such papist, or person or persons professing the popish religion, or upon any trust or confidence, mediately or immediately, to or for the benefit, use, or advantage of any such person or persons professing the popish religion; should be utterly void and of none effect to all intents, constructions, and purposes whatsoever.

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ments, according to the estate, use, trust, interest, or confidence, which such papist or person professing the popish religion had, or should have had therein, had he, she, or they been qualified to purchase, hold, or enjoy the same; subject nevertheless, to all such rents, covenants and conditions, reservations and incumbrances whatsoever, as the same would have been subject to in the hands of such papist, or in the hands of such person to whom the same were sold or leased, in trust for such papist, or person professing the popish religion, or to his, her, or their use, benefit, or behoof.

Benjamin Green, deceased, on the 4th of February 1731, exhibited a bill in the Court of Exchequer in Ireland, against Edward Fitzgerald the appellant, and others; setting forth that one Michael Murphy, being seised in fee simple of the town and lands of Williamstowne, in the county of Waterford, and having mortgaged the same to one Edward Brown; did afterwards execute an absolute conveyance of the equity of redemption thereof to the said Edward Fitzgerald, and his heirs, in consideration of £2200. But that the said Edward Fitzgerald, being then and always a papist, was precluded and disabled from enjoying the benefit of the purchase by the said statutes. And that the estate or interest meant, or intended to be sold and conveyed to him as aforesaid, was null and void in respect of himself, and subsisted only for the use and advantage of a protestant discoverer or informer, as a forfeiture granted to him by virtue of the last mentioned act: but it was thereby further suggested, that in order to protect and secure the purchase, which the said Edward Fitzgerald had so made, and to elude the several disabilities and incapacities laid upon him by the said statutes; the appellant had been prevailed upon to exhibit a bill in the Court of Chancery in the said kingdom, against the said Edward Fitzgerald and others, claiming the whole benefit and ad-[405]-vantage of the said purchase, and also of the mortgage (which was charged to have since come to and vested in the said Edward Fitzgerald) as the first protestant discoverer entitled thereto under the said act of Parliament: but that such bill was exhibited only in trust for the said Edward Fitzgerald; and that the same, or any recovery or other subsequent proceedings thereupon, could not be any bar to the said Benjamin Green, but that he ought, notwithstanding, to be looked upon as the first true and real protestant discoverer; and therefore the said Benjamin Green, by his bill, prayed to be decreed to the said lands, or to such interest therein as was intended for the said Edward Fitzgerald, or the said mortgagee, who were both alleged to be papists.

After the appellant and the said Edward Fitzgerald, and the other parties, had severally put in their answers, and thereby fully denied all the material allegations of this bill; the said Benjamin Green, pursuant to an order of the 18th of May 1732, exhibited a supplemental bill against the appellant and the said other parties: suggesting, that since the time of his exhibiting his original bill, he had made further discoveries of several facts and circumstances, tending, as he alleged, to a further manifestation of the supposed trust between the appellant and the said Edward Fitzgerald; and which he therein disclosed and set forth at large. But before all the parties could put in their answers thereto, the said Benjamin Green died; having in his last illness made his will, and thereby devised to his son, the respondent James Roch Green, all the benefit of the said discovery, and likewise of all the past and future proceedings of the said information, and of the decree to be pronounced thereupon; and thereof appointed the respondents Green and Colles executors.

The executors having proved the will, exhibited a bill of revivor against the appellant and the said Edward Fitzgerald, and the other parties; praying, that the said several bills and the proceedings had thereon respectively, might be revived and stand in the same plight and condition in their names, as the same stood at the time of their said testator's death; and that they might be admitted to prosecute the said suits in their own names, and have the same benefit as the said Benjamin Green would have had were he then living; and that such of the defendants as had not answered the said supplemental bill, might answer the same.

To this bill of revivor the appellant put in a demurrer; and for cause of demurrer shewed, that by the rules of law or equity, no bill of revivor did lie, or could regularly be brought in this, or any such like popular suit or information; and for that, if any such bill did lie, yet in regard the interest thereby demanded was in the nature of an inheritance, and that neither of the complainants claimed the same as heir at law, but only by a devise, and in a course of executorship, they were not as such entitled to have exhibited or maintained any bill of revivor.



This demurrer came on to be argued on the 8th of July 1734, before the Chancellor, Treasurer, Lord Chief Baron, and other [406] Barons of the said Court of Exchequer; and on the next day they were pleased to order, that the same should stand over-ruled with costs.

The appellant therefore appealed from this order, contending (N. Fazakerly, W. Murray), that where by any penal statute a forfeiture is annexed to that which was no offence before, and the right of suing for it is given to any common informer, no transmissible interest, estate, or title, can vest in him, before judgment is first obtained for recovery thereof. That in the present instance, the first discoverer could only be considered as a common informer, since he had barely a right of action given him by the above-mentioned penal statutes; but if any such estate or interest had devolved upon the respondents Colles and Green, by virtue of the devise in Green's will, they ought to have entitled themselves thereto by an original bill, and not by a bill of revivor, which cannot regularly be exhibited by a devisee.

To this it was answered (D. Ryder, J. Strange), that by the aforesaid acts of Parliament Benjamin Green, the first protestant discoverer, became entitled to the rents and profits of the estate, from the time of filing his bill, which must therefore go to his devisee, or representative, after his death; and whatever interest vested in him, it was in his power to dispose of by his will, though he had not the actual possession. That as this estate was to be considered as an interest vested in Benjamin Green on filing his bill, it was apprehended, that the respondent James Green was well entitled to it by descent from his father, to whom he had shewn himself to be son and heir, although he should not be so entitled as devisee; and the title of Green's executors was good as to the rents and profits of the estate which accrued in his lifetime, and which therefore entitled them to revive the former suit. And that though a devisee cannot, as such, bring a bill of revivor, because that is confined to the representative of the plaintiff; yet he may bring a bill in the nature of a bill of revivor, to have the benefit of the former proceedings. It was therefore hoped, that the order for over-ruling the demurrer, would be affirmed, with costs.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of should be reversed, and that the demurrer should be allowed; without prejudice to the respondents Green and Colles, or either of them, bringing an original bill for the premises in question, as protestant discoverers in their own right, as they should be advised. (Jour. vol. 25. p. 239.)

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[407] CASE 9.—ROGER BERNARD,—*Appellant*; FRANCIS WOODLEY and another,—*Respondents* [11th December 1753].

[See *ante* p. 731, headnote.]

The English act 1 *Ann.* for the relief of protestant purchasers of the forfeited trustee lands, annuls all lands made to or in trust for papists, as between lessor and lessee; yet it is not inconsistent, that such leases should under the Irish popery acts be allowed to subsist for the benefit of a protestant. —A lease made to a papist contrary to the popery acts, is, in respect to any beneficial interest to himself, void; because he is to have no profit by it. But still he may take as a trustee for a protestant discoverer, to whom he will be accountable for the profits, without contradicting the true intent and meaning of the English act.

DECREES of the Irish Court of Exchequer AFFIRMED.

Divers laws have been from time to time made, both in England and Ireland, for preventing the growth of popery, by restraining papists from taking permanent or beneficial interests in land; and those laws have already been so often, both literally and substantially stated (see the preceding cases of this title), that it is thought unnecessary to repeat them any more.

Arthur Bernard esq. the appellant's father, being seised in fee of the lands of Leades East, Leades West, Ballyvougane, otherwise Ballyvougane, otherwise Rylane,

and Contane, situate in the barony of Muskerry, and county of Cork, in Ireland, did, by lease, dated the 29th of October 1718, for the considerations therein mentioned, demise the same to Francis Woodley, father of the respondent Woodley, and his heirs; to hold during the lives of the said Francis Woodley, and of the appellant and Francis Bernard, the second son of the lessor, and the life of the longest liver of them, to commence from the 1st of May 1718, at the yearly rent of £120 sterling, payable half-yearly, and 6d. by the pound receiver's fees, without other reservations therein mentioned. And the lessor thereby covenanted, for him and his heirs, to renew the said lease for ever, on payment of £60 sterling for every new life, to be added within six months next after the death of any of the *cestuique vies*, in whose place or stead such new life or lives should be added; and, upon the nomination of such new life, and surrender of the old lease, to execute a new lease accordingly.

This lease was taken by Woodley at the request of Bernard the lessor, in trust for one Lawrence Mac Carthy, the son of Felix Mac Carthy, and Woodley declared the trust accordingly; but Lawrence being a minor at the time of granting the lease, his affairs were managed and transacted by Charles Mac Carthy, his uncle and guardian, who, as such, continued in the possession of the lands, and in the receipt of the rents and profits thereof, till the year 1720, or 1721, at which time Lawrence attained his age of 21, and then entered into and enjoyed the same.

[408] Woodley the lessee was a protestant; but Felix Mac Carthy, Lawrence Mac Carthy, and Charles Mac Carthy the father, son, and uncle, were all of them known papists; and as such incapable by law of taking any beneficial interest in lands.

Lawrence Mac Carthy, after attaining 21, neglected to pay the rent reserved by the lease, which Woodley, as being the nominal lessee, was obliged to pay, under his personal covenant for that purpose; and several distresses being made upon the tenants, and ejectments brought against the lands for non-payment of the rent, he did actually pay several sums for Lawrence on account of the trust estate; and being still threatened to be sued for the rent, and Mac Carthy neglecting to perform any of the covenants, these motives at last determined Woodley (as he was necessarily to bear the burthen of the lease, by standing always liable to be troubled for the payment of the rent) to seek for the benefit thereof to himself, agreeable to the laws made in favour of Protestant discoverers.

Accordingly in Michaelmas Term 1723, Woodley caused a bill of discovery to be exhibited in the Court of Exchequer in Ireland, in the name of the respondent Dixon, as a protestant discoverer, but in trust for himself, against Lawrence Mac Carthy the papist, and *cestuique trust* of the lease, Arthur Bernard the lessor, and himself as the lessee and others; praying, upon the foundation of the laws made against papists, to be decreed, as a protestant discoverer, to the benefit of the lease made by Woodley, in trust for Mac Carthy the papist; and to be put into possession of the lands, with an account of the profits from the commencement of the lease.

Soon after filing this bill, the respondent Dixon executed a declaration, under his hand and seal, that his name was used therein, in trust for Woodley; and that he should have the sole benefit of any decree, and proceedings to be thereon had; and that Dixon would not any way release, discharge, or annul the same, Woodley indemnifying him as to all costs.

All the defendants answered the bill.—Mac Carthy admitted his being a papist, and that Dixon was a protestant; and both he and Woodley, his trustee, admitted the trust of the lease to be for Mac Carthy's benefit: and Bernard the lessor, stated the great arrears of rent due to him from Mac Carthy, which, at the time of putting in his answer, amounted to no less than £473 2s. 2d. but made not the least objection to the discovery, or relief prayed by the bill.

Dixon replied to the answers of Mac Carthy and Woodley, against whom only the relief was sought; but as to Bernard, he brought the cause on to hearing upon bill and answer; and the cause being at issue, Dixon fully proved himself a protestant, and Mac Carthy a papist. And on the 4th of June 1728, the cause was heard, when Dixon, as a protestant discoverer, was decreed to the full benefit of the lease made by Bernard to Woodley, and of the lands thereby demised, during the term thereby granted, under the rents, conditions, and agreements therein mentioned, with the full benefit of the clause for renewal, together with an account of the profits [409] of the lands, from the time of filing the bill; as also his costs of suit, to be recovered against the

defendants: and an injunction was directed to issue to the sheriff of the county of Cork, to give Dixon peaceable possession of the premises in question.

This decree was inrolled, and the respondent Dixon was, by an injunction granted on the decree, and directed to the sheriff of the county of Cork, on the 9th of the same month, put into possession of the lands, in trust and for the use of Francis Woodley, the respondent's father, under the preceding declaration of trust; but no costs were ever paid under this decree, by the appellant's father, or any of the other defendants, except Woodley only, for whose benefit it was obtained.

Under this decree and declaration of trust, Woodley continued in possession of the demised lands at the time of his death, and made under-leases thereof, and paid the rents, duties, and fees, reserved by the original lease to Arthur Bernard, till his death, which happened in 1735; and from that time Woodley, during his life, paid the same to the appellant, as eldest son and heir of Arthur Bernard the lessor.

Francis Bernard, one of the lives named in the lease, died in January 1736; and Francis Woodley the nominee, and another of the lives named in the lease, died within a fortnight afterwards, having made his will, and thereby devised his estate and interest in the demised lands, to his son the respondent Woodley, then a minor, subject to an annuity and certain legacies; and appointed Elizabeth Woodley his wife, and William Johnson, executors; and also appointed Elizabeth Woodley, the respondent Woodley's mother to be guardian of the respondent during his minority.

Soon after the death of the respondent's father, Elizabeth Woodley, as guardian of the respondent, applied to the appellant, to know when he would receive the fines, and renew the lease; but the appellant put her off, till he should come to the summer assizes at Cork; and before that time he fell dangerously ill: whereupon Mrs. Woodley, after waiting a considerable time for his recovery, and the time for renewal being almost expired, in the beginning of August 1737, wrote a letter to the appellant, to know when he would be ready to receive his fines; but receiving no answer, she, on the 13th of that month, sent Mr. Joseph Harrison, on the respondent's behalf, to the appellant's house, about eighteen miles from Cork, to make him a tender of £120, being two renewal fines: and Mr. Harrison accordingly carried with him, together with the old lease, a draught of a new lease, perused by counsel, and a clerk to ingross the same, if the appellant should approve of it; and on the same 13th of August he tendered the £120 to the appellant, who still remained confined to his chamber, as the renewal fines for adding two lives in the place of the two lives fallen, the last of which had fallen on the 11th of February 1736; and produced a draught of the new lease at the same time, and nominated the lives of the respondent, and Margaret Woodley, his sister, in the place of the said Francis Bernard and Francis Woodley: [10] and Mr. Harrison having previously paid the rent in arrear, produced to the appellant two receipts for all the rent due to the first of May preceding; the one from Richard Baldwin, who was entitled to a yearly chief-rent out of the demised lands, and the other from Daniel Connor, agent for Mr. Francis Bernard, to whose father he lands had been, amongst several others, mortgaged; and to whom part of the rent had been some time before, by appointment of the appellant, usually paid: but the appellant refused to renew the lease, upon the single pretence that the fines were not tendered within the six months limited by the original lease for that purpose, notwithstanding the time was elapsed but two days only, viz. the excess in the six months incurred between the 11th of February and the 13th of August following; and though it was through the appellant's own neglect, and his indisposition, that the lease was not renewed before; and notwithstanding Mr. Harrison offered to pay interest for the fines for the two days elapsed, beyond the six months limited by the covenant for renewal.

Soon after this refusal, the appellant being a man of fortune and influence in the county of Cork, and taking advantage of the respondent Woodley's minority, prevailed on most of the tenants of the demised lands to attorn to him, and harassed and distressed such as refused; upon which Mr. Harrison, on behalf of the respondent Woodley, and in order to take off all pretence for such proceedings, on the 10th of November 1737, paid the appellant the half year's rent due the 1st of that month; for which the appellant refused to give any other receipt, than one which imported, that he received the sum of £63 10s. on account of the rent of the demised lands, into which the appellant had lawfully re-entered; which receipt Mr. Harrison refused to take, though he paid the appellant the half year's rent.

The appellant having, by these means, illegally turned the respondent Woodley and his guardian out of possession, and thereby prevented them from recovering £300 and upwards, due from the under-tenants for arrears of rent, at the time of the appellant's entry; a bill was, in Hilary term 1737, filed in the Court of Exchequer in Ireland, in the name of the respondent Woodley, then a minor, by the said Elizabeth Woodley, his mother and *prochein amy*, against the appellant; praying, that he might be compelled to renew the lease, by the addition of the two lives before mentioned; and to account with the respondent Woodley, for the surplus profits of the demised lands, from the time he entered into possession.

The appellant put in his answer to this bill; by which he admitted the original lease to Woodley the father, and the trust thereof for Mac Carthy a papist; and also the decree of 1728, by which Dixon, as a trustee for the respondent, was decreed to the benefit of the lease, with an account of rents and profits; but insisted, that the lease was null and void in its creation, and could not subsist for the benefit of a protestant discoverer, for that all [411] the lands comprised therein were part of the estate of the late Earl of Clancarthy, who had been attainted for high treason committed in Ireland against their Majesties King William and Queen Mary, during the rebellion in 1688; upon which account, the said lands became vested in certain trustees appointed by an act of parliament passed in England in the 11th and 12th years of King William III. intituled, "An act for granting an aid to his Majesty, by sale of the forfeited estates, and other estates and interests in Ireland, and by a land tax in England;" and that the said trustees, pursuant to the power given them by that act, sold the said lands to Arthur Bernard the appellant's father, who was seised in fee thereof by that title, at the time of the lease made to the respondent's father: The appellant further insisted, that by an act passed in England, in the first year of Queen Anne, intituled, "An act for the relief of the protestant purchasers of the forfeited estates in Ireland," etc. papists were disabled to purchase or take any estate or interest in their own names, or in the name of any other person in trust for them, of or in any the lands or hereditaments vested in the said trustees; and that by the said act, all estates and interests taken contrary thereto were declared null and void: And he craved the benefit of the said acts accordingly, for that the lease in question having been made in trust for a papist, was contrary to the said acts.—He further said, he was advised that the said lease was not sueable for, by virtue of the act which creates the right of a protestant discoverer; and therefore submitted, that the respondent Woodley had no right to the lands by colour of the lease, or covenant of renewal.—Admitted that Harrison came to his house on the 13th of August 1737, being only two days after the expiration of the six months limited for the renewal; and that he said, he was come to pay the fine for renewing the two lives which had dropt.—But the appellant submitted, that as application was not made to him for a renewal of the lease within the time limited by the covenant, the respondent was barred on that account of the renewal sought by his bill, though otherwise entitled to the benefit of the lease.

Issue being joined, several witnesses were examined in the cause, and on the 20th of April 1741, it came on to be heard; when an objection was taken by the appellant, that the respondent Dixon, in whose name the decree of the 4th of June 1728 had been obtained, was not before the court; upon which objection the cause was ordered to stand over, with liberty to amend the bill, by adding parties.

The bill was accordingly amended, by making the respondent Dixon a party, with the proper charge as to the declaration of trust by him executed to the other respondent, of the decree of the 4th of June 1728, and praying a legal conveyance from him of the premises to the respondent Woodley, pursuant to that declaration.

[412] The respondent Dixon put in his answer; and being then under the influence of the appellant, who was at the expence of putting in his answer by his own attorney, said, he believed he made such declaration of trust as in the bill; but referred thereto, and put the respondent Woodley to the proof of it.—He further said, that he apprehended the declaration of trust was void in itself, as being made to the respondent's father, who was then trustee for a Papist; and admitted the proceedings on the bill filed in his name, and that possession was given him by the sheriff of the county of Cork.

The cause was again heard on the 9th of November 1742, when it was objected

by counsel for the appellant, that the proper parties were not yet before the court; for that Francis Bernard, eldest son and heir of Francis Bernard, who had a mortgage upon the demised lands, and Winthrop Baldwin who was entitled to a yearly chief-rent out of the same lands, were not parties. Upon which objection (so unwilling was the appellant to come to a hearing on the merits) the cause was again ordered to stand over, with liberty to amend the bill, by adding further parties.

The bill was accordingly amended, by making Francis Bernard and Winthrop Baldwin parties; and charging, that the mortgage was made to Francis Bernard subsequent to the lease of 1718, and that Baldwin was entitled to the chief-rent; and praying, that Francis Bernard might join with the appellant in executing a renewal of the lease.

Francis Bernard the mortgagee, stood out process of contempt to a sequestration, for want of an answer to the amended bill.—But Baldwin put in his answer; and insisted that he was entitled to the chief-rent, and had no objection to the respondent Woodley's getting a renewal of the lease.

The respondent Woodley having attained his age of 21, obtained an order to proceed in the cause in his own name. And on the 2d of May 1748, the cause came on a third time to be heard; when the appellant's counsel came once more prepared with objections for want of parties; but the respondent Woodley finding there was no end of giving way to these objections, and having therefore strenuously opposed the same, the court, upon full debate of the matter, over-ruled the objections, and ordered the respondent Woodley to go on with his cause.

Pending the progress of this cause to a hearing, and whilst the appellant was catching at every opportunity to retard it, he took the following methods of availing himself of his own delays; viz. he first procured a bill to be filed in the Exchequer in Ireland, in the name of Nicholas Cue, a tenant or servant of and in trust for himself, against the respondent Woodley, then a minor, the appellant, and Elizabeth Woodley and others, as parties defendants; grounded on the Irish acts of the 2d and 8th of Anne, on which the respondent Woodley's bill had been framed; charging the lease to have been originally a trust for a papist: that Francis Woodley, the respondent's father, had obtained the decree of 1728, in the [413] name of the respondent Dixon, in trust for Felix Mac Carthy, or Lawrence his son, both papists; and that after the decree was obtained, and the respondent Dixon put into possession, the expence whereof was charged to have been defrayed by Mac Carthy, the respondent Woodley's father treated with, and purchased from Mac Carthy his interest in the premises, for £300: and therefore praying to be decreed by virtue of the said acts, to the benefit of the lease of 1718, and the covenant of renewal, as the first real protestant discoverer.

The respondent Woodley, by his mother and guardian, and she likewise in her own right, put in their answers to this bill; by which they insisted on the benefit of the respondent Dixon's decree in 1728, and expressly denied, that there was any trust whatever between the respondent Woodley's father and Mac Carthy, relative to Dixon's suit and decree.—That Mac Carthy, so far from advancing any money to carry on that cause, gave all possible delay and trouble in the prosecution thereof; but that Woodley, after the decree and possession obtained, being greatly alarmed at the menaces given out by Mac Carthy, of taking away his life; and which had already broke out into such outrages committed against the tenants, that the governor had ordered troops to his assistance and support; he on that account, and no other, was prevailed upon to give Mac Carthy the £300 for procuring his peace, and for quiet enjoyment only, and not with a view of purchasing any interest whatever from Mac Carthy; and said, they believed this suit had been instituted by Cue, at the instance and expence, and for the sole benefit of the appellant.

The plaintiff replied to the answer of the respondent Woodley, but not to the answers of any other of the defendants; and witnesses having been examined, and the plaintiff Cue having delayed to bring his cause to a hearing, the same was at last set down at the request of the respondent Woodley and his mother; and on the 30th of May 1745, was, by them, brought to a hearing, when the court dismissed the bill with costs; which decree of dismissal was soon after inrolled, and the costs taxed at £87 Os. 10d. but, through the poverty of Cue, the respondent Woodley was never able to recover any part of these costs.

Whilst this last cause was at issue, a bill was preferred in the names of the respondent Woodley, and the said Elizabeth his mother, against the appellant and Nicholas Cue, charging, *inter alia*, that the suit thus prosecuted in the name of Cue, was in trust and for the benefit of the appellant, and prosecuted at his sole expence. This they both expressly admitted, by their answers; and Cue declared himself an entire stranger to the allegations of his own bill, referring himself entirely to the appellant's answer, in whose favour he disclaimed all benefit of the proceedings which had been instituted in his name. The appellant having been defeated in this attempt; and the respondent Woodley, notwithstanding all the delays given him in his cause, still proceeding to bring the same to a hearing, the appellant as his last effort, in Michaelmas [414] Term 1745, exhibited another bill in the Court of Exchequer against the respondent Woodley, as eldest son and heir of Francis Woodley his father, and against the executors of the said Francis Woodley, and also against the said Lawrence Mac Carthy and John Dixon, and one Edmund Deane, who claimed an under-lease of the lands, in the nature of a bill of review and reversal; stating the proceedings in Dixon's cause, and the decree therein of the 4th of June 1728, which he prayed might be reviewed and reversed, for three sorts of errors suggested to be therein apparent; 1st, Because the respondent Dixon was decreed, as a protestant discoverer, to the benefit of the lease, though it appeared upon the face of the decree, that the lands were the estates of the late Earl of Clancarthy, who was attainted of high treason; and that by such attainder, the said lands were forfeited to the Crown, and were by act of Parliament vested in trustees, and by them sold, in pursuance of the said act, to the Governor and company for making hollow sword blades in England; and that the said lease was therefore absolutely null and void, by virtue of the several acts of parliament, made in England touching the forfeitures in Ireland that were vested in the trustees of the said forfeitures; and that a protestant discoverer could have no right to the said lease, or the covenant of renewal, by colour of the statutes made in Ireland in the 2d and 8th years of Queen Anna.—3dly, That the decree, as against Arthur Bernard, was without foundation, the cause having been heard as to him, upon bill and answer; which answer, as stated by the decree, did not admit that the lease or covenant of renewal, was in trust for Lawrence Mac Carthy; and therefore the bill ought, in all events, to have been dismissed against Arthur Bernard.—And, 3dly, Because the respondent Dixon was awarded his costs by the decree against the defendants in the cause, though it appeared by the decrees, that no costs should, in justice, have been decreed against the said Arthur Bernard.

The respondent Woodley, by his guardian, put in an answer to this bill, and thereby admitted the several proceedings in Dixon's cause; but insisted, that the appellant had no right, at that time either as heir or executor of his father, to pray the relief sought by the bill; for that Arthur Bernard his father acquiesced under the decree of 1728, from the time of pronouncing thereof, to his death; and received the subsequent accruing rents, reserved on the lease from the respondent's father: and that the appellant had also received the rents accrued on the lease in his own time, after his father's death: that the appellant had likewise, on the 11th of May 1742, caused a bill to be filed in the said Court of Exchequer in the name of Nicolas Cue, but in trust for himself, praying to be decreed to the benefit of the lease so made to Woodley, in trust for Mac Carthy, a papist, and to the benefit of the decree obtained by the respondent Dixon; for which purpose, it was by the same bill averred and affirmed, that the said lease, and the benefit of it, did and was then really subsisting, for the benefit [415] of a real protestant discoverer; and that the appellant caused the said bill in Cue's name, to be prosecuted to a final hearing; and that it was dismissed with costs; and that the prosecution was carried on at the appellant's own proper charge, in order to obtain the benefit of the said lease and decree: wherefore the respondent insisted, that the appellant was concluded and estopped, by such act of his ancestor and testator, and also by his own acts, from praying the relief sought by this bill; the respondent Woodley claiming the same benefit from his thus insisting, as if he had expressly pleaded the same in bar of the relief so prayed.—But if the court should be of opinion, that the appellant was not concluded by such acts of his ancestor and testator, or his own acts, yet the respondent insisted, that no error appeared on the face of the decree, for which the same ought to be reviewed and reversed, so as in any respect to prejudice or affect his right to the benefit of the said

lease, under that decree, and his father's will; for that he was advised, that the said lease, and the estate and interest thereby demised, under some or one of the acts of parliament in the bill mentioned to have been made in Ireland, in the reign of Queen Anne, to prevent the further growth of popery, were good and valid, and did subsist for the benefit of a protestant discoverer; notwithstanding the demised lands were formerly (if so they were) part of the estates of the Earl of Clancarthy, and on account of his attainder vested, by act of parliament made in England, in trustees, and by them sold, as charged in the bill: and lastly, that the appellant had, in answer to the bill filed against him by the respondent Woodley, long subsequent to the pronouncing the decree of 1728, admitted or confessed, that the lease was taken in trust for Lawrence Mac Carthy, a papist: for which, and several other reasons, the respondent insisted, that the appellant was not entitled to the relief prayed by the bill, and that there was no error or imperfection in the said decree.

The respondent Woodley having thus fully answered the objections arising from the supposed errors apparent in the decree of 1728, the appellant, in order to evade a real discussion of this defence with the person who made it, and to prevent the respondent Woodley from availing himself of several judicial matters subsequent to the decree, which he had a right to insist upon for his defence, and were properly put in issue by his answer, but could not be introduced any other way; found means to prevail upon the other respondent Dixon (who was a mere trustee for Woodley, and had so declared himself by writing under his hand, and consequently had not the least personal interest in the question) to consent to the appellant's putting in a demurrer for him to his own bill; and by this demurrer the respondent Dixon was made to allege, in general terms only, that the former decree was not erroneous; and that the several errors alleged by this bill of review, were not errors apparent on the decree, or such for which the same ought to be reviewed or reversed; but that the decree, [416] notwithstanding any thing alleged to the contrary by the bill, was valid, and ought to be performed.

As the appellant had prepared, so his own attorney set down this demurrer to be argued, with an intention to have argued the same by the appellant's counsel, and at his expence; but the respondent Woodley having luckily come to the knowledge of these proceedings, he thereupon moved the court to set aside the demurrer, and to be at liberty himself to make such defence, in the respondent Dixon's name, as he should be advised; and the respondent Woodley having, in consequence of this motion, obtained, by the indulgence of the court, an opportunity of supporting the decree of 1728 against the bill of review, the demurrer (prepared as it was by the appellant himself) was, on the 8th of February 1748, allowed, though without costs; and the bill at the same time dismissed against the other defendants, whose answers and defence were opened, and fully gone into; the cause as to them having been set down by the appellant, upon his own motion, to be heard on bill and answer, and to come on at the same time with the demurrer.

In a few days after the dismissal of this bill of review, viz. on the 18th of February 1748, the Court of Exchequer likewise gave judgment in the cause instituted by the respondent Woodley, for the renewal of the lease in question; and decreed, that the respondent Woodley's bill should be taken as confessed against Francis Bernard, and that the respondent as son, heir, and devisee, of Francis Woodley, deceased, was entitled to a renewal of the lease made by the appellant's father to the said Francis Woodley of the lands in question, pursuant to the covenant of renewal contained in the said lease, for the lives of himself, and Margaret Woodley his sister, in the room of the said Francis Woodley and Francis Bernard, deceased, two of the lives named in the original lease; and that the appellant should execute a deed of renewal accordingly, in which the defendant Francis Bernard was to join; and the appellant was to account with the respondent Woodley for the rents and profits of the lands, from the time he entered into the possession thereof, or into the receipt of the rents and profits; and the respondent Woodley was to account with the appellant for the respective renewal fines, which became due and payable by the deaths of the said Francis Woodley and Francis Bernard, with interest from six months next after their respective deaths; and also for the rents, fees, duties, and payments, reserved and made payable by the said lease, to the time the appellant entered into possession of the said lands; and it was referred to the Chief Remembrancer, or his deputy, to audit and state the accounts, in which all parties were to

have all just allowances: And an injunction was to issue, directed to the sheriff of the county of Cork, to put the respondent Woodley into the possession of the said lands, and to quiet and establish him therein; and the respondent Dixon was to execute to the respondent Woodley a legal conveyance or assignment of the decree in 1728, obtained in his name, as a protestant discoverer, in trust for the said Francis Woodley, deceased, the respondent Woodley's father, and of all his right to the demised lands under that decree; and the bill, as against the defendant Winthrop Baldwin, was dismissed with costs; but the defendant Woodley was decreed to have his costs against the appellant.

The decree was inrolled, and an injunction issued thereon to the sheriff of Cork to put the respondent Woodley into possession; by virtue of which, he was accordingly put in possession on the 1st of May 1749.

Soon after this decree was pronounced, the respondent Woodley carried in his charge before the Remembrancer, against the appellant, upon the account directed by the decree; and on the 21st of February 1752, the officer reported, that the appellant entered into possession of the demised lands in October 1737, and prevailed on the tenants to attorn to him, and continued in such possession, and in receipt of the rents and profits, from that time to the 1st of May 1749; and that at the time of the appellant's entering into possession, there was £30 12s. 8d. and no more, due to him on account of the rent, fees, duties, and payments reserved, and payable by the lease: that there was due to the respondent Woodley, after credit given for the renewal fines, and interest for the same, till discharged by the rents and profits of the lands in question, and other allowances, the sum of £1349 9s. 5½d.

To this report the appellant took six exceptions; and the cause having been thereupon set down by the respondent Woodley, to be argued on the report and exceptions, the same was heard on the 13th of June 1752, when three of the exceptions were overruled; and upon the three remaining exceptions, the court ordered the Remembrancer to deduct out of the sum reported due to the respondent Woodley, three several sums of £35 3s. 6d. each, amounting together to £105 10s. 6d. and also a further sum of £61 1s. which reduced the sum reported due to the respondent Woodley, to £1177 17s. 11½d., who was thereupon decreed by the court to the said principal sum of £1177 17s. 11½d. sterling, appearing due as aforesaid from the appellant, together with interest for the same at £6 per cent. per ann. from that day till paid, together with the costs of suit.

The respondent Woodley proceeded to inrol this last decree, and sued out an injunction against the appellant for performance of the same, which was served upon him the 13th of August 1752, and a demand at the same time made by the respondent Woodley, of the sum decreed him, with the interest; which the appellant refusing to pay, the court, on the 1st of December following, ordered an attachment to issue against him for not performing the decree.

The appellant however, thought proper to appeal from all these several decrees: insisting (D. Ryder, W. Murray), that as the right accruing to a protestant informer was expressly confined and restricted to such estate [418] only as a popish purchaser himself might enjoy, at or before the time of making the first Irish act 2d Anne: and as at that particular time no popish lessee was able to enjoy or claim any estate or title in or to the lands in question, in respect of the disabilities introduced by the preceding act passed in England, 1st Anne; so it was apprehended, that there was not, nor could be any foundation whatever laid for creating or raising such a transmissible interest as might afterwards be recovered or sued for, within the words or meaning of the second of the Irish acts, made in the 8th year of the same reign. But though the words of this last act might be supposed to bear such a construction, as would enable a popish purchaser to take even a qualified interest in this case, for the benefit of a protestant discoverer; yet the same ought not to be received but rejected, as directly repugnant to, and amounting in its consequences to a repeal of that part of the act made in England, which had before declared all such estates and interests utterly void and of no effect to all intents and purposes whatsoever, and which could not be varied, explained, or controuled, by any other than an act of parliament made in Great Britain.

On the other side it was contended (W. Noel, C. Yorke), that the lease in question was not a voluntary grant from the appellant's father, but for valuable consideration.



and beneficial to the lessor. That the orders complained of left the appellant, as heir of the lessor, in possession of every right stipulated for by that lease; his rent, his fines, and every other interest, were effectually preserved to him. What was recovered by virtue of the decree, was only to the prejudice of the *cestui que* trust of the lessee, who was a papist, and did not complain; but the struggle was between the appellant and the respondent Woodley, the one seeking to avoid his own lease for a supposed original nullity, the other to support that lease, and with it the act of the lessor, for the benefit of the protestant discoverer. That the subsistence and validity of this lease were now established by repeated determinations: Dixon's decree in 1728, Cue's dismissal in 1745, the allowance of Dixon's demurrer in 1748, and the respondent Woodley's decree for a renewal in the same year, were all uniform determinations, affirmative and negative, in favour of the lease, and the respondent Woodley's right to it. The appellant or his father were the avowed parties to three of these determinations, and the appellant the promoter, and party really interested, though concealed, in the fourth. In all of them the same questions were agitated and determined, as were now again brought in review for a fifth determination between the same parties; and the popery acts, as well English as Irish, were immediately under consideration in Dixon's cause; and Cue's bill was brought at the expence and in trust for the appellant, as a protestant discoverer, upon the foundation of the same Irish acts, on which the respondent Woodley had so often recovered. Nor was the acquiescence in this case, of less weight or authority than the judicial determinations. An interval of 17 years and upwards succeeded between 1728 and 1745, when the bill of review was exhibited; [419] nor was that bill brought till after the dismissal of Cue's cause, and the respondent Woodley's bill had been several times at hearing. And though possibly there might be no precise limitation of time to the bringing a bill of review, yet courts of equity will not reverse a decree after so long an acquiescence, but upon very apparent errors. The present appeal was exhibited four years after the dismissal of that bill of review, and after an attachment had been absolutely ordered against the appellant, for non-performance of the decree. And yet the respondent relied not so much upon an implied acquiescence, as upon the positive acts, both of the appellant and his father, in receiving the rent reserved by the lease for many years after, and in confirmation of the decree of 1728, at the hands of the respondent and his father, for whose benefit that decree was made.

But to consider the question between the parties as *res integra*, unprejudiced by all former determinations, acquiescence, or confirmation; the objection made by the appellant is, that the lease was a nullity in its creation, and could not subsist for the benefit of a protestant discoverer; for that the lands demised were part of the forfeited estates of the Earl of Clancarthy, as such vested in trustees appointed by the English act of parliament, passed in the reign of King William, and by them sold to the appellant's father; and that by the English act, 1st Anne, papists are disabled to take any interest in the lands vested in the said trustees, and all estates taken contrary thereto are annulled; and consequently, the lease in question being made in trust for a papist, was a nullity within this act, and the lands must therefore return to the lessor.

To this it may be answered, that the English and Irish acts referred to, concern estates in Ireland only; they all tend to one and the same end, namely, the support and enlargement of the English interest, and protestant religion in Ireland; the legislature had the same intention in them all; they are necessarily dependent upon, and have been construed to bear a strict relation to each other; and many judicial determinations in Ireland, both in courts of law and equity, have been founded upon such construction. The English act, 1st Anne, annuls all leases of the forfeited or trustee lands, as they are called, made to or in trust for papists, as between lessor and lessee; but it is not inconsistent, that such leases should, under the popery acts of the 2d and 8th of the same reign, made in Ireland, be allowed to subsist for the benefit of a protestant. A lease made to a papist contrary to the popery acts, is, in respect to any beneficial interest to himself, void, because he is to have no profit by it: but till he may take as a trustee for a protestant discoverer, to whom he will be accountable for the profits, without contradicting the true intent and meaning of the English act; and though the Parliament of Ireland have carried the matter further than the English parliament, their intention was by no means to repeal, controul, or weaken

the English act, but to give it an additional force, and carry it more effectually into execution, by making those leases or interests subsist for the benefit of a protestant discoverer. That the Irish act, 8th Anne, extends to all lands in Ireland, and trustee lands, as well as all other lands, are equally within the purview of it; for it would be as dangerous to the protestant interest in Ireland, that papists should have permanent or beneficial interests in lands which were vested in the trustees, as in any other lands in that kingdom; and this was the mischief which that statute was intended to remedy. That the exception of the trustee lands out of the proviso in this act, operates only upon the proviso itself, to prevent papists conforming before the 25th of December 1709, from having the benefit of purchases and leases made of such trustee lands, which would have been a direct contradiction to the English acts: but was not intended to take such lands out of the general purview of the Irish act, which was apprehended to be perfectly consistent with the English acts. That this act ought to receive the most extensive construction for the benefit of the protestant discoverer; and it might affect the constitution of that kingdom, and the titles of many estates there, in case the lands which were vested in trustees, which are of great extent and value, and have hitherto been considered as within all the acts made in Ireland for preventing the growth of popery, should now be determined not to be within those acts. That the appellant having drawn the same question so often into judgment, after such repeated determinations, and acts of acquiescence and confirmation: having defended himself against a renewal, by the supposed lapse of two days only in the tender of the fine, and having been guilty of such vexatious conduct in the progress of the several causes; the court thought proper to punish him with costs, which are discretionary, and depend upon the circumstances of the case; and therefore it was hoped, that the several orders and decrees appealed from, would be affirmed without variation, and with costs adequate to the great vexation which the appellant had occasioned.

After hearing counsel on this appeal, the Judges were directed to give their opinions on the following question, viz. "Whether the lands comprised in the lease in question in this cause, can be sued for and recovered by a protestant discoverer, within the Irish act of parliament of the 8th year of Queen Anne?" And the Lord Chief Justice of the Common Pleas having delivered the unanimous opinion of the Judges in the affirmative; it was thereupon ORDERED and ADJUDGED, that the appeal should be dismissed, and the orders or decrees therein complained of affirmed: And it was further ORDERED, that the appellant should pay to the respondents £100 for their costs in respect to the said appeal. (Jour. vol. 28. p. 170—174.)

[421] CASE 10.—FRANCIS WOODLEY,—*Appellant*; JOHN CUE and others,—*Respondents* [15th February 1757].

Where a papist, to avoid a discovery under the popery acts, surrenders a former lease granted to himself, and obtains a new lease in the name of a protestant, in trust for him; the new lease shall be equally subject to discovery by a protestant, and he shall be entitled to the benefit of it.

DECREE of the Irish Exchequer REVERSED.

From this, and many other cases, it appears that, previous to the statutes for relief of the papists, they were not less fertile in devices to elude the force of the laws against them, than the churchmen of old were with respect to the statutes of *Mortmain*. It is well when contests of this nature are put an end to by a liberality equally honorable to both parties.

Vide *ante*, ca. 9.

Before pronouncing the decree which was the subject of the appeal in the preceding case between some of the present parties, the respondent Cue, as a protestant discoverer, in Easter term 1748, exhibited his bill in the Court of Exchequer in Ireland, against the appellant and Elizabeth Woodley his sister, Laurence Mac Carthy, John

Dixon, and Roger Bernard and others, setting forth a lease of the 26th of October 1715, granted by Arthur Bernard to Francis Woodley, deceased, the appellant's father, in trust for a papist; and insisting, that the same was a subsisting lease, and ought to take place of the subsequent lease of the 29th of October 1718, mentioned in the former appeal; and that he the respondent was a protestant of the church of Ireland by law established, and as such, by virtue of the statute of the first of Queen Anne, made in England, and of the eighth of the same reign, made in Ireland, was entitled to the benefit of the said lease of the 26th of October 1715, notwithstanding a decree of the 4th of June 1728, obtained by John Dixon, as a trustee for the said Francis Woodley, deceased; in regard the said lease of October 1715 had been granted by the said Arthur Bernard to the said Francis Woodley, deceased, in trust for Felix Mac Carthy, or Laurence Mac Carthy his son, both papists, and who were therefore incapable of holding or enjoying the same. And therefore the bill prayed, that Cue might be decreed to the said lease of the 26th of October 1715, and the right of renewal therein specified, and to all the estates, rights, and trusts which subsisted of the lands therein contained, in trust for the said Felix Mac Carthy, or Laurence Mac Carthy, at any time before the 29th of October 1718, the date of the said second lease, and to the profits of the said lands, from such period of time as to the court should seem just and reasonable.

The appellant and the other defendants put in their answers to this bill; and the appellant by his answer said, he had heard and believed, that the said lease of 1715 was taken by his late father in trust for the said Felix Mac Carthy, father of the said Laurence [422] Mac Carthy, and that his father permitted the said Felix Mac Carthy, during his life, to enjoy the said lands under the rents and covenants contained in that lease.

In Trinity term 1749, the appellant exhibited his cross bill against the respondent Cue, and the said Roger Bernard, and against Arthur Bernard esq. a mortgagee of the said lands, charging (C. Pratt, E. Willis), that the said lease of the 26th of October 1715 was surrendered or cancelled at the execution of the lease of the 29th of October 1718; or at least, that the acceptance of the said lease of 1718 was a sufficient surrender of the lease of 1715, or considered as a renewal of it, or was grafted on that lease, and considered as one and the same interest, and so understood by all the parties interested in the lands; and that the said Roger Bernard was so conscious hereof, that he never attempted to set up the said lease of 1715 as a separate interest, independent of the lease of 1718, though he knew of the said lease of 1715, at the time he answered the appellant's bill in the former suit, to compel him to renew the said lease of 1718; and also charging, that the said bill brought by the respondent, and also the ejectment therein mentioned, for recovering the possession of the lands, were both brought in the name of the respondent, in trust, and for the use of the said Roger Bernard, and that the same were carried on by his procurement, and at his expence; the cross bill therefore prayed a discovery of the premises, and that he respondent Cue might be stayed by injunction from proceeding at law on the ejectment, and that the appellant might be quieted in the possession of the premises under the former decrees, made in causes wherein the said John Dixon and the appellant were respectively plaintiffs.

The respondent Cue, and the said Roger Bernard and Arthur Bernard, put in joint answer to this last bill, and thereby insisted that the lease of the 26th of October 1715 could not be extinguished or annulled by the lease of the 29th of October 1718, against a protestant discoverer; and the rather, as the decree obtained by Dixon, in trust for the appellant's late father being confined to the lease 1718, left the discoverable interest arising under the lease of 1715 open to be sued for.

The appellant afterwards amended his bill; and the respondents, and the other defendants, put in their answers thereto: and in May 1752, he filed a supplemental bill, charging, that after issue had been joined in the said two causes, he had discovered that Felix Mac Carthy, in trust for whom the lease of the 26th of October 1715 was granted to the appellant's late father, was killed by a fall from his horse on the 11th of June 1715, above four months before the date of the said lease; and that the lease of the 29th of October 1718 was duly registered in the public Register Office in Ireland; but that the lease of 1715 was never registered, nor had been executed by the said Arthur Bernard, and that if the said Felix Mac Carthy was ever in

possession of the said lands, it was only as tenant at will to Arthur Bernard, and that Charles Mac Carthy, the uncle of Laurence, requested the appellant's father, to [423] become lessee or nominee in the said lease of 1718, in trust for Laurence Mac Carthy, the eldest son and heir of Felix Mac Carthy; and that the said Arthur Bernard consented to the same, the better to secure certain debts due from Felix to him, as his receiver; and that therefore the said lease of 1718 was taken, and put into the hands of the appellant's father, who was related to the said Arthur Bernard, deceased, and which was the reason of granting that lease to him.

The respondent Cue and the said Roger Bernard by their answer to this supplemental bill admitted, that Felix Mac Carthy was killed by a fall from his horse on the 11th of June 1715, and believed that Arthur Bernard, before the death of Felix, had executed an article in writing to the appellant's father, for a lease of the said lands for three lives, renewable for ever; and that the appellant's father had given the said Felix Mac Carthy a declaration of trust for the said article; and that both the article and declaration of trust were put into the hands of Felix, and afterwards fell into the hands of the appellant's father; and that the lease of the 26th of October 1715 was executed in pursuance of the said article, at the request of Honor Mac Carthy, the widow of Felix, in trust for Laurence Mac Carthy, his only son and heir, and that the tenant's part was executed by the said Arthur Bernard only, and the lessor's part by the appellant's father; and that the tenant's part was cancelled, and given up on the execution of the lease in 1718, but that the lessor's part was found among the papers of the said Arthur Bernard, by, and came to the hands of Roger Bernard, after his said father's death; and they also believed, that the said lease of 1715 was never registered, and that Felix Mac Carthy was in possession of the lands before his death, under the said article and declaration of trust.

Issue being joined; divers witnesses were examined on both sides; and publication having passed, the causes came on to be heard in the Court of Exchequer in Ireland on the 2d, 4th, and 11th of June 1755; after which the Court took time to give their opinion, till the 28th of the same month; when it was decreed, that the appellant's bill should be dismissed, and that the respondent John Cue, as a protestant discoverer, should have the benefit of the said lease of the 26th of October 1715; and that it should be referred to the chief Remembrancer of the Court, or his deputy, to take an account of the rents and profits of the lands contained in the said lease, which had been received by the appellant, or for his use, from the time of the respondent John Cue's filing his bill, and that an injunction should forthwith issue to put him into possession of the said lands; but no costs were given on either side.

From this decree the appellant appealed, insisting (R. Henley, C. Yorke), that it appears to have been the intent of the several popery acts, and particularly the act of the 8th of Anne, to prevent papists from taking lands, or any interest therein by purchase; and for that purpose to give to the first protestant discoverer whatever estate or interest [424] the papist had, or should have had, and to entitle him to hold and enjoy the lands accordingly. That the interest being once taken out of the papist, the meaning of the acts was satisfied, and the discoverer was to be considered as standing in his place; and therefore to have the like advantages both in law and equity. That Dixon (Woodley's trustee) being the first protestant discoverer, was entitled to whatever interest Laurence Mac Carthy the papist had, or should have had in the lands. The respondents had admitted, that the lease of 1715 was surrendered, and the lease of 1718, accepted in lieu of it, during the minority of Laurence the papist; and if Laurence had been a protestant, he would, upon attaining his full age, have been entitled to his election, either to take the benefit of the lease of 1715, or of 1718; consequently, if the protestant discoverer is to stand in the place of the papist, Dixon was entitled to the same election, to which Laurence would have been entitled if a protestant. The discoverer, when he has prevailed in his suit, takes possession under the decree, and by force of the act recovers all the estate, use, trust, interest, or confidence, which the papist had, or should have had in the land. His title arises out of the act, and he has a right to call upon the lessor to make him such a lease, by virtue of the covenants for that purpose, as he was bound to have made to the papist, in case there had been no legal incapacity. That the construction contended for by the appellant, tended to promote the end and design of the laws made against the further growth of popery; nothing but the estate of the papist could be affected by

it; the landlord was left in the possession of every advantage stipulated for by his original agreement; and the landed property of the papist became vested in a protestant. But on the other hand, the respondent's construction would open a way to elude the acts, and must be attended with very pernicious consequences: For, in the first place, protestants who really and *bona fide* intend to sue for interests created contrary to the popery laws, would be discouraged from so doing; because, if such a construction should prevail, the apparent lease under which the papist held, would always be covered by several old surrendered leases; and by this means, after the protestant discoverer should have established his right to the apparent interest, through perhaps 20 or 30 years litigation, and at an immense expence, the lessor, or a secret trustee for the papist, or at least some friend of the papist, more agreeable to him than the first protestant discoverer, might set up one of these old surrendered leases, involve the first protestant discoverer in another expensive suit, perhaps to the ruin of his family, and strip him of that benefit which the act intended for him. Nay, even supposing that he should have the good fortune to find out the first and original lease, yet as there could be little certainty, none would venture to purchase an interest, which might possibly be defeated the very day after the purchase. And in the next place, such a construction would draw into question the validity of most of the titles to [425] estates in Ireland, under decrees founded on the popery acts, even so far back as the 8th of Queen Anne; and would only open a door to litigation, without the least advantage to the public.

But further: The leases of 1715, and 1718, though not identically, were yet virtually the same; they were of the same lands, at the same rents, under the same covenants, made between the same lessor and lessee, and in trust for the same person; both were leases for lives renewable for ever, and at the same fine for renewal; and though the lives inserted in the lease of 1718 were different from those in the lease of 1715, yet there being in both a covenant for perpetual renewal, they must be of equal duration: for the reservation of duties in kind or money in the lease of 1718, in lieu of those reserved in kind only by the lease of 1715, or the indorsed covenant not to alien without the consent of the lessor, even supposing it to be a valid covenant, created no difference in the interest to be taken in the land. The lease of 1718, at the time of filing Dixon's bill, was the more beneficial lease, all *cestui que vies* therein named being then living, whereas one of the *cestui que vies* in the lease of 1715 was then dead: it was likewise the subsisting lease, it being admitted that the tenant's part of the lease of 1715 was actually surrendered and cancelled at the time of taking the lease of 1718, and though it were not actually surrendered, yet the acceptance of the lease of 1718 was a surrender in law of the lease of 1715, and there had been a possession and enjoyment under the lease of 1718 since the time of making it. It appears, that Arthur Bernard the lessor considered the lease of 1718 as the only subsisting lease, and received rent and gave receipts on the foundation of it: and the respondent his son admitted, that he always until a day or two before filing the respondent Cue's bill, which was not till the 2d of May 1748, considered and understood both leases as one and the same interest. Besides, the lease of 1718 was the only apparent interest, and was duly registered according to the act of parliament for that purpose, but the lease of 1715 was never registered; and therefore it was apprehended, a Court of Equity ought not to set up this surrendered lease of 1715, under which it was not pretended there had been the least enjoyment since 1718, against the only apparent and registered lease, under which the enjoyment had been uniform: for it would be against justice, to deprive the representative of the first protestant discoverer of the benefit of this last lease, who was not only a purchaser as against the lessor and his heir, the respondent Roger, by payment of the rent and performance of the covenants in the lease; but who also on the credit of the decree obtained by Dixon, and before he enjoyed any of the profits of the lease, had paid more than the value of it, by the money expended in Dixon's suit, the arrear of rent to the amount of £700 paid to Arthur Bernard the lessor, and the £300 paid to Laurence Mac Carthy the papist. Besides, the respondent Roger, in trust for whom Cue's bill was filed, was so far from meriting the interposition of a Court of Equity in his favour, that he ought to receive the utmost dis-[426]-couragement; after the acceptance of rent by him and his father for many years under the lease of 1718, after the oppressive and vexatious litigation in which he had engaged the appellant

for so many years concerning that lease, and after repeated determinations in favour of it, to all which the respondent Roger or his father were parties. Lastly, that the decree in favour of the respondent Cue, would in its consequences take away from Dixon that legal estate to which he had been decreed; for Cue being decreed to the entire benefit of the lease of 1715, it necessarily included the benefit of the covenant of renewal contained in it; so that Bernard, who by the former decree was bound to renew for the appellant, would now hold to his own use.

On the other side it was argued (C. Pratt, E. Willes), that the Irish act, 2 Anne c. 6. disables papists to purchase in their own names, or in the names of any others in trust for them, any lands or leases, except leases for 31 years in possession, and on which rents not less than two-thirds of the improved value must be reserved; and all other estates and terms are thereby made void, to all intents and purposes: so that with regard to all estates purchased, or leases taken contrary to this act, neither the papist vendee or lessee, nor his trustee, could acquire any dominion or power over such estates, but the contract was a nullity, and the vendor or lessor held his land as he did before the making of such sale or lease: but after the Irish act 8th Anne was made, whereby any protestant was enabled to sue for and recover the whole interest so granted in trust for a papist, together with all other securities made to cover and protect the same, these grants and conveyances were no longer void to all intents and purposes, but grew to have an effect for the benefit of a protestant discoverer, and hung in a kind of abeyance unalienable and unalterable, so that neither the grantor or grantee, the trustee or *cestui que* trust, either alone or in conjunction, can by any possible method of conveyance, defeat or vary any interest so once granted to or in trust for a papist, save only by a sale to a protestant, without notice; for the moment that such unwarrantable interests are conveyed to a papist or his trustee, that instant such papist or trustee become trustees for the benefit of a protestant discoverer. That it was not contended but in the present case, Woodley the appellant's father was a trustee for Felix or Laurence Mac Carthy, both papists; nor was it contended but that Mr. Bernard made a lease for lives, with a covenant for a perpetual renewal to Woodley, in the year 1715, for the benefit and in trust for those papists; Woodley therefore became a trustee for a protestant discoverer in general, from the instant that Bernard executed that lease to him; and if no protestant informer had received the benefit of that interest, before the time that the respondent Cue filed his bill, Cue ought to be decreed to such lease.

But it is objected, that Bernard made another lease for three lives renewable for ever, to the same trustee, in the year 1718, by which the lease of 1715 was surrendered, and that this new [427] lease being a discoverable interest, Dixon as a protestant discoverer filed his bill, and obtained a decree for it; and that therefore, the end of the law was answered before Cue's bill was filed.

In answer to this objection it must be observed, that the lease of 1715 was a lease for three different lives from that of 1718, that it differed from it in its commencement, and the reservation of the duties, and more materially in a clause indorsed upon the lease of 1718, by which the lessee was prohibited to alien without licence. The lease of 1715, being contrary to the act 2 Anne, became a trust for a protestant discoverer in general, and could not therefore be prejudiced by any act of the lessor or papist lessee, or his trustee, *Res inter alios acta alteri nocere non potest*; and as no interest could according to that statute have passed to Woodley by the lease of 1715, he had no dominion over it. As to him and his *cestui que* trust, it was void in its creation, and existed only for the benefit of a protestant discoverer, who should sue for the same under the 8th of Anne, which law disabled Arthur Bernard from taking such a surrender, as much as it disabled any other person, having notice of the trust, from purchasing the lease: it has accordingly been often determined in courts of equity in Ireland, and is the general and prevailing opinion there, that a discoverable interest can never be cancelled, even by an express surrender, the lessee or his nominee having no interest to grant; and this act of Woodley's being at most but an implied surrender of the lease of 1715, *a fortiori*, it could not be given up so as to defeat a protestant discoverer from recovering the same. That Dixon by his bill took no sort of notice of this lease of 1715, but confined the allegations and prayer of it to the lease of 1718, and could therefore be decreed to that lease only: and if no discoverer had ever prayed the benefit of the lease of 1715, Dixon would

have the full benefit of his bill, as he in fact had by enjoying the profits of the land from the time of its being filed, to the time of Cue's filing the bill in question: he might indeed have framed his bill in a general way, and suggested that the papist or his trustee, besides the lease of 1718, took other unwarrantable leases or interests, and might have prayed to be decreed to all estates or interests taken by or in trust for the papist, contrary to the act 2 Anne; but this he did not do, and therefore left the lease of 1715 open to be sued for by Cue. That the end of the law could not be answered by Dixon's bill; for this end was to make an unwarrantable lease to a papist of his trustee void in its creation in respect of the papist, which it was not, if Woodley could have surrendered the lease of 1715, or destroy the benefit of it from coming into the hands of a protestant informer: but if the end of the law had been in some sort answered, that would not have enabled Woodley to surrender the lease of 1715, for the end of the law would have been equally answered by the papist or his trustee assigning the lease to a protestant, having notice of the trust and nature of the lease; and [428] yet it has been often held in the courts in Ireland, and is looked upon as a point not to be disputed, that no such assignment can be made good to defeat the interest of a protestant discoverer; but that such lease will always remain open to be sued for and recovered by him, out of the hands of such protestant assignee.

It is however said, that at this rate there always will be a private lease; and when the discoverer comes to look for the lease that is public, a friendly discoverer will start up and sue for the private lease. But it is not pretended that the lease of 1715 was made for this purpose, or that the land was not held under that lease, till the making of the lease in 1718; nor could it be pretended, that it was made to deceive Woodley who executed it: There must be an uniform rule to judge by; for if it should be in the power of the papist or his trustee, by an express or implied surrender, or by any other act, to defeat or vary a right once vested in a discoverer, there is an end of that part of the act. This inconvenience will always be, and might in the present instance have been prevented, by the first discoverer's framing his bill in the general and extensive manner above mentioned; and where the bill is thus framed, the plaintiff, without any amendment to be made in the progress of the cause, will be always decreed to every discoverable interest created for the benefit of any of the parties.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed: and it was DECLARED, that the lease in question, dated the 26th of October 1715, ought to be deemed to have been duly surrendered; or in case any estate or interest thereby granted was still subsisting, the appellant, as the first protestant discoverer, was entitled to the benefit thereof, by virtue of the former decree affirmed by the House on the 11th of December 1753, and the Irish act of the 8th of Queen Anne: and it was therefore ORDERED, that the bill brought by the respondent John Cue, in the Court of Exchequer, should stand dismissed out of the said court: and upon the cross bill brought by the appellant, it was ORDERED, that the said lease of the 26th of October 1715 should be delivered up by the respondents to the appellant, and that a perpetual injunction should issue out of the said court against the respondents, to restrain them from proceeding at law in the ejectment already brought, or in any other action at law by colour of the said lease, and from setting up the same, and that the appellant should hold and enjoy the lands and premises in question, by virtue of the decree formerly affirmed, and of this judgment, according to all such estate, use, trust, interest, or confidence, which Felix Mac Carthy, or Laurence Mac Carthy his son, or Francis Woodley, in trust for them or either of them, had, or should have had therein, provided the said Felix Mac Carthy or Laurence Mac Carthy had been qualified to purchase, hold, or enjoy the same; subject nevertheless to such rents, covenants, conditions, reservations, and in-[429]-cumbrances, as in the said act are described: and it was further ORDERED, that the respondents Arthur Bernard and John Cue should pay the appellant his costs, both of the original and cross causes in the said court, and also his costs of the ejectment at law, to be taxed by the Deputy Remembrancer; and that the said court should give all proper directions for carrying this judgment into execution. (Jour. vol. 29. p. 45.)

CASE 11.—The Governors of STEPHEN'S Hospital, Dublin,—*Appellants*;  
DANIEL SWAN,—*Respondent* [27th March 1760].

On a bill brought to recover the estate of a person deceased, upon the allegation of his being a papist, and therefore unable to devise; the Court directed an issue to try whether he was at any, and at what time or times (distinguishing the times respectively) a papist, or person professing the popish religion. But on an appeal, the decree was reversed, and the bill dismissed.

DECREE of the Irish Chancery REVERSED.

It appears that the weight of evidence in favour of the Appellants, as to the fact of the deceased's being a protestant, was so strong, that the Court of Chancery were by no means justified in directing *an issue*; which is not on all occasions to be granted merely on the asking for; but the plaintiff may seek his remedy at law. See *post*, ca. 13, 14 [5 Bro. P. C. 446, 456].

Edward Cusack, who lived to a great age, was born of protestant parents. He had one brother and four sisters, who were all protestants. He was bred up by his father as a protestant till he was about five or six years old, when his father died. At 13 or 14 years of age, he was placed out apprentice to his uncle Joseph Fenton, a tanner in Dublin, who was likewise, as well as all his family, a protestant. To this uncle and one Joseph Rabo, who was likewise a protestant, he served his apprenticeship. In 1703, he married Mrs. Ledwidge his first wife, who was a protestant. He lived many years at the town of Athboy, where, as well as elsewhere, he was a constant communicant at the sacrament, when administered in the parish church, till his death; particularly so long since, as in the years 1705, 1707, and 1708. Being bred a tanner, he went through and served all offices in the corporation of tanners, first as warden, and afterwards as master. In 1712, he was admitted to the freedom of the city of Dublin, to which none but protestants are ever admitted, and took the several oaths required upon that occasion. After the death of his first wife, he married Diana Bunbury, his second wife, who was also a protestant of the established church, as well as her parents. In a word, he was born, bred, lived, and died a protestant, and was a religious observer of his duty at church, and a constant [430] communicant with both his wives, at the sacrament at his parish church in the town of Athboy and St. James's in Dublin, the different places of his residence during his whole life, which was extended to a period of about 70 years.

The appellants, the governors of the hospital, were incorporated by act of parliament passed in Ireland, 3 George II. by which the corporation was to consist of the Lord Primate, Lord Chancellor, Archbishop of Dublin, Bishop of Clogher, Chancellor of the Exchequer, and the Lords Chief Justices and Lord Chief Baron, all for the time being, and several other respectable persons, with liberty to purchase or take any lands and hereditaments, not exceeding £2000 per ann. of the alienation, gift, or devise of any persons having a right, and not being otherwise disabled, to alien, grant, or devise the same, as well for the finishing the building of the said hospital, as for the relief, support, and maintenance of the sick and wounded persons to be placed therein.

Edward Cusack made his will, dated the 23d of June 1753, by which (after directing his body to be buried in the church-yard of Athboy, and giving two guineas to the minister who should read the funeral service) he gave to John Hopkins esq. all his lands and hereditaments, and all other his estate real and personal, leases for lives and years, and other effects, subject to the payment of his just debts and funeral charges, upon trust, to stand seised and possessed thereof, for the use of such child of his body as should be living at his death. And if he should die without leaving issue living at his death, or born in due time afterwards, or if such child or children should die before 21, without leaving issue of their bodies, then in trust to permit his wife Diana Cusack to dispose of £200 of his personal estate to whom she pleased: and also to permit her to receive the clear rents and profits of all his estate and fortune during her life: and after her decease, in trust and for the use of the appellants, the governors of the hospital, for the use and benefit of the hospital for ever.

The testator then devised to Henry Cusack, son of his brother William Cusack.



an annuity of £20 during his life; and to the appellants the minister and churchwardens of the parish of Athboy, and their successors, the yearly sum of £10 sterling, to be issuing out of his lands in Castletown, during so long time as his lease thereof from Richard Vincent esq. should subsist, to be by them applied for putting out the children of the said parish apprentices. And he appointed his wife Diana Cusack sole executrix in trust of his said will.

On the 1st of October 1754 the testator died without issue, leaving Diana Cusack his widow and executrix, who survived him, and proved his will.

In a few days after his death a bill was exhibited in the Court of Chancery in Ireland, in the name of the respondent, as a protestant discoverer, against Diana Cusack, the widow and executrix, the appellants the governors of the hospital, as devisees of the testator's estates in trust for the charitable purposes aforesaid, [431] expectant on the death of Diana Cusack, his Majesty's Attorney General of Ireland, the appellants the minister and churchwardens of the parish of Athboy, in respect of the annuity of £10 given to them and their successors by the will, and against John Hopkins the trustee, and the said Henry Cusack the annuitant, who was also the testator's nephew and heir at law; stating the will of the said Edward Cusack, with a variety of purchases made by him at different times during a course of 40 years preceding his death, of leaseholds and other interests, some for lives renewable for ever, and others for long terms of years, together with several securities taken by him by mortgages and judgments for money lent; and charging, that he was in possession of, or entitled to, these several acquisitions from the respective purchases till his death: The bill then stated the several acts passed in Ireland for preventing the growth of popery, and charged, that Edward Cusack was born of popish parents. —That they educated and bred him up in the popish religion, whilst he continued with them or under their care, which was till his age of 15 or 16 years: That he was then taken as apprentice by his uncle Joseph Fenton, who was a protestant, from which time he pretended to be a protestant of the church of Ireland, as by law established; but in truth was a papist, or person professing the popish religion, not only whilst he continued with his said uncle as an apprentice, but all his life afterwards. —And in manifestation of these charges, that he went frequently to mass, kept company with papists and popish priests, whom he harboured, and particularly one Munkett: That he contributed to the rebuilding a mass-house when thrown down, and lent one of his own houses to celebrate mass in, whilst it was rebuilding: That he continued a papist to his death, and, in his last illness, sent for a priest, who administered the sacrament to him according to the ceremony of the church of Rome. The bill further charged, that Edward Cusack at the respective times when he made the several purchases, or took the several leases, mortgages, and other interests and states before mentioned, and during his whole life, was a papist, or person professing the popish religion, and was therefore incapable of taking the same; and that though he sometimes pretended to be a protestant, yet it was done with an intent to evade the popery acts, and to screen the said several purchases and interests from any protestant discoverer; and that he so artfully concealed his being a papist, that he enjoyed the said several estates and interests during his life, without any suit commenced against him by any protestant: That he died seised and possessed of the said several estates and interests, and of a considerable personal estate of the value of £3000 and upwards; and that his widow proved his will, and possessed herself of all his real and personal estates, and received the rents of the real estates, amounting to £500 per ann. That the respondent was a protestant, and that the lands in question were leased at much less than two-thirds of the real value; and the leasehold and other interests were of such a nature as the said Cusack was incapable [432] of taking, but for the benefit of the first protestant who should sue for the same.

The respondent therefore prayed, that being the first protestant discoverer, he might be decreed to the benefit of the said several purchases or acquisitions, and of all others made by Cusack contrary to the acts for preventing the growth of popery, with an account of the profits.

The appellants the governors of the hospital, by their answer to this bill, denied that Edward Cusack was born of popish parents, or educated in that religion; but, on the contrary, said, that his parents, brother and sisters were all protestants: that his father bred him a protestant till five or six years old, when the father died: that

he was first bound apprentice when very young to a protestant master, and afterwards taken apprentice, when about 14 or 15 years old, by his uncle Joseph Fenka, who was a protestant: that he was married to his first wife, who was a protestant, in 1703; at which time they both received the sacrament in the parish church of Athboy: that he was admitted as a protestant to the freedom of Dublin in 1712, as a tanner, and served the offices of master and warden, and all the other offices of that company: that his second wife was also a protestant: that upon enquiring into his religion since the filing of the bill, it appeared from the parish books of the parish of Athboy, where he frequently resided, that in the years 1705, 1707, and 1708, and for several years afterwards till his death, he frequently received the sacrament in the said parish church: that both he and his second wife, when he was ill, frequently received the sacrament at home from the minister or curate of the parish where he lived: and they denied his ever going to mass, or conversing with priests, except in the way of business, and in the common acts of good neighbourhood; or that he ever harboured Plunkett, or sent for him in his last illness; but said he was suddenly taken ill, and at once deprived of his senses, and died in half an hour after his being first seized: that he was always looked upon to have been a strict and rigid protestant, and regular in the discharge of the duties of the protestant religion, and in his attendance on the performance of Divine service, to his death; and was therefore qualified to take the several estates, mortgages, and interests in the bill mentioned;—and insisted upon their right thereto.

Diana Cusack the widow, by her answer, repeated every circumstance mentioned in the preceding answer, as to her husband, and his parents and relations, being all protestants; and as positively denied every charge in the bill as to his being a papist, or conversing with them; and said she was married to him 20 years before his death: that previous to the marriage, and in consideration of her portion, he settled estates upon her to the value of £100 a year; and that she married him without the least suspicion that any part of his estate was liable to discovery.

Henry Cusack, the nephew and heir at law, by his answer, swore that he had known Edward Cusack and his family 40 [433] years; and that his parents, brother, sisters, and both his wives, were all protestants; and that he was himself a firm and real protestant.

Hopkins the trustee, and the appellants the ministers and churchwardens of Athboy, all likewise concurred upon oath in the same common answer, that Cusack and all his family, were protestants.

The Attorney General disclaimed any right to the annuity of £10 given to the minister and churchwardens of Athboy, except on behalf of the particular charity to which it was given.

Diana Cusack, after answering, married the appellant John Sellen Allen, and dying intestate in 1756, he administered to her; and the appellant Putland about the same time took administration, with the will annexed, to Edward Cusack, in trust for the appellants the governors of the hospital, who, upon the widow's death, became entitled to the devised estates in possession.

The respondent replied to all the answers; and issue being joined, the religious persuasion of Edward Cusack was fully examined into by proofs on both sides, taken as well in the examiner's office in Dublin, as on commission into the country.

The respondent's witnesses, who appeared to have been of an inferior rank, endeavoured to prove Edward Cusack's having been present by stealth, at different times during his life, at the celebration of mass, seeing it sometimes through a window, and at other times clandestinely in his own house, about 15 or 16 years before his death: that he once contributed to rebuild a ruinous mass-house, and, whilst it was building, suffered mass to be celebrated in his coach-house: some of them believed him to have been a papist in his heart; and one witness only pretended his father and brother had been papists, but at the same time admitted his mother and sisters had been protestants: they proved his apprenticeship to Fenton, a protestant, and that his wives were protestants; and the short continuance of his last illness was proved, but no proof of the charge of his being attended by a priest upon that occasion; and the witnesses were contradictory to, and inconsistent with, each other.

The appellants supported their own answers and those of their co-defendants, by a variety of unexceptionable witnesses.

Elizabeth Roberts, a sister of Edward Cusack, (who was 86 at the time of her amination,) said, she knew him from his birth to his death: that his parents, other, and sisters, were all protestants of the established church: that he was no more than five or six years old when his father died: that he was educated in the protestant religion from the time he was able to speak, or say his prayers, and ever continued so: that she saw him very often at church, and several times saw him receive the sacrament there: That at 15 he was bound apprentice to his uncle Fenton, who was a protestant, as were all his family: that he married two wives, who were likewise protestants, as were all their relations; and that she frequently saw him and both his wives receive the sacrament [434] at their parish church. And being cross-examined by the respondent, she confirmed every word of her first examination; saying, that she knew he several times took the oaths as a freeman of Dublin and Athboy, and denied his ever being a papist.

Isaac Dickinson, aged 70, said, he knew Edward Cusack from 1712 till his death, having been his neighbour upwards of 20 years: That he likewise knew William Cusack his brother, his uncle Fenton, his mother, and both his wives; proved them all to have been protestants, and that he often saw Cusack and his second wife attend religious worship at St. James's church, and was very often present, and saw them receive the sacrament, and often received it with them, and particularly he saw them receive it the year before Cusack's death.

George Allen, aged 70, another neighbour of Edward Cusack's, said, he knew him above 25 years, and also knew his brother, two of his sisters, and his second wife, and that they were all protestants; and he likewise proved Cusack and his second wife's having often received the sacrament at St. James's church.

John Ellis, D.D. aged 67, the minister of St. James's parish, said, that he knew Cusack from 1717 to his death, and likewise knew his brother, one of his sisters, and a second wife, and that they were all protestants: that the brother and sister were parishioners, and he had administered the sacrament to the brother when ill; and that he very often saw Cusack and his second wife at church, and very often saw Cusack receive the sacrament there, and believed he had several times administered the same to them.

Peter Cook, aged 50, the curate of the same parish, knew Edward Cusack 20 years, and likewise knew his brother, sister, and second wife, and proved their all being protestants, and having frequently received the sacrament at that church at his hands; and that he had administered it to Cusack in his own house, when he had been ill.

Richard Morress, parish clerk of Kilpatrick, aged 63, knew Edward Cusack 39 or 40 years, having lived 20 years and been parish clerk at Athboy 10 years, whilst he lived there: that Cusack was a protestant; and the witness constantly, for the course of 16 or 17 years, saw him and his wives attend at Athboy church; and many times saw them, with other communicants, attend to receive the sacrament there.

John Beaumont, the parish clerk of Athboy, knew Edward Cusack 15 years before his death, during which time he lived in Athboy, and was clerk to Cusack some time, and that he very often saw Cusack and his wife attend at Athboy and St. James's churches; and proved their having received the sacrament in Athboy church five different times in 1738, 1739, 1740, and 1741.

The parish book for Athboy was likewise proved by the two last witnesses; and it appeared by entries therein, that Edward Cusack had received the sacrament at that church, at different times, so long since as in the years 1705, 1707, and 1708.

[435] Edward Reylins, aged 45, knew Edward Cusack as long as he remembered any thing; and confirmed the testimony of the former witnesses, as to the religion of Cusack, his wives, and two of his sisters, and their constant attendance at prayers and the sacrament in Athboy church; and said, he was so constant a communicant, that the witness had seen him go on crutches to church, when troubled with the gout, and scarcely able to stand, and there receive the sacrament along with the witness.

Grace Mercer, aged 70, knew him 40 years ago, when he was bound apprentice to Fenton her father, and proved them both to have been ever after protestants till their deaths, and that all the family of Fenton were protestants.

Henry Gonne, town clerk of Dublin, proved Cusack's being admitted to the franchises of that city, as having served his time to Joseph Fenton, a freeman, and that he

was previously admitted into the corporation of tanners; and that all persons admitted to the freedom of Dublin are protestants.

John Pentland, apothecary, proved his attending Cusack in his last illness: that he was immediately taken senseless, and died in half an hour after his first seizure about one in the morning; and that he neither did, nor was capable of performing any religious duty; and he likewise concurred with the other witnesses, in proving him a protestant during 14 years that he knew him.

The Lord Chancellor of Ireland having declined hearing the cause, as being one of the governors of the hospital, it was heard in his Lordship's absence, on the 13th and 14th of February 1759, before Arthur Dawson esq. one of the Barons of the Exchequer, and Robert Marshall esq. one of the Justices of the Common Pleas, and Charles Walker esq. one of the Masters of the Court of Chancery, three of the Commissioners for hearing and determining of causes in the said Court, in the Lord Chancellor's absence. And on the 14th of February, the Court (though they were pleased to declare themselves satisfied with the evidence on the appellants' part, yet, from the respondent's importunity, and from an apprehension that it was not in the power of that Court to refuse an issue, when demanded, in a case thus circumstanced) was pleased to order, that the respondent should, as of the then next Easter Term, commence a feigned action in his Majesty's Court of Common Pleas in Ireland, to which the appellants were to appear *gratis*, and plead the general issue, to try, at the bar of the said court, by a jury of the county of Meath, the following issue, viz. "Whether Edward Cusack, deceased, in the pleadings mentioned, was at any, and what time or times (distinguishing the times respectively), a papist or person professing the popish religion." And on the return of the verdict, such further order was to be made as should be fit.

From this order the appellants appealed, insisting (C. Yorke, T. Sewell), that there was no foundation in this case, from the great weight of evidence in their favour, to have directed any trial to inform the conscience of the Court, already so well satisfied, and especially upon so un-[436]-favourable a question as that of trying a man's religion after his death; and that much less ought such issue to have extended to the whole period of the testator's life, who lived to be 70 years of age, instead of being restrained to the time of his first purchase, which was a leasehold for lives made in 1718, or to the earliest period of time reached by the respondent's evidence, or to any other certain period. But, that instead of directing any issue at all, the Court ought to have dismissed the respondent's bill with costs. That if issues upon all questions of fact, whether doubtful or not, and between all persons, are matters of right, and *ex debito justitiæ*, the determination appealed from must prevail; but if this is not a matter of strict right, and if in any instance where neither the nature of the case, nor any doubt, or sufficient degree of doubt upon the evidence, makes it necessary to direct an issue to inform the conscience of the Court, the court may in their discretion properly refuse to direct such issue: and this was conceived to be one of those cases, and that there was not the least ground for the present issue, especially on a claim so unfavourable in all its circumstances, as that of the respondent's. That the parties to the question, were a protestant discoverer, and the trustees of a protestant charity. The intention of the popery laws would be at least equally answered by the estates going to the charity, as if the discoverer should wrest it back again by inverting the law, to destroy that very interest which it meant to preserve. The heir at law concurred with the charity in supporting the will, from which he received a valuable annuity; and though there were at present no purchasers before the Court, yet they must necessarily be involved in the same common fate with the appellants: as the charge of popery would work a general incapacity, and affect every alienation made by Cusack during his life. That the respondent was attempting to bring a man's religion to a public trial after he was in the grave, which was never doubted in a life of 70 years; and to enquire into the sincerity of his heart, when he could no longer defend himself: Whereas, if a bill of discovery had been brought in his life time, and if there had been really a foundation it might and ought to have been brought, he would have spoke for himself, and declared his religion. But the will still spoke for him, and not only evinced him a protestant, but one of a superior degree; and though popery may admit of works of charity as well as faith, they are rarely employed out of the pale of their own church, and still more rarely to counter-

work the increase of that persuasion, in favour of one with which it is at perpetual amity. That as the testator was a protestant to his last breath, so was he from the first moment he could be said to be of any religion at all, even before the popery acts took place; and his parents, brothers, sisters, wives, masters, and every relation lineal and collateral, were the same. He was so as soon as he could speak, or say his prayers, and was proved to have received the sacrament, as well in 1705, as in 1741, and to have been a constant communicant during the whole of that interval. To the [437] religious he joined the civil test, and his admission to the different city and corporation freedoms, was preceded by his as often taking the oaths to the government. That if the testator had been a renegade convert, and afterwards relapsed and become a secret papist, as contended by the respondent, the claim of the protestant discoverer would have been at an end; for a *premunire* would have incurred, and the state been forfeited to the crown. That the respondent's evidence, as well as the issue directed, were adapted to no particular period, nor levelled at any certain purchase: the pretended incapacity was general, not only that he could not devise, but that during his whole life he could neither take or alien any acquisition: a case and event in which multitudes might be interested, and which none could defend or guard against. That if a trial should be allowed to ascertain a matter at present confessedly not doubtful, the Court would scarcely be satisfied with the verdict, if the respondent should gain one: this would produce a new trial, and a contrary verdict might gain occasion a third; and after a multiplicity of trials, the conscience of the Court might be less satisfied and informed at last than at first. That the denial of an issue on this cause, would not preclude the respondent from trying the question in any other court; for though the act gives him a particular remedy by bill in equity, in order to entitle him to a discovery upon the oath of the party, yet he had likewise his remedy at law, and might still bring an ejectment, and take his chance before a jury.

On the other side it was said (C. Pratt, A. Forrester) to be in proof, that Edward Cusack was born of a popish father, and by him educated as such, until he was 15 or 16 years old. That he never made any public recantation of his errors; and that he several instances of his going privately to mass-houses after he was a man, having mass celebrated in his house, confessing to a popish priest, and receiving the sacrament according to the rites of that church, all which were continued to the very time of his death, fully proved him a papist, and that he lived and died in that communion. That the appellants had brought no proof sufficient to invalidate the respondent's evidence. Cusack's outward profession of protestantism, was admitted by the bill; but one single instance of his receiving the sacrament from the hands of a popish priest, and according to popish rites, was of greater weight to prove him a papist, than ever so many instances of his going to a protestant church and communicating there, could be to prove him a protestant; the first could proceed only from persuasion and principle, the second might be calculated for a worldly purpose, to remove the incapacity which papists labour under. That this was corroborated by the last act of his life, viz. the desire that his body should remain uninterred one night in a common barn, for what purpose was easily guessed. One fact indeed, that of the priest and his two popish nieces being with him the evening of his death, the appellants had endeavoured to get rid of by pretending it was only to play at cards; but of this they had not brought the least proof, and it was [438] easy to examine the priest and the nieces. The order complained of therefore, pressed harder upon the respondent than the appellants, as by the evidence laid before the court he had better reason to expect an absolute decree, than the trouble and expence of a trial at law.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed; and that the respondent's bill should be dismissed without costs. (Jour. vol. 29. p. 623.)

CASE 12.—EDWARD FARRELL,—*Appellant*; SAMUEL TOMLINSON,—*Respondent*  
[19th February 1761].

Where the Legislature imposes terms, and prescribes a thing to be done within a certain time, the lapse even of a day is fatal; because no inferior Courts admit of any Terms, but such as directly and precisely satisfy the law. And therefore where a papist makes his recantation from popery, on the 26th of November, and does not receive the sacrament, etc. till the 16th of May, it is not a sufficient conformity.

DECREE of the Irish Chancery AFFIRMED.

The principle of this case, is of more consequence than the facts. It seems to have been decided on the known rule of law, that *months* generally take mean *lunar* months, unless where *calendar* months are expressly mentioned. This in a Case so highly penal, and where the person affected by the law appears to have intended to conform, was surely a very harsh construction, and contrary to what had been adopted on other occasions. See 2 Com. c. 9. p. 141, and Mr. Christian's note there. [See 52 and 53 Vict. c. 63, s. 1.]

The question in this cause arose upon the popery laws already so often stated in the preceding cases. The facts of the case were these:

Anthony Jessop esq. being, by virtue of several purchases and mortgages made by and to his ancestors, in possession of the lands in question, whereof Roger Farrell claimed the equity of redemption, and Jessop being involved in several suits relating thereto, he employed the appellant as his attorney or agent in the conduct of the suits, whereby the appellant got into his custody several of Jessop's deeds and papers, and became acquainted with his title, and Jessop instructing him to treat with Roger Farrell for buying in his claims to the lands, the appellant accordingly entered into a treaty with his heir at law (Roger Farrell himself being then dead) and others for the purchase of the equity of redemption; but, instead of buying it for Jessop, agreed to buy it for his own use and benefit, for some very trifling consideration, and by deeds of lease and release, dated the 17th and 18th of January 1754, Francis O'Farrell, John O'Farrell, Terence O'Farrell, Faughny O'Farrell, Francis O'Farrell the younger, and John O'Farrell the younger, [499] for the considerations therein mentioned, did grant and convey the manors, towns, and lands of Mornine and Barry, in the county of Longford, with their appurtenances, being the lands in question, to the appellant, his heirs and assigns for ever, to the only proper use and behoof of the appellant, his heirs and assigns for ever.

The appellant being so entitled, on the 2d of July 1755, exhibited his bill in the court of Chancery in Ireland against the said Jessop and others, for an account of the rents and profits of the lands from the year 1698, and to be let into a redemption of the same.

The respondent, who was a protestant of the church of Ireland as by law established, born of protestant parents, and educated in the protestant religion, soon afterwards filed his bill as a protestant discoverer, in the court of Chancery in Ireland, against the appellant and others, upon the popery acts; charging, that the appellant was born of popish parents, was himself a papist, and had purchased the said lands, and therefore praying to be decreed to the said manor, towns, and lands of Mornine, and the several other lands in the pleadings mentioned, and comprised in the said deeds of lease and release, of the 17th and 18th of January 1754, so purchased by the appellant, with an account of the profits thereof, and to be put into possession.

To this bill the appellant put in a plea and answer, admitting by his answer, that he was born of popish parents, and professed the popish religion till he was of years of discretion; but by his plea insisted, that on the 26th of November 1741, he publicly renounced the errors of the church of Rome in St. Bridget's parish church in the city of Dublin, and was on that day received into the communion of the church of Ireland; that on the 28th of the same month, the then Archbishop of Dublin granted him a certificate of his conformity, and that on the 3d of December he filed this certificate in the Rolls office of the court of Chancery. That on Sunday the 16th of May 1742, he received the sacrament of the Lord's Supper, according to the usage

the church of Ireland, in the parish church of St. Peter in Dublin, and obtained certificate thereof from the minister and churchwardens of the said parish; and on the 26th of May in the same year, he produced, proved, and filed the said certificate in his Majesty's court of Chief Pleas in Ireland, and did then and there take and subscribe the oaths, and repeat and subscribe the declaration required and directed by the act of the 2d of Queen Ann; and that on the 23d of August following, he filed certificate of his having taken and subscribed the said oaths, and of his having repeated and subscribed the said declaration, in the Rolls office of the said court; and that he had continued to be a protestant at all times since the 26th of November 1741, and at the time of putting in his plea was a protestant of the church of Ireland, by law established; and that he did not acquire or purchase any estate or interest in the said lands at any time before the 23d of August 1742. And [440] by his answer the appellant said, that since his conformity he had attended the service of the church and duties of religion as a protestant, and had several times received the sacrament according to the usage of the church of Ireland, and had upon divers occasions taken and subscribed the oaths, and repeated and subscribed the declaration mentioned in the statute. He denied that he was then a papist, or had been at any time since the 26th of November 1741; but admitted he was born of popish parents, and educated in, and professed the popish religion, but that before he had attained his age of 21, he did, on the 26th of November 1741, first profess and declare himself a protestant, and had never since been a papist.

On the 4th of July 1755, this plea was argued, when it was ordered, that the merit thereof should be reserved to the hearing of the cause, with liberty for the respondent to except to some particular matters in the order mentioned.

The respondent on the 25th of July 1755, filed exceptions to the said plea and answer, and the appellant on the 28th of April 1756, put in a further answer; and a respondent having replied to the answers, and the cause being at issue, witnesses are examined on the respondent's part, but none for the appellant; who only produced the certificates of his having conformed and taken the oaths at the times aforesaid, and did not make any proof whatever, though it was put in issue by his answer, that he had from the time of his taking the oaths as aforesaid, done any one act whereby it might appear that he really professed the protestant religion as by law established.

The cause was heard by the Lord Chancellor of Ireland on the 2d and 6th of June, and the 13th and 14th of November 1758, and his Lordship having taken time to consider thereof till the 25th of January 1759, was then pleased to order that a case should be stated upon the pleadings and proofs in the cause, and sent to the court of King's Bench for their opinion, whether the appellant, at the time of the purchase in the pleadings mentioned, was a person qualified to purchase lands of inheritance, according to the true intent and meaning of the popery acts, or not.

A case was accordingly settled and agreed to on both sides, and sent to the said court, containing the several facts abovementioned; and the question was, Whether the said defendant Edward Farrell, at the time of making the said purchase, was duly qualified, according to the several acts of parliament made in Ireland against the further growth of popery, to become a purchaser of the said lands of inheritance fee-simple in the said kingdom, for his own use and benefit?

This case was argued by counsel on both sides, in Easter and Trinity terms 1759, before the Lord Chief Justice Caulfield and Mr. Justice Robinson, (there being then no other judge in that court,) and on the 4th of July 1759, they respectively certified their opinions.

[441] The opinion of the Lord Chief Justice was as follows: "If the defendant Edward Farrell was really a protestant at the time of his purchase, I think he was well qualified to make such purchase, without performing all or any of the requisites mentioned in the first and second popery acts; but it does not appear to me, in this case, that the defendant is either admitted or proved to be really a protestant; the more performing the requisites in the said acts, 13 years before his purchase, without more, either before or since, is, I think, hardly sufficient to prove him a protestant."

Mr. Justice Robinson's opinion was given in the following words: "Upon consideration of the foregoing case, inasmuch as the defendant Edward Farrell, who is a convert from popery, did not complete his conformity to the church of Ireland, as

by law established, by performing all the additional requisites within the time prescribed, I am of opinion, that at the time of making the purchase in the case mentioned, he was not duly qualified, according to the several acts of parliament made in this kingdom against the further growth of popery, to become a purchaser of the said lands of inheritance in fee-simple for his own use and benefit. And I humbly submit to your Lordship the following grounds and reasons of my opinion."

I. "I conceive that the children of papists, who profess the popish religion after attaining their age of 12 years, whatever their religion really and in fact may afterwards be, remain and are papists by construction of law, until, by a regular and complete conformity, they appear to be protestants; and by a clause in the act of the 2d of Queen Ann, every papist, as well as person professing the popish religion, is disabled from purchasing estates in land, other than terms not exceeding 31 years: wherefore, in my opinion, this class of constructive papists, to which the defendant belongs, falls within the express letter of this disability."

II. "This opinion, I apprehend, receives strength from another clause of the act, which directs that no person shall take benefit by it, as a protestant, within the intent and meaning thereof, who shall not perform the requisites therein prescribed: forasmuch as I conceive removing a disability to be taking a benefit, especially upon the construction of these laws, which in many instances have made regular conformity requisite for even the preserving old rights."

III. "And this opinion is, in my apprehension, farther enforced by the clause in the act of the 8th of Queen Ann, which enacts, that no person who hath turned or shall turn from the popish to the protestant religion, as by law established, shall be deemed or taken to be a protestant, within the intention of that or the former act, or shall take benefit thereby, without also performing the additional requisites therein mentioned."

IV. "These two acts, I conceive, are to be construed as if originally one, and incorporated together; the second being to [442] amend, as well as explain, the first. And the construction above given, seems to me to make the two laws stand most consistently together; and to give all the material words in both an effectual and uniform operation, without rejecting any of them, or forcing them into an ungrammatical meaning; and without supposing the legislature to make use of vain and unnecessary repetition. To all which objections, every other interpretation offered before us in argument, seems to me to be liable."

V. "As, under the express letter of these laws, the children of papists professing the popish religion after their age of 12 years are, until a regular and complete conformity, to be deemed papists, and consequently, as I conceive, disabled from purchasing; so this opinion seems to me most effectually to answer the design and end of these laws, which in this respect I apprehend ought not to be considered as penal, but as remedial and constitutional laws, made for the preservation and security of the protestant interest and establishment in this kingdom. It appears (among other reasons) from the sacramental test introduced in the first of these laws, that one great end of them was to increase the members of the established church; and this end is best and most consistently answered, by exacting from converts a regular and complete conformity, in acts of public notoriety, authentically evidenced by matter on record."

VI. "Farther, by holding converts to such a conformity, the public is best secured against their relapsing to popery; which, without such a regular conformity, I conceive to be an offence not punishable under the acts of Queen Ann. And this seems to have been the opinion of the legislature in the act of the 6th of Geo. I. for when the regular conformity of the children of papists was dispensed with, in the circumstances therein mentioned, a special clause was thought necessary to make their relapse penal."

VII. "A regular and complete conformity is necessary for a converted son to make his father tenant for life, or to preserve the ordinary course of descent against the gavelkind: It is no less necessary to entitle a convert to take by gift, devise, or remainder, estates in lands which had belonged to protestants. The right to keep or take in these two last mentioned ways, is as much an ordinary right of subjects, as that of acquiring by purchase; and the removing the disability of papists, in all these several cases, is an equal benefit, and not more a benefit in any one of the cases



han in another. The legislature has required the removal of the disability, by solemn acts of notoriety, for taking or keeping their family estates; and it would, in my opinion, be unreasonable to suppose, against the letter of the law, an intention to leave converts looser as to acquiring new property; which, in the common course of things, must be a more likely means of continuing and keeping up a landed interest."

[443] The cause was heard on the judges certificates and merits, on the 12th, 13th, and 16th of November 1759, and the Lord Chancellor took time to consider till the 3th of December following; when it was ordered, adjudged, and decreed, that the respondent, as the first protestant discoverer, by virtue of the popery acts in the pleadings mentioned, was entitled to the benefit of the purchase made by the appellant of the lands in the pleadings mentioned; and that an injunction, directed to the sheriff of the county of Longford, should be awarded to put the respondent into, and from time to time to quiet and establish him in the possession of the said lands; and that the appellant should deliver over to the respondent, all deeds, conveyances, and writings, any way relating to the title of the said lands; and that the respondent should make up and enroll a decree with costs.

From this decree the appellant appealed, and on his behalf it was insisted (C. Pratt, C. Yorke), that it had been adjudged in many cases determined in Ireland, upon the statutes of the 2d and 8th of Queen Ann, that no strict mode of conformity was required to enable a convert from popery to purchase lands, or any specific evidence of it; for that under both acts no person is disqualified to purchase but a papist, or person professing the popish religion: In which case, the *onus probandi* lies on the party who seeks to take advantage of the disability. And the rule has never been laid down, that in such case it will be sufficient for a protestant discoverer to prove the defendant the son of a papist, and that he continued a papist till the age of 12 years, without shewing him to be a papist, or professing the popish religion at the time of his purchase; because though he may not be a protestant convert, conforming to the established church, so as to entitle himself to the benefit of new rights, or the re-titution of old ones, within the words of these statutes; yet it does not follow, that he must therefore of necessity be a papist, within the disabling or penal clauses. That the statute of 4 Geo. I. c. 9. which is a perpetual law for encouraging protestant strangers, clearly shews that the intention of the legislature was to make Ireland a protestant country; yet there are no particular terms of conformity imposed upon such protestant strangers, but to take the oaths, and subscribe the declaration; and these persons, though perhaps papists the day before they landed in Ireland, are not only naturalized and made free of corporations, but have several other privileges and immunities. Would it not therefore be harsh and unreasonable to say, that a natural born subject, who has conformed in his minority, and is still a protestant, should be stripped of his purchase as a papist, in favour of an informer; even supposing he had made some trifling mistake in the mode of his conformity, or in the time of taking the oaths, or in perpetuating the evidence by which it is required to be proved? That if this determination should stand, estates in Ireland to an immense value, which had been purchased by converts who had not filed certificates within six lunar months, (omissions most frequently imputable to attornies and others appointed [444] by persons living remote from Dublin,) would be wrested not only out of their hands, and the hands of their legal representatives, by popish heirs and protestant informers, but from protestant purchasers, who had bought and derived title under them; for a purchase from a disqualified person leaves the estate in the hands of the purchaser, open to the demand of the heir, or suit of the informer, as such as it was in the hands of the first purchaser; nor is there any limitation of time prescribed to the discoverer's suit. Many other inconveniencies would also flow from this determination; the children of a convert father or mother who might have omitted to file such certificates, must be looked upon as papists, if such children should not be able at any distance of time, when the question might arise, to make precise proof of their having been protestants from the age of 12 years: converts from popery who had conformed themselves to the established church in England, or in the colonies, as the laws of England require, or who had joined themselves to protestant dissenters, under the protection of the toleration act in England, would nevertheless be subject, in Ireland, to all the disabilities and incapacities to

which papists are liable: And converts from popery, omitting to file certificates within the time limited, would be protected from prosecutions for relapsing into popery, even though it should be otherwise notorious, from the most satisfactory and authentic proofs, that they once conformed to the established church.

On the other side it was said (T. Sewell, A. Forrester) to be admitted, that the appellant was a papist, until he arrived at the age of discretion. That the act 8 Ann. sec. 14. positively ordains, that no convert from the popish to the protestant religion shall be deemed a protestant, within the intent of that act, or the former act, 2 Ann. or take benefit thereby, notwithstanding such person, so professing himself a protestant, shall procure a certificate from the bishop, unless he shall, *within the space of six months* next after his declaring himself a protestant, receive the sacrament, make and subscribe the declaration there mentioned, and take the abjuration oath, and file certificates thereof in some of the courts of justice. This the appellant had not done. His recantation from popery was on the 26th of November 1741. The six months from that time must, by the known rules of law, be construed to be not calendar, but lunar months, so that they expired on the 13th of May 1742, and the appellant did not receive the sacrament till the 16th, nor take the oath and subscribe the declaration till the 26th. He therefore never complied with the requisites of the acts; and when the legislature imposes terms, and prescribes a thing to be done within a certain time, the lapse even of a day is fatal; because no inferior court can admit of any terms, but such as directly and precisely satisfy the law. That the two acts of the 2d and 8th of Ann. being *in pari materia*, and the latter made for explaining and amending the former, they must both be taken and construed together, as making but one law. The 2d of Ann. sec. 7, 8. disables papists from purchasing any estate in land but [445] for 31 years; and declares, that the children of papists shall be taken for papists, until by their conformity they appear to be protestants. What that conformity must be, is laid down in precise terms by the 8th Ann. sec. 14. viz. besides recantation certified by the bishop, the oath must be taken, and the declaration subscribed within six months, else no convert is to be deemed a protestant, within the intent of that or the former act, or take benefit thereby; and this rule was plainly meant to enlarge and enforce the provision of the former act, sec. 15. The appellant therefore, as the child of a papist, and himself a papist, was absolutely disabled from purchasing beyond terms of 31 years, and could never take the benefit of the provision made for converts, *i.e.* remove his disability, but by such a conformity as the acts require.

It is however objected, that a man's declaring himself a protestant, without performing any of the requisites of the acts, sufficiently enables him to purchase; that being a subject's birthright, and not to be considered as taking the benefit of these acts. That such has been the received opinion; and that protestants who have purchased from such popish owners, may be affected by a contrary determination.

But that such has been the received opinion was denied, unless the evasions from the 2d Ann. recited in the preamble of 8th Ann. as the cause of making that act, could be called a received opinion. There never was, or could be one single determination to warrant this pretence, because it would make these acts absurd, contradictory, and inconsistent. And even should such a mischief, as suggested, happen to a few protestant purchasers, which it was not to be admitted would be the case, it was not to be put in competition with the inconveniencies attending the construction contended for by the appellant, whereby every pretended convert would, upon a bare declaration of his being a protestant, be at liberty to purchase, contrary not only to the whole scope and intent, but to the very letter of the acts. That a full performance of all the requisites of the acts was admitted to be necessary, for a converted son to reduce his popish father to a tenancy for life, upon the 2 Ann. sec. 3. and for enabling converted papists to take by descent, or a remainder limited by devise or gift after the death of a protestant, upon sec. 8. and for preventing the gavelkind, and preserving the estate in a regular course of descent, upon sec. 10 and 12. all which are old rights; and it was impossible that the legislature should not intend an equal notoriety of conversion for the acquisition of new rights as for the preservation of old ones; for otherwise, if the appellant's father who was a papist, or *act.* protestant ancestor of his, should die seised of lands of inheritance, he could take but in gavelkind from the one, and not at all from the other, until his full conform-

mity; but might take as much as he pleased by original purchase. So that as to one purpose he would still be a disabled papist, but as to the other a qualified protestant. An absurdity too gross to be countenanced! By the 6 Geo. 1. c. 6. the children of popish parents, who from the age of 12 years have been con-[446]-stantly bred up in the protestant religion, cannot by such education, without having also received the sacrament, remove their disability; nor are they upon a relapse after the age of 18, guilty of a *premunire*, without that essential is performed: and this shews, that the bare profession of protestantism, without more, neither qualifies, on subjects to penalty; and the law never meant more favour to the children of papists, continuing papists to their manhood, than to those who are educated protestants from 12 years of age. Lastly, that the appellant, though his answer was applied to, and his popery thereby fully put in issue, had not proved one single act of conformity to the established church, from his taking the oaths in May 1742; but had rested his defence on the sufficiency of a bare declaration of protestantism, which pretty clearly evinced how great was the sincerity of his conversion.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed. (Jour. vol. 30. p. 65.)

CASE 13.—MEADE HOBSON,—*Appellant*; SAMUEL MEADE,—*Respondent*  
[9th February 1767].

On a bill brought to set aside a will on the ground of the testator's being a papist, an issue was directed to try, whether he was from the age of 12 years or from any other, and what period of time, constantly bred up in the protestant religion or not? But on an appeal, the DECREE was REVERSED; and the bill was retained for twelve months, with liberty for the plaintiff to bring an action at law, upon any title which he might have under the popery acts. See *ante*, Case 11 [5 Bro. P. C. 429].

John Meade, whose religious persuasion was the subject of this appeal, was born in the year 1684, and was eldest son of Dr. John Meade, a reputed papist, who died in 1706, and of Elizabeth Maynard his wife, who was an undoubted protestant, and who survived her husband and educated all her children protestants; she died in 1715.

In 1702, John Meade came to England to study the law, where he professed the protestant religion, and continued until 1711, when he went to Ireland, and was called to the bar. In the year 1722, he was a justice of oyer and terminer, and gaol delivery at Corke, for trying several persons charged with enlisting men for the Prender's service. He was afterwards a Captain in the militia, and in 1745, he was promoted to be Lieutenant Colonel of a regiment of horse militia belonging to Corke. In 1751, he was appointed a commissioner to try several persons in Corke, who were charged with having committed offences upon the high seas; [447] and upon all these occasions, he took the oaths, and performed all other requisites prescribed by law.

In the year 1756, the lands in dispute, and several other lands in the county of Tipperary, in Ireland, and an estate in England descended to him in fee-simple, on the part of his mother, who was one of the coheirs of Robert Maynard, a protestant; and were soon after allotted to John Meade, upon a writ of partition executed in the county of Tipperary in 1758, as his part of the Maynard's estate in Ireland; which writ of partition was entirely conducted on behalf of John Meade, (who was then ill,) by the respondent presumptive heir.

John Meade, having long had a very particular regard for Captain Hobson, father of the appellant, who was his grand nephew and godson, and named after him, made his will dated the 27th of September 1758, whereby he devised all those lands and estates in the county of Tipperary, which descended to him as one of the coheirs of Robert Maynard, as also the lands in England, which were undivided between him and the other coheirs, unto Charles Smith Esq. for the use of his nephew, the appellant, and his heirs for ever; subject to a charge of £50 a year, to be paid to Abigail,

the wife of the respondent, in case she should survive her husband. He then gave divers legacies out of other lands, to other nephews and nieces; and particularly he devised his right, title, and interest in the lands of Palletstown, and East Michaelstown, to his nephew, the respondent, and appointed the said Charles Smith, and Captain Samuel Hobson, the appellant's father, his executors; and died on Saturday the 30th of September 1758, aged 74 years.

After his death, Capt. Hobson, one of the executors, obtained a probate of his will in the prerogative court in Ireland, without opposition from the respondent, or any of the next of kin.

But soon afterwards, the respondent filed a very long bill in the Court of Exchequer in Ireland, against the appellant, the said Samuel Hobson and Charles Smith, and against John Mac Carty, tenant of part of the estate, charging the grossest frauds on the part of Captain Hobson, in obtaining the will; that the testator was at all times a man of strong passions, and easily imposed upon; that he had been insane and a lunatic, for a considerable time before the making of his will; that he never read or knew the contents of it, and that his hand was put to it at a time when he was in a state of absolute insensibility: the bill therefore prayed a discovery of his real estate, and of the will; and that it might be set aside; and that the respondent, as his heir at law, might be decreed to the possession of such parts of his real estate in Ireland, as were out of lease, and to the rent of such parts as leases were subsisting of.

The appellant by his guardian, jointly with the said Samuel Hobson, answered this bill, and Samuel Hobson by his answer set forth all the circumstances of the execution of the will; relied upon the sanity of the testator; and that the will he had made was the result of his deliberate intentions, and free from any fraud [448] or imposition whatsoever; and the appellant insisted on his right under this will.

Near six months after the coming in of this answer, the respondent amended his bill, by charging several other facts and circumstances, as evidence of fraud in obtaining the will; and further charged, as a matter entirely new, that the testator's father was a papist; that the testator himself was bred and continued a papist after his age of 21, and after the year 1711, in which it was charged, he was called to the bar in Ireland; that after his age of 21 he attended mass, and received the sacrament according to the usage of the church of Rome; that he never read his recantation, or enrolled any certificate of his conformity; that therefore he ought to be deemed a papist at his death; and that, as a constructive papist, by the Irish popery acts, he was incapable by will to dispose of any real estate; but supposing him to be capable, the bill insisted, as in the original bill, upon the nullity of the will for fraud and insanity.

The appellant and his guardian answered the new matters; denied all the new circumstances of fraud and insanity; and as to the incapacity on account of religion, said they were informed the testator's father was a papist, but that the testator's mother was always a protestant, and of a protestant family; that by her and her family, such early impressions were made on the testator and the rest of her children, that they, and particularly the testator, professed the protestant religion long before the age of 21; that they were informed, but otherwise knew not, that the testator's father had endeavoured to educate him in the popish religion in his tender years; but that having from his minority professed the protestant religion, they insisted, that it was not usual or necessary for the testator formally to renounce the errors of the church of Rome, or enroll a certificate of his conformity, but referred to such proofs as should be made of those facts; and they also insisted, that by the popery acts, he was not incapable of disposing of his real estate by his will; having, as they were informed, professed the protestant religion before the first law made in Ireland, in the reign of Queen Ann, against the growth of popery took place; and that for 50 years before his death and upwards, the testator was not only a protestant, and constant church-man, but also zealously attached to the present constitution in church and state, and entrusted by the government with several commissions and trusts under their majesties George I. and II. and frequently took the oaths and received the sacrament according to the rites of the established church; and they therefore insisted, that he was capable of devising his estate to a protestant.

The defendant Charles Smith likewise answered, but John Mac Carty never did, nor was he brought to a hearing.

The respondent replied to the several answers, and issue being joined, all the circumstances of fraud and insanity charged in the bill, were fully refuted, as well by witnesses examined before [449] the Barons, as upon several commissions in the country; but the respondent as well in his proofs, as at the hearing of the cause, applied himself first and principally, to insist upon the matter insidiously thrown into the amended bill; viz. that the testator was, as a constructive papist, disqualified to devise his estate.

This he attempted to support, by the evidence of Nicholas Archdeacon, Margaret Galway, and Henry Gould. Nicholas Archdeacon, aged 74, deposed, that the testator's father was a papist, his mother a protestant; and that he saw the testator at mass, about seven years after the siege of Corke, which must mean the year 1697; that city having been taken by the army of King William III. in 1690. Margaret Galway, aged 74, said no more than that she, in 1701, 1702, 1703 or 1704, saw the testator's father at mass with one of his sons. Henry Gould, aged 74, contrary to the uniform evidence of all the other witnesses, said he believed the testator's mother to be a papist; and that in the year 1704, he saw the testator several times at mass at Mallow, but not afterwards; and in the foregoing part of his deposition he spoke with uncertainty, whether it was in 1703 or 1704. But all these witnesses, though papists, said they never saw the testator receive the sacrament *according to the rites of the church of Rome*.

The respondent also produced Henry Rugg esq. a protestant, aged 74, who said he knew the testator since 1692 or 1693; that his mother was a good protestant, but believed the testator to have been a papist to his father's death, in 1706; and assigned as the cause of his belief, that the testator often told him, if his father knew he put his foot inside of a church, he would not leave him a groat; that the testator sometimes fasted in Lent; and that he once saw him going into a popish ambassador's chapel in London, when at the Temple; which last, if true, must have been between the years 1703 and 1706.

Besides these, the respondent produced two or three illiterate witnesses, of the lowest class of people, who attempted to prove the testator to have appeared openly at mass in a public chapel in the city of Corke, after his attaining the age of 40 or 50 years; and after he had appeared and acted in the same city in the station of a judge of oyer and terminer on the trial of persons for their lives, their conviction, attainder, and execution, for inlisting men in the service of a foreign popish prince; and to have publicly received the sacrament, and confessed at another popish chapel, soon after being called to the bar, near the abode of his uncle Maynard, a zealous protestant: But these depositions were thought so improbable and inconsistent, that the Barons, who heard the cause, openly declared their disbelief of them.

On the other side, the appellant made the fullest proof of the testator's sanity, and of the due execution of his will, and of the several other circumstances relied upon in the answer in these respects; and although there was reason to suppose from the scope of the bill, that it was upon these points the respondent would rest his case, and not upon the pretence of religious disqualification; yet it was proved by Mr. John Dixon, aged 70, who was the testator's acquaintance from his infancy, and his school-fellow, that he always looked upon him to be a staunch protestant, and that he professed such principles ever since his knowledge of him. By the rolls of the Court of King's Bench it appeared, that upon the testator's return to Ireland, and being called to the bar, he received the sacrament, filed a certificate thereof, which appeared to be of his own hand-writing, and made, took, and subscribed the oaths and declaration, on the 18th and 19th of November 1711, according to the letter and strictest test prescribed by the 2d Ann. and the 8th Ann. ch. 3. sect. 14. for persons who had returned from the popish to the protestant religion, and who were then out of the kingdom of Ireland. It also appeared in evidence, that he was several times justice of oyer and terminer, and gaol delivery; and particularly, that he acted as such in the year 1722, at Corke, upon the trial of persons for their lives, for inlisting men for foreign service, at a time when those kingdoms were threatened with an open invasion from Spain; and that he had several other commissions and places of trust under Geo. I. and Geo. II. and upon all those occasions took the religious and civil tests, and acquitted himself with fidelity and zeal. It further appeared, by the evidence of eleven gentlemen of credit and fortune, as well clergymen as laymen, that

from his return to Ireland, to the time of his death, he was a constant frequenter of the service and sacrament in the established church, and a zealous assessor of its doctrine and principles in church and state, and remarkably averse to the popish religion. And lastly it appeared, that on his death-bed he gave the strongest proof that he was a religious protestant, having been attended by a protestant clergyman, and received the sacrament of the Lord's Supper from his hands the day before he died.

One of the Barons being indisposed, the cause was heard by the Lord Chief Baron, and the other Baron, on the 6th, 7th, 9th, and 19th of February 1765, when the Lord Chief Baron, and the other Baron then present, delivered it as their opinions, that two issues should be tried; first, "Whether the testator, John Meade, was a papist at the time of making his will, or at the time of his death?" And secondly, "Whether the said John Meade devised the estate, mentioned in the pleadings, unto the defendant Meade Hobson." And the register then took the notes accordingly; but on the next morning the Baron, who had been absent, being on the bench, the cause was mentioned again to the Court by the respondent's counsel, who objected to the first issue, as directed the day before; and then the two puisne Barons were pleased to alter the decretal order and notes, with respect to the first issue, as follows: viz. "Whether John Meade, the testator, was from the age of twelve years, or from any other and what time, constantly bred up in the protestant religion, or not?"

[451] From this order, so far as concerned the direction of the first issue, the present appeal was brought; and on behalf of the appellant, it was said (W. de Grey, C. Yorke, A. Forrester) to be a mere legal question, triable and determinable at law: that there was no bar or impediment in the case, nor any occasion for a court of equity to interpose; and especially in so unfavourable an attempt as that of trying a man's religion after his death, and from so early a period as his birth, which by the proofs appeared to have been about 1684, or even from his age of twelve years: when at this day it could scarce be presumed, that any person now living could have judged of his religion so many years ago; besides the additional hardship of being obliged, from the issue as now directed, to be prepared with proofs for every day of a life which extended beyond 74 years. It appeared, that the estate in question descended to the testator from a protestant in 1756; that the respondent then, and to the hour of the testator's death, was the next protestant who would have been entitled, if the testator was dead; and therefore, if he was to be considered as a papist the respondent by 2 Ann. c. 6. s. 9. must have been entitled to enjoy the same estate during the testator's life; nay he, or any protestant, might, as a protestant discoverer, have deprived the testator of his earliest landed acquisitions; but instead of setting up any such claim, the respondent appeared to have acted for his uncle in the management of this very estate; and at this day enjoyed the interest which the testator purchased many years ago in Palletstown and East Michaelstown, under the will which, with regard to the Maynard estate, he now sought to defeat. That if the testator was deficient in *form*, the *reality* of his religion at this period not being questioned, he undoubtedly had it in his power, by a formal conformity, to bring back the estate at any time during his life; and surely, the respondent's lying by until such conformity became impossible by the act of God, was a badge of ill faith and fraud, which removed him still farther from any pretence to the aid of a court of equity. Besides, his admission, throughout the whole scope of his bill, of his uncle's capacity to *inherit* the estate of Mr. Maynard, destroyed the supposition of an incapacity to *devise* it. That the testator could not be construed a papist, from being born of a popish father, without making a papist of his brother, the respondent's father; and the respondent, if born of a popish father, must equally be deemed a papist, and consequently incapable of inheriting the Maynard estate from a protestant; for the respondent's appearing to be a clergyman was not a stronger test of his conformity, than having been a judge was of his uncle's. That the religious disability contended for by the respondent was founded upon 2 Ann. c. 6. s. 4. and 3 Ann. c. 3. s. 3. whereby the inrolment of the Bishop's certificate, is made necessary for certain purposes; and upon 2 Ann. c. 6. s. 12. whereby the real estates of papists are made descendible in gavelkind, notwithstanding any voluntary disposition by will; but no particular test is prescribed by any of the acts to determine who shall be deemed papists [452] disqualified to *devise* their estates, nor was it ever deter-

mined that a circumstantial conformity was necessary for that purpose; and though such conformity may be necessary to qualify papists to *purchase* estates, it does not follow that the same strictness should be requisite to give their estates away to *protestants*, who *only* can take them by devise, it being scarce reasonable to suppose, that a man becoming a protestant from conviction, so near the time of his death, or in such a state of infirmity as not to be able to go through ceremonies and forms when his sincerity is least to be suspected, should not be able to devise his estate; nay, it must invert those laws to the prejudice of protestants in favour of papists, if, by a strained construction, a sincere convert, who through fatality or error, or from impossibility, might have omitted a single circumstance in his conformity, should not have power to *devise* his estate to a protestant, perhaps from motives of religion or loyalty, in order to disinherit the popish heirs. That all the witnesses for the respondent, who deserved any attention, spoke with great uncertainty as to the time of the testator's being *last* at mass; and to call property in question, upon the uncertain memories of men so old, is not the province of a court of equity. For Henry Gould, who had attempted to prove, that he last saw the testator at mass in 1704, in the town of Mallow, when at school there, was uncertain in another part of his deposition, whether it was not in 1703, in which year the first popery act took place; whereas Archdeacon Davies fixed the time of the testator's being at school at Mallow to the reign of King William; and it is considered as an established point, that no formal conformity, at least no bishop's certificate, was necessary for protestants born of popish parents, or for those who became converts *before* the first popery act took place; and to say, that by a constructive retrospect, those who had conformed before the act, should be obliged to procure and inrol the bishop's certificate of their conformity, (which perhaps might have been before bishops or clergymen then dead,) did not seem to be very consistent with, nor was warranted by the letter of those laws, which only require, that converts from popery shall receive the sacrament, file a certificate thereof, take the oaths of abjuration, and make the declaration within a limited time. That it appeared by the evidence of Henry Rugg, that the testator was in England in 1706, and then declared himself a protestant upon his father's death; by the bill, that he was called to the bar in Ireland in 1711; and by the rolls of the King's Bench, that upon his return to that kingdom he received the sacrament, filed a certificate thereof, took the oaths of abjuration, allegiance, and supremacy, and subscribed the declaration; he appeared therefore to have complied with the strictest test required, even to entitle him to enjoy the highest offices, civil or military.

But it is objected, that he did not inrol the certificate of the bishop of the diocese where he resided, of his conformity, as required by 2 Ann. c. 6. s. 4. and 8 Ann. c. 3. s. 3.

[453] The circumstance of inrolling the certificate of the bishop is not applicable, by construction, to conformists out of Ireland, perhaps in the colonies, or Scotland, where there are no bishops; but the receiving the sacrament, taking the oath of abjuration, making the declaration and the inrolment thereof in the King's Bench, by the testator upon his return to Ireland, was an express and literal observance of the test required by the 8 Ann. s. 14. for all persons who had conformed before that act, and were then out of that kingdom. The inrolment of this certificate, which by the way was the only circumstance pretended to have been omitted by the testator, is by the acts required only for particular purposes, such as, by 2 Ann. s. 4. to make a popish father tenant for life; and by 8 Ann. s. 3. to entitle protestant children to a discovery of the estates of popish parents; and for other different purposes, mentioned in different parts of the several acts, but not for the purpose of giving a convert a capacity of devising his estate; and if all the tests prescribed for *particular* purposes are required to remove all disabilities imposed on papists, in every part of either act, it must follow, that a stricter test is required to enable a convert to dwell in a hovel, in the suburbs of Limerick or Galway, than to qualify a man to hold the highest trust in church or state; and that, where converts from popery have omitted any *one* of these tests, though deemed protestants all their lives, their heirs need not pay their creditors, if their incumbrances have not been inrolled in the Court of Exchequer.

But further: If any issue ought in this case to have been directed to try the

religious capacity of the testator, the first was the proper one; viz. "Whether he was a papist at the time of making his will?" For upon his capacity at that period it is, that the validity of his will must depend. To this however it is said, that by 2 Ann. s. 9. children of papists are to be deemed papists, until, by their conformity to the established church, they appear to be otherwise; unless, by being constantly bred protestants from the age of twelve years, they are exempted from the disabilities, by 6 Geo. 1. c. 6. But this objection arises from these words being misplaced in the act, which should evidently have come in four lines higher, after the words *actually dead*. The respondent's [454] inference was, however, totally foreign to the purpose; this whole clause relating singly to the protestant's taking in place of the *living* papist, whose children are also to be taken for papists till conformity, and so let in the nearest protestant relation. During John Meade's life, the respondent, if in earnest, should have set up his present claim; it was now too late. The testator was not the child of papists, his mother having been a protestant, and penal laws must be strictly construed. Besides it was begging the question, to object, that his conformity to the established church, was not sufficiently manifested by his long life and practice, and the many tests he gave of his religion. That the issue now directed precluded the appellant from shewing the testator's express conformity, within the letter of 2 Ann. s. 14. by receiving the sacrament, subscribing the declaration, and taking the oath of abjuration, and filing a certificate thereof in the King's Bench within three months after his return to Ireland; and from proving any other legal and sufficient conformity on his part, except that of being bred a protestant from the age of twelve: even though the appellant might be able to prove that a bishop's certificate had been inrolled, and that the record was lost; of which it was some evidence, that every other part of the record of conformity was found in such complete form in the Court of King's Bench. That the case of *O'Grady v. Lord Kinsale*, in the Court of Chancery in Ireland, in Trinity term 1765 (*vide* case 14), where the heirs of the late Lord Kinsale sought to set aside his will after his death, on pretence that he was a papist for want of a formal conformity; but principally, the appeal of the governors of *St. Stephen's Hospital v. Daniel Swan* (see case 11), were authorities to shew that

\* The whole clause runs thus: "That no papist, or person professing the popish religion, who shall not within six months after he, she, or they shall become entitled to enter, or to take or have the profits by descent, or by virtue of any devise or gift, or of any remainder already limited, or at any time hereafter to be limited, or by virtue of any trust of any lands, tenements, or hereditaments whereof any protestant now is, or hereafter shall be seised in fee simple, absolute, or fee tail, or in such manner that after his death, or the death of him and his wife, the freehold is to come immediately to his son or sons, or issue in tail, if then of the age of eighteen years, or if under, within six months after he shall attain that age; until which time, from his being so entitled, he shall be under the care of such protestant relation, or person conforming himself as aforesaid, as shall for that purpose be appointed by the High Court of Chancery, for his being educated in the protestant religion; become a protestant, and conform to the church now established in this kingdom, shall take any benefit by reason of such descent, devise, gift, remainder, or trust; but from thenceforth during the life of such person, or until he or she do become a protestant and conform as aforesaid, *the nearest protestant relation or relations, or other protestant or protestants, and his and their heirs, being and continuing protestants*, who should or would be entitled to the same, in case such person professing the popish religion, and not conforming as aforesaid, and all *and* other intermediate popish relations and popish persons were ACTUALLY DEAD, and *his and their heirs* shall have and enjoy the said lands, tenements, and hereditaments, without being accountable for the profits received during such enjoyment thereof; subject nevertheless to such charges, other than such as shall be made by such disabled person, and in such condition as the disabled person would have held and enjoyed the same, *the children of papists being to be taken to be papists till they shall, by their conformity to the established church, appear to be protestants*; and also subject to such maintenance as the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal of Ireland for the time being, shall think fit to allow to the children of such papist, until such children attain their respective ages of eighteen years."



a court of equity should not give any aid in this cause, to enquire into the religion of a man *after* his death; and the case of *Farrell v. Tomlinson* (see Case 12 of this title), was no authority on the other side; because the defendant Farrell was himself the person whose conformity was called in question, and by his plea stated his own qualifications to purchase; viz. that he first became a protestant, 26th November 1741, afterwards filed the bishop's certificate, received the sacrament, took the oaths, and subscribed the declaration in the King's Bench, 26th May 1742, which was several days after the expiration of six lunar, and one day after six kalendar months, from his first declaring himself a protestant; and therefore upon [455] the face of his plea it appeared, that he had not complied with the general test required by 8th Ann. s. 14. in performing *all* the requisites *within* six months. Besides, Farrell, in a space of 13 years from the time of subscribing the declaration to that of filing his bill, did not shew one single act of conformity; whereas this testator's life for 50 years together, to the very instant of his death, produced repeated tests of conformity.

On the other side it was contended (F. Norton, J. Dunning, J. Casey), that by the acts of 2d and 8th Ann. which have always been considered as making together but one law, papists, or persons professing the popish religion, are subject to various disabilities; and among others, to that of disposing by will of any estate of inheritance; and the children of papists are to be taken to be papists, *until* they shall, by their conformity to the established church, appear to be protestants. That the disabilities imposed by these acts may be removed, and the rights which they have taken away may be regained, on complying with the direction prescribed by the acts, which is a complete conformity to the established church; and the requisites to that conformity are pointed out in the acts; but *unless* and *until* these requisites are precisely and *individually* performed, no convert from the popish to the protestant religion can be deemed a protestant within the meaning of these acts, or deliver himself from the disabilities imposed by them. For no court has power to dispense with any one requisite prescribed by these laws, or in other words, with the laws themselves; or of varying, changing, or substituting any other mode of conformity. That in the present case it was admitted and proved, that John Meade was the son of a popish father. It was also admitted, that he did not perform some of the requisites of these acts; consequently he was and must have remained a papist, within the letter and spirit of them, unless he fell within that class of protestants described in 6 Geo. 1. and of this the court could have no doubt, for the fact and law were clear. But as it was possible that John Meade, though a papist within the former acts, might have been constantly bred up in the protestant religion from the age of twelve years, and thereby have been entitled to be considered as a protestant, under the provision of the latter act, the court directed an issue to try this fact, which properly fell within the province of a jury to determine; but reserved to themselves the future decision of the law, if any question of law should arise or remain upon the fact which the jury should find. But if such an issue was directed as the appellant contended for, it would be sending a matter of law, not of fact, to be tried by a jury; for "whether John Meade, born of a popish parent, was a papist at the time of making his will, or at the time of his death," was certainly a question of law, depending upon the construction of the several Irish laws against popery, and on what was a due conformity within those laws; which was a question for the court to decide; and not to be referred to a jury, who were not the proper judges of it.

[456] After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree as directed the issue complained of should be reversed: And it was further ORDERED, that the bill, so far as it sought to impeach the appellant's title under any of the popery acts, should be retained for twelve months; and that the respondent should be at liberty in the mean time, if he should thing proper, to bring his action at law upon such title, wherein the appellant was not to set up any leases, or other incumbrances, to bar the said action. (Jour. vol. 31. p. 477.)

CASE 14.—JOHN O'GRADY, and others,—*Appellants*; LORD KINSALE, and others,—*Respondents* [14th December 1767].

On a bill brought to set aside a will, on the ground of the testator's being a papist, the bill was retained for a year, with liberty for the plaintiff to go to law to decide the question.

The plaintiff having neglected to bring his action within the time limited by the decree, the Court dismissed the bill with costs.

DECREE of the Irish Chancery AFFIRMED. See *ante*, Cases 11, 13, on which the respondent relied [5 Bro. P. C. 429, 446].

Gerald late Lord Kinsale had at his death three daughters, Mary the wife of the appellant O'Grady, Elizabeth Geraldina, and Elinor Elizabeth, and no other issue; and they naturally expected to have enjoyed all his real and personal estate, more particularly his real estate, as he was, by virtue of the popery acts in Ireland, incapable of disposing thereof by will.

Nevertheless, a will of Lord Gerald was produced soon after his death, dated the 28th of March 1757; whereby, after expressing some resentment against the appellant O'Grady and his wife, he gave them one shilling only; and devised to the appellants Elizabeth Geraldina and Elinor Elizabeth and their heirs, some lands in Warwickshire and Lincolnshire, subject to incumbrances; and devised all his honours, manors and lands in Ireland to the respondent John de Courcy (a very remote relation) now Lord Kinsale, for his life, with remainders to his several sons in tail male; with a remainder to the respondent John De Courcy, uncle to Lord Kinsale, for his life, with remainder to his sons in tail male; and appointed the respondents John Lord Kinsale, Dominick Sarsfield, and Charles Barnard executors of such will.

Lord Gerald was 71 years of age at his death, which happened on the 1st of December 1759; and as his singular manner of living, actions, and expressions for several years before had given great cause for a prevailing report that he was in a state of lunacy, or so impaired in his understanding as to be incapable of [457] making a will, or liable to have been easily imposed upon therein, the appellants could not help entertaining suspicions of that sort, and also a doubt, whether the respondent Lord Kinsale stood so related as described in the will; and as he had, under colour of this will, entered into possession of all or part of the lands thereby devised, the appellants on the 12th of May 1760, brought their bill in the Court of Chancery in Ireland, for discovery as to these matters, and they therein also charged Lord Gerald's disability under the popery acts.

The respondent Lord Kinsale put in an answer to this bill, and insisted upon the due execution of the late lord's will, denying all circumstances of insanity or imposition, and insisted that the testator was a real protestant, and never professed the popish religion; the appellants therefore, on the 2d of May 1761, amended their bill, charging a great many facts and circumstances, to shew that Lord Gerald was a papist; and prayed that they might be decreed to the lands and premises, and be put into possession thereof by injunction; but in case the Court should think proper to direct issues concerning the religion of Lord Gerald, that, upon the trial of such issues, they might be at liberty to give in evidence the depositions of such of their witnesses as could not attend the trial.

The respondent Lord Kinsale, by his answer, admitted that Lord Gerald was born of popish parents; but said that his father died when he was very young, and that he was removed to England, and was before his age of 12 years educated a protestant, and continued so to his death; he relied upon several instances of Lord Gerald's professing the protestant religion, after his title and estate descended to him, and particularly the educating his daughters in that religion before they were sent to France; and alleged, that they were sent thither without his privity, and that he did not pay, or give any orders for payment of their expences there, till after their return.

Issue being joined, several witnesses were examined on both sides, principally to the fact of Lord Gerald's religion, some of whom proved him to be a papist, and others gave many instances of his professing himself a protestant. And upon this evidence the cause was heard before the Lord Chancellor of Ireland, on the 10th of May 1765:

and on the 1st of July following, his lordship was pleased to order, that the bill should be dismissed with costs, so far as it sought to impeach Lord Kinsale's will, on account of insanity, or any imposition charged to have been used in obtaining it: and with respect to all other matters, that the bill should be retained for one year, with liberty for the appellants to go to law; and that the respondents should waive all temporary bars upon any trial at law.

The time limited by this decree having expired, without any legal proceeding on the part of the appellants, the cause was set down by the respondents for further directions; and on the 27th of November 1766, the Lord Chancellor was pleased to order the [458] whole of the bill to be dismissed with costs; no counsel appearing for the appellants.

Notwithstanding this neglect, the appellants thought proper to appeal from both the decrees; and in support of the appeal it was argued (F. Norton, A. Wedderburn), that a principal view of the acts to prevent the further growth of popery in Ireland, was to induce the heirs at law of papists to become protestants; therefore hereditary succession was thereby preserved, under such restraints and variations as appeared necessary to answer that end. The rights which heirs at law now derive under those acts, ought to be as favourably considered upon any question of disability, which the acts have imposed upon the ancestor, as in case of insanity or any other legal incapacity. Among other disabilities which papists are laid under by those acts is, heir being prevented from disposing of their estates of inheritance by will. This was admitted by the decree complained of; for otherwise, a verdict upon the point of religious incapacity, would be irrelevant. Protestant discoverers upon the acts against popery, prosecute their claims in courts of equity; and if upon the proofs taken in those courts, it appears that they have established the fact of popery, they are decreed to the papist's estates; and protestant heirs ought not, in a court of equity, to have any advantage in proving religious incapacity in a testator, who by his will attempts to disinherit them. Supposing then, Lord Gerald's religious incapacity to be sufficiently proved by the appellants, they ought to have had a decree for his real estates. Now in the present case it was admitted, that Lord Gerald was born of popish parents; and it was proved, that he was educated in the popish religion, that his first profession of religion was popery, and that he professed it during the greatest part of his life. To this nothing was opposed, except that he sometimes joined in the protestant worship and sacrament; that he took the oaths of qualification to sit in the house of peers, and privy council, and for an employment or pension; but his conformity with the proper requisites, as prescribed by the popery acts, had not been attempted to be proved. The court therefore could not reasonably entertain a doubt of his having been a papist, within the meaning of those acts, nor that he remained under the disabilities imposed by them, to the end of his life. But if after the evidence given by the appellants, the Court could entertain a doubt of Lord Gerald's religious incapacity, they ought to have directed an issue to ascertain the same; specifying the particular period of his life, or fact doubted of, concerning such religious incapacity. That by sending the appellants to law generally, to take their advantage there of the religious incapacity, without directing the nature of the action, or who should be the plaintiffs and defendants herein, and without directing the depositions taken in the Chancery cause, to be given in evidence, under the usual restrictions; the appellants were exposed to the hazard, trouble, and expence of several suits to try their right, and could not have the benefit of their depositions in the Court of Chancery, notwithstanding the witnesses might have died since their examination, or might not be able to attend to give their evidence upon a trial at law, or might reside out of Ireland. It was therefore hoped, that the decrees would be reversed; and that the appellants would either be decreed to the real estates in question, or that a proper issue would be directed to be tried, concerning the religion of the late Lord Kinsale; with liberty to give in evidence, on such trial, the depositions of such witnesses examined in the cause, as should appear to be dead, or out of Ireland, or not able to attend.

On the other side it was submitted (C. Yorke, A. Forrester), that the late determination in the case of *St. Stephen's hospital v. Swan* (*ante*, Case 11), and the very recent one in *Hobson v. Meade* (*ante*, Case 13) made it totally unnecessary to repeat, and again insist, that by the very words and intent of the Irish popery acts, such suits

as the present can be at law only; and consequently, that the Court of Chancery in Ireland had done perfectly right in refusing to grant the appellants an issue to try whether their father the late Lord Kinsale, born in 1688, a reputed protestant from his age of nine years, as such sitting in house of peers and privy council of Ireland, and repeatedly trusted by the crown, near 72 years old when he died, and now above eight years in his grave, was or was not a constructive papist within the meaning of those laws; and indeed, had those determinations never been, the present attempt was so odious, as neither would nor ought to find the least assistance from a court of equity. It is the established practice of those courts, upon the dismissal of bills on account of the remedy being at law, to dismiss them generally, without giving liberty to read, on a trial at law, the depositions taken in the equity suit; for the right being triable at law, the evidence to be given on such trial must be legal evidence; and it would not only be absurd in the Court of Chancery, after dismissing the bill for want of equity, to order evidence to be received on a trial at law, which by the rules of law is not admissible; but it would be an inconsistency in the court, by granting an issue in effect, where it did not mean to grant one. The decrees therefore, by refusing to give any directions as to reading the depositions at the trial, was perfectly right, and precisely agreeable to the determination in *Hobson v. Meade*. The appellants, however, had good reason for so strenuously pressing this direction, since, considering the high rank and character of the witnesses adduced to prove the late Lord Kinsale's protestantism, and the wretchedness of those brought to impeach it, a personal *voir dire* examination might have been inconvenient; so to prevent that, an affidavit of the death, absence, or inability of these witnesses to attend the trial, and consequently the admitting their depositions to be read, would have been of great use; excluding all apparent distinction of credibility, and putting the worst upon a footing with the best testimony. That the retaining the bill in part for a year, and afterwards dismissing the whole with costs, did not at all distinguish this from the case [460] of an original dismissal with costs; for the Court retained the bill only to direct the necessary accounts, in case the appellants had established their claim on a trial at law; but they not taking the advantage of the liberty reserved to them, the Court was quite proper in dismissing their bill in the whole, with costs. And this obstinate refusal in the appellants to proceed before the only competent jurisdiction, all temporary bars being absolutely waived by the respondent's answer, sufficiently pointed out the oppressiveness of the present appeal; which it was therefore hoped would be dismissed with exemplary costs.

On the day appointed for hearing this appeal, *the first counsel for the appellants declared at the bar, that upon considering the decree of the House, in the case of Hobson v. Meade, he could find no substantial difference between that case and the present; and therefore he thought it improper to trouble the House with any argument upon the point thereby decided*: It was therefore ORDERED and ADJUDGED, that the appeal should be dismissed, and the decrees therein complained of affirmed: And it was further ORDERED, that the appellants should pay the respondents £100 for their costs in respect of the said appeal. (MS. Jour. *sub anno* 1767. p. 82.)

CASE 15.—JAMES KEALEY,—*Appellant*; GEORGE DAWES,—*Respondent*  
[26th February 1770].

[Mew's Dig. xii. 99.]

Where a bill is filed by a protestant discoverer, to have the benefit of a lease granted to a papist, on the ground that the rent reserved is less than two thirds of the yearly value; the fact ought to be ascertained by a jury, upon the trial of a proper issue.

DECREE of the Irish Exchequer REVERSED.

Richard Dawes, being possessed of part of certain lands called Tireboy and Clontoe, in the county of Galway, which belonged to the dean and provost of Tuam, for the residue of a term of 21 years, at the yearly rent of £30 under a lease granted to him by the said dean and provost; died some time in 1732 intestate, leaving Margaret

Dawes his widow, who having administered to him became thereby entitled to, and accordingly entered upon the said lands.

Margaret Dawes afterwards obtained two renewals of the lease from the dean and provost, at the same yearly rent of £30, the first on the 24th of September 1735, for which she paid a fine of £12 besides receiver's fees; and the other on the 27th of July 1748, for which she paid a fine of twenty guineas, besides the usual fees.

[461] On the 27th of December 1755, the appellant purchased of Mrs. Dawes the residue of her term and interest in these lands, under the last mentioned lease, for the sum of £20, and she executed an assignment thereof to him accordingly. And on the 1st of October 1759, the appellant having surrendered up that lease, obtained from the dean and provost a new lease of the same premises, for a term of 21 years, commencing from the 27th of December preceding, at the same rent of £30 per ann. for which he paid a fine of £40. And as the appellant had continued in possession for near four years, under his derivative title from Mrs. Dawes, he had not the least apprehension that his possession would be disturbed, after he had acquired such new lease.

But on the 26th of April 1760, the respondent thought proper to exhibit his bill against the appellant, in the Court of Exchequer in Ireland; charging, that the appellant being a papist, or a person professing the popish religion, he was, under several acts of parliament made in that kingdom, in the 2d and 8th years of Queen Anne, for preventing the growth of property, rendered incapable of holding the said lands, or taking any benefit either from his said purchase or renewal: for that the said reserved rent of £30 was far less than two thirds of the yearly value of the lands at the time of the last renewal; the same having been let by Mrs. Dawes to several tenants for a clear profit rent of £33. The respondent therefore, as the first protestant discoverer, prayed to have the benefit of the appellant's said purchase and renewal, and to be put into the possession of the lands and premises, according to the purport of the said acts of parliament.

The appellant, by his answer to this bill, denied, that to his knowledge, or belief, Mrs. Dawes had ever let the lands to any tenants or tenant at a clear profit of £33 per ann. but admitted, that some poor persons did hold the same of her for a short time at a clear profit rent of £29 19s. 5d. per ann. and that, in order to enable them to pay such rent, they planted potatoes upon some part of the lands, and turned other part thereof into tillage, whereby they destroyed the pasture, and a great part of the turbary, and otherwise reduced and impoverished the land in such a manner, that the same was of very little value for many years after.—The appellant insisted, that such tenants would not have paid so high a rent for a long term, nor would have taken the lands at that rent, even for the short term they did, but for the great advantage of their being at liberty to make the most of the land for that term, by using it as they should think proper for their immediate profit, without any regard to the injury which the land would thereby sustain. That the premises contained only 60 acres; that the reserved rent of £30 was at the rate of 10s. an acre; and that such reserved rent, either at the time of the appellant's purchase from Mrs. Dawes, or at the time of the last renewal, was not, to the best of his judgment and belief, at all less than two thirds of the yearly value. The appellant admitted the fact of his being a papist, or a person professing the popish [462] religion, as charged by the bill; but submitted to the court, that under the circumstances of the case he was by no means disqualified to accept and hold the benefit of his said purchase and renewal; nor was the said renewed lease discoverable by the plaintiff, as a protestant discoverer, under or by virtue of an act of parliament then subsisting.

The cause being thus at issue, and the only material fact to be proved being the yearly value of the lands in question, several witnesses were examined on both sides as to that fact; but upon this examination a very great contrariety of evidence appeared. The respondent's witnesses swearing, that the lands were of the yearly value of £63, and thereby proving the consequential fact, that the reserved rent was less than two thirds of the yearly value; while the witnesses examined on the part of the appellant, deposed in a clear and positive manner, from their own knowledge of the quantity, quality, and condition of the land, that it was not worth more than 12s. or 14s. per acre, at the most, to be let to a responsible tenant for a term of 21 years; and thereby the annual value of the whole was fixed at £42 upon the largest calculation; which rendered the reserved rent more by 40s. than two thirds of the yearly value.

On the 4th of July 1764 (when the cause had been several days in hearing,) the Court made a leading order, directing a trial at law upon the following issue; viz. "What the yearly value of the lands in the pleadings mentioned was, on the 27th of December 1755, and the 1st of October 1759." And that such issue should be tried by a jury of the county of Galway, at the next assizes.

It was understood by the appellant and his counsel, to be the sense of the Court upon this hearing, that the issue so directed, was to enquire into the value of the land at those two distinct periods of time, *if the same was to be let for a term of 21 years to a solvent tenant*; because the appellant's witnesses had uniformly grounded their opinion of the value upon that supposition: But through the mistake or inattention of the register in taking his minutes, the issue was framed as above.

The appellant, however, was ready to meet the respondent upon a fair trial of that issue, general as it was; but he did not think proper to take any steps for that purpose, so that the matter slept for almost two years.

However, on the 8th of February 1766, the respondent gave notice of his intention to move for a renewal of the said order of the 4th of July 1764; and the appellant, apprehending this to be a very proper opportunity for rectifying the mistake above-mentioned, caused a counter-notice to be given, signifying, that unless the respondent would consent to an amendment of the issue, by inserting therein the following words; viz. *if at such times to be let for a term of 21 years to a solvent tenant*; the appellant would not only oppose the intended motion, but would at the same time move to rehear the cause. To this fair and reasonable proposal the respondent having refused his consent, the appellant petitioned the Court for a rehearing; which being granted, the cause was accordingly reheard upon that petition alone, no application having been made by the respondent for the like purpose, because he did not, nor had any reason to object to the order of the 4th of July 1764.

This rehearing continued four days, viz. the 18th and 20th of May, and the 22d and 25th of June 1767. On the last of which days, the Court was pleased not only to refuse varying the order complained of, as to the form of the issue thereby directed, but to make an absolute decree for the respondent, as a protestant discoverer, according to the prayer of his bill; to order an injunction for the putting him in possession of the premises, and to direct an account of the rents and profits thereof from the time of filing the bill.

From this decree, and also from the order of the 4th of July 1764, the present appeal was brought; and on behalf of the appellant it was said (W. de Grey, J. Skynner) to be an established rule, and essential to the administration of justice in courts of equity, that in all cases where there is any considerable contrariety of evidence upon a material fact, such fact is sent to be tried by a jury; before whom the witnesses being examined *viva voce*, a more clear and certain discovery of the truth may be obtained. That the appellant's case came expressly within this rule; here being a flagrant contrariety of evidence upon the only material fact in issue; and a fact on which the rights of the parties immediately depended: for if the reserved rent of the lands in question should turn out to be more than, or equal to two thirds of their annual value, it was clear the respondent was not entitled to any part of the relief prayed by his bill. That it was extremely material to the discovery of this fact to ground the enquiry upon the supposition which the appellant contended for; namely, *if the lands were to be let to a solvent tenant for a term of 21 years*. For it was evident, that the appellant's witnesses made this supposition the criterion of their estimated value; and it was no less evident, that the witnesses for the respondent proceeded chiefly upon what had been paid as a yearly rent, by persons who were tenants for a much shorter term, not restrained by covenants to a regular and proper cultivation of the land, and who therefore conducted themselves by no other rule than their own immediate advantage, without any attention to the future benefit or detriment of the estate; from whence a very imperfect idea was to be formed of what other tenants under different circumstances could afford to pay. Lastly, that the order and decree complained of were inconsistent with each other: The one being grounded on a reasonable doubt, on which side the weight of evidence preponderated, and therefore directing a farther and more conclusive enquiry into the fact: whereas the other was a final determination upon the fact, without making such farther enquiry, and before the doubt originally entertained had been

in any manner obviated. A determination in [464] favour of that party, who expressly grounded his claim upon the truth of the fact, and who had never complained, but acquiesced in the issue directed for the discovering that truth, and clearing it from the doubt in which, by a contrariety of evidence, it was necessarily involved.

On the other side it was insisted (A. Wedderburn, A. Forrester), that the question as to the improved value of the lands, was applicable by 2d Ann. to two different periods of time, either to the year 1755, when the lease was purchased, or to the year 1759, when it was renewed by the papist; and that this must be established, not by their value for a whole term of 21 years, nor by conjectural uncertain evidence of what a responsible tenant would pay for them, but by positive proof of what the appellant's own tenants actually paid him at both periods, and for many years afterwards, till he turned them out; and he who had that evidence in his hands, would not have waived the real fact by his answer and proofs, and recurred to speculation, but from a consciousness of the fact being against him, and the hopes of dazzling and misleading a jury, to think that uncertain which before was clear. That the appellant's proofs, if any thing, proved too much; for they insinuated, that the lands were not worth even the yearly rent reserved to the church; and yet he first bought them for £20, renewed them for £40, reheard the cause in 1767; and in 1768, when 9 years of the 21 were run out, thought them still worth an appeal, at the peril of a recognizance of £200 and was now hearing that appeal in 1770, at a certain and great expence, with a view only of being let into a still further great expence, of a trial by jury; and all this for the short residue of a term of years in lands, which he would represent as at most not worth above £15 per ann. That by the rehearing, though applied for by one party and for a single purpose only, the cause was entirely open to the review of the Court, where a new judge then presided; and the proposed variation of the issue necessarily renewed and brought on the consideration of the whole evidence, when the very circumstances which induced the Court to reject the proposition for the trial of a question, neither *ad idem* or consonant to law, naturally led them to determine upon the certain and uncontradicted evidence then before them, without putting the parties to the expence of a trial at law, for which the Court saw no occasion.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of the 25th of June 1767 should be reversed. And that in the decree of the 4th of July 1764, the words "what the yearly value of the lands in the pleadings mentioned was," should be left out; and the words "whether £30 a year was less than two-thirds of the yearly value of the lands in the pleadings mentioned to be let for 21 years to a solvent tenant," should be inserted instead thereof: And that the said decree thus amended should be affirmed. (MS. Jour. *sub anno* 1770. p. 213.)

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[465] CASE 16.—JAMES CUSACK & Ux.,—*Appellants*; FORD GILBERT and others,—*Respondents* [25th January 1773].

[Mew's Dig. i. 336; xii. 98.]

No part of the popery laws prohibit a papist from devising his lands to a protestant trustee, to be sold *bona fide* for the payment of his debts, legacies, and funeral expences; because none but a protestant can in that case become a purchaser, and a papist cannot thereby in any shape acquire a dominion over the lands, without subjecting himself to a discovery.

Where a party to a suit sells and conveys all his right and interest under the decree to another for a valuable consideration, such sale and conveyance is an absolute bar to an appeal from that decree.

DECREES of the Irish Exchequer AFFIRMED.

In November 1745, John Ford died without issue, leaving three sisters, Ann, Catherine, and Mary, his heirs at law.

Ann married George Cruise, who died in the year 1721, leaving two sons, who died without issue, and a daughter the appellant Angelina; having made a will, and

appointed James Cruise and the said John Ford his executors; Ford alone proved the will, and possessed all or the greatest part of his effects, which he never accounted for or paid to the said Angelina, who, in the year 1726, intermarried with the appellant James.

Catherine married George Gilbert, and died, leaving two sons, William and the late respondent Robert Gilbert, who died after his answer was put in to the appeal; William died, leaving one son Peter, who afterwards died without issue.

Mary the third daughter died unmarried, and without issue.

The appellant Angelina, some years after her marriage, by her uncle's desire, lived in the house with him, and she and her husband, the appellant James, transacted all his business and affairs for some years before his death, and he always expressed the greatest affection for them and their children: And in order to make them some compensation for the effects of her father, which he had not accounted for, and for the services the appellants had done him in transacting his business, and for making a proper provision for his niece and her children, he, on the 26th of October 1743, executed two bonds, in the penal sum of £1600 each, the one conditioned for payment of £800 on the 26th of October then next, to the appellant Angelina, the other for payment of the like sum to the respondent Bridget, a daughter of the appellants; and on the 2d of July 1745, he executed another bond of the same penalty and condition to the appellant Angelina, and a fourth bond of the same penalty and condition, on the 9th of the same month, and he likewise executed warrants of attorney to confess judgments on the said several bonds, and such judgments were accordingly entered up in his lifetime.

At the time of the execution of these bonds, John Ford was possessed of the town and lands of Ballyronan in the county of Wicklow, under a lease for three lives, at the yearly rent of £2 2s. 10½d. and of Hall's farm in the said county, under a [466] lease for three lives, at the yearly rent of £6; he had likewise a reversionary lease of both Ballyronan and Hall's farm for 999 years, to commence at the expiration of three lives, at the yearly rent of £9 10s. for both the said farms. He was also seized of the town and lands of Kildea, under a lease of three lives, with a covenant of renewal for ever, at the yearly rent of £20 and a fine of five pounds on the fall of a life, and of the town and lands of Teatore, alias Tittore, under a lease for three lives, at the yearly rent of £20, with a reversionary term for 31 years, to commence at the failure or expiration of the said lives, at the yearly rent of £25, all which lands he, by indenture of lease, dated the 27th of June 1745, demised to the appellant Angelina for 31 years, commencing from the 25th of March preceding, at the yearly rent of £100, which was full two thirds of the then improved yearly value of the lands.

On the 15th of July 1745, Mr. Ford made his will, and thereby devised to John Darcy esq. who was grandfather of the respondent Elizabeth Darcy, all his terms or leases for lives and years, to be disposed of by him to the best advantage, and thereout to pay all his debts, legacies, and funeral expences; and after bequeathing a legacy of £40 to the late respondent Robert Gilbert, and several other legacies, he appointed his niece, the appellant Angelina, sole executrix; to whom he bequeathed all his ready money, plate, household goods, debts due to him, and all other his personal estate whatsoever, excluding all others from distributive shares; and declared, that this bequest was not to be taken in anywise as a compensation for the debts due from him to his said niece. On the 17th of November following he died, without revoking or altering his will, which the appellant Angelina soon afterwards proved in the Prerogative Court of Ireland.

The appellant James Cusack, and his wife, and also all their children, were at this time papists.

On the 12th of June 1746, the late respondent Robert Gilbert filed his bill in the Court of Exchequer in Ireland, as a protestant discoverer, against the appellants, the respondent Bridget, and the said John Darcy; and on the 19th of February following, he filed an amended bill against the same parties, grounded on the several acts in that kingdom, of the 2d and 8th of Queen Anne, to prevent the further growth of popery; charging, among other things, that the aforesaid devise to John Darcy, who was a protestant, was in trust for papists, and calculated merely to elude the acts; that the debts in the will mentioned to be due to the appellant Angelina were not real, but contrived to incumber the lands; that the lease to the appellant Angelina was



made to commence on some day subsequent to the execution thereof, and that a rent was reserved less than two thirds of the full improved yearly value, and that it was not warranted by the aforesaid acts: That the devise to Mr. Darcy, the several securities above-mentioned, and the lease for 31 years, were all calculated to cover the lands from a real protestant discoverer, and to evade the popery laws; [467] and therefore praying, as a protestant discoverer, to be decreed to the benefit of the said devise, securities, and lease. And on the 19th of February 1754, the late respondent filed another bill, which he amended on the 18th of November 1756, praying in like manner to be decreed to another denomination of land (being the lands of Tittore) not mentioned in any of the former bills, but which was demised by the said lease for 31 years, and claiming all the said lands as a protestant discoverer; and also charging, that he was the next protestant heir at law to John Ford, his nephew Peter Gilbert, son of his eldest brother William, being some time before dead without issue.

To these several bills the appellants put in their answers, by which they admitted that the testator John Ford was possessed of the several lands for the several terms in the bills mentioned; and that he executed the said lease for 31 years, and likewise duly made his will, and thereof appointed the appellant Angelina sole executrix, who upon his death proved the same in the Prerogative Court of the Archbishop of Dublin; admitted they were papists, but denied that the devise in the will to John Darcy was in trust for and for the use and benefit of the appellants or either of them, or for any other papist or person professing the popish religion, or that the same was calculated to elude the acts made in that kingdom to prevent the further growth of popery: And said, that the debts mentioned in the will to be due to the appellant Angelina from the testator, and on which judgment had been obtained against him in his lifetime, were not contrived to load or incumber the lands, and by that means elude or evade the said acts; but were created by the testator, as well out of regard and affection for the appellants, as to make them a satisfaction for several sums of money which had come to his hands, belonging to the appellant Angelina, as executor of her father, and for which he never had accounted; and as to the lease for 31 years, they said there was reserved a rent more, and not less than two thirds of the improved yearly value of the premises, at the time of making thereof; and that the appellant James was, before the execution of it, in possession of the premises, under a verbal agreement made previous to the lease.

The said John Darcy by his answer said, he did not know that such devise to him was in trust, or for the benefit of the appellants or either of them.

From the time of putting in the last answer of the appellants to these several amended bills, which was on the 15th of February 1757, the respondent Gilbert, though frequently called upon by the appellants agents, never thought proper to proceed in his suit till the year 1764, when he again amended his bill, stating the death of his elder brother William, and the death of his son Peter, by which he became the next protestant heir to John Ford, and therefore praying to be decreed to the benefit of the said devise, lease, and securities as such.

[468] The appellants put in their answer to this bill, which was to the same effect as their former answers; and the respondent having replied, issue was joined, and several witnesses were examined on the part of the respondent to prove his being a protestant, and the value of the lands contained in the lease for 31 years. The witnesses who were examined as to the value were Dominick Doyle, Murtagh Burne, and Martin Malone, whose evidence went to their belief of the value of the lands, by the acre, at the time of the death of the testator John Ford, which happened near five months after the time of making the lease, and not at the time of the commencement of making the lease; and the number of acres was only from the computation of the country, and not from any actual admeasurement, or other matter to guide them in the number of acres specified in the original leases made to John Ford, a great number of years previous to his death.

The appellants did not examine any witnesses in the original cause, but filed a cross bill, stating that the appellant James had for several years been a protestant of the church of England, and that on account of his parents having been papists, he had been advised that a regular conformity was necessary, and he had therefore duly conformed to the established church, and had performed the several requisites, and filed the proper certificates enjoined by law: That the lease granted to the appellant

Angelina was at a rent full two thirds of the yearly improved value of the lands; and praying that the several freehold and leasehold interests of the testator might be sold, for the purposes in the will, and applied in discharge of his several debts and legacies, and the residue paid to the appellant James in right of his wife; and that the respondent Gilbert might be restrained from proceeding in his cause till he should answer the cross bill, and that both causes might be heard together.

As soon as the late respondent Gilbert had answered, the appellants filed their replication, and the issue being joined, several witnesses were examined for the appellants, who fully proved the value of the lands, and that the reserved rent was more than two thirds of the improved yearly value.

On the 9th of November 1768, both causes came on to be heard, which continued on the 10th and part of the 12th, and the Court having refused to hear the evidence taken in the cross cause read, were pleased to decree that the late respondent Robert Gilbert was entitled, from the time of filing his amended bill as a protestant discoverer, and under and by virtue of the several acts of that kingdom to prevent the growth of popery, to the benefit of the lease by John Ford made to the appellant Angelina Cusack, bearing date the 27th of June 1745, for the term of 31 years, from the 25th of March preceding, and to the full benefit of the lands thereby demised: And ordered an injunction to issue to put the late respondent Gilbert in possession thereof; and referred it to the Chief Remembrancer, to take an account of the clear yearly issues [469] and profits of the said lands, from the time of filing the amended bill of the 23d of December 1749, and by whom received; and the late respondent Gilbert was to be at liberty to make up and inrol the said decree with costs.

The appellants being advised to present a petition for rehearing the causes, the same was granted, and they were heard on the 23d of the said month of November, when the Court affirmed the decree with this variation, that the plaintiff's bill, so far as it sought to be decreed to the original leases made to the said John Ford, and the several securities in the pleadings mentioned, should be dismissed.

The original appeal in this cause was brought from both the decrees; the cross appeal was only from the decree of the 23d of November, so far as the same dismissed the respondent's bill, as to the original leases and securities therein mentioned.

In support of the original appeal it was said (A. Wedderburn, J. Dunning), that by the Irish act, 2 Ann. s. 8. "All papists are disabled from purchasing lands, or any leases or terms of lands, other than terms of years not exceeding 31 years, whereon a rent, not less than two thirds of the improved yearly value at the time of making such lease, shall be reserved during such term." That the point in issue in the cause was the value of the lands demised to Angelina at the time of making the lease; but the late respondent produced no proof whatever of the value of the lands at that time, nor ever attempted it: The only thing he endeavoured to prove, was the value of the lands at a period near five months subsequent to the time of making the lease, viz. the time of Mr. Ford's death, which happened on the 17th of November 1745, whereas the lease was made on the 27th of June preceding; and consequently the Court at the time of pronouncing the decree, had no evidence of the value of the lands demised, *at the time of making the lease*, before them, as required by the act of parliament. That as the cause was heard upon the *ex parte* evidence of the late respondent, and as he was endeavouring to avail himself of a penal statute against the appellants, his evidence ought to be clear and incontrovertible; and yet it was in other respects, besides those already mentioned, loose, inconclusive, and suspicious: for none of his witnesses swore that the lands demised were worth any *certain* sum at the time of Mr. Ford's death, but that, by the computation of the country, the lands contained a certain number of acres, and that they believed each acre was worth a certain yearly rent: And yet the number of acres so sworn to greatly exceeded the number specified in the original leases made to Mr. Ford long before his death; and it must be presumed, that the original lessor and lessee were better acquainted with the real number of acres demised than the witnesses, who were all poor and illiterate people; one being a butcher, another a labourer, and the third an alehouse-keeper; and swearing to the number, not even as to their own knowledge and belief, but by the computation of the [470] country. That this lease was made to the appellant Angelina during the height of the rebellion in Scotland, when the value of lands fell remarkably in the kingdom of Ireland; and the late respondent never attempted to

make any proof whatsoever of the value of these lands till 20 years had elapsed after the commencement of the lease. Besides, almost the whole of the demised lands were mountainous. That the appellants laboured under every disadvantage in the original cause, which was protracted by the respondent Gilbert, by every kind of delay and expence, so that the appellants were prevented from letting any part of the estate; and Mr. Darcy, the trustee, was likewise prevented from selling any part of it for the purposes of the testator's will. That by these means the appellant James's circumstances were so greatly reduced, that he was for a long time confined in prison, and absolutely incapable of advancing monies for the defence of the cause. That Gilbert, taking advantage of such poverty and situation, immediately replied, and examined his witnesses, and set down the cause for hearing; and no witnesses having been examined on the part of the appellant James, he was obliged to file his cross bill, in order to give him an opportunity of examining his witnesses; whose depositions, if allowed to have been read, would have fully proved, that the rent to be paid by the appellants far exceeded two full thirds of the yearly value of the estate at the time of the testator's granting the lease to them; and if it had increased in value afterwards, it was from their own improvements. But as there clearly appeared to be a contrariety of evidence as to this fact, the Court ought at least to have directed an issue to try what was the real value of the lands at the time of granting the lease; and which the appellants then offered to try, at the peril of costs.

With respect to the cross appeal it was said, that the late respondent's bill being dismissed as to the original leases and securities, and he having since died, his claim to those leases and securities was totally extinct; and as every popular suit dies with the discoverer or informer, his representative and heir at law, the present respondent, had no right to his cross appeal respecting such original leases and securities. And with respect to the late respondent's claim, as the next protestant heir at law of John Ford, it would, upon considering his case, be found to have no manner of weight, and seemed to have been thrown in as a sort of varnish over the less respectable title of a protestant discoverer; in which light alone he sued for the first ten years of his prosecuting this suit, until the death of his nephew Peter Gilbert, son of his elder brother William, who in his lifetime never gave the appellants any trouble, or commenced any suit against them. But supposing the present respondent to have a right to a cross appeal as heir at law and administrator of the late respondent, considered as a protestant discoverer; yet he would be found in that capacity to have no right whatsoever, under any [471] of the Irish popery acts, to the said securities and original leases; for both the letter and spirit of those laws were calculated to prevent papists from acquiring any interest in lands, other than leases for 31 years, upon the terms therein specified. The appellants acquired no other interest whatsoever in the lands in question; but insisted that the representative of Mr. Darcy, the trustee, should sell the lands so devised to him by Ford, in order to pay his debts, etc. and which would have been long since done, if the litigiousness of the late respondent had not prevented it. Besides, no part of the popery laws prohibited a papist from devising his lands to a protestant trustee, to be sold *bona fide* for the payment of his debts, legacies, and funeral expences: Because no person but a protestant could in that case become a purchaser; and a papist could not thereby in any shape acquire a dominion over the lands, without subjecting himself to a discovery.

On the part of the respondent in the original appeal it was said (E. Thurlow, A. Forrester), that the late respondent Robert Gilbert, in March 1769, above three months after the decrees appealed from were pronounced, and near eleven months before the appeal was presented, sold and conveyed all his right, title, and interest under those decrees for a valuable consideration; and that such sale and conveyance was an absolute bar to the appeal, or else no person purchasing under a decree could ever be safe while there was a possibility of its being appealed from. But as to the merits of the case, the lands leased by Ford to the appellant Angelina were proved by two witnesses to be let at less than two-thirds of the improved value, if leased to a solvent tenant, for they appeared to be worth £200 yearly, and the rent reserved was only £100. The appellant Angelina was allowed to be a papist, and the late respondent was proved to be a protestant, and born of protestant parents. His right therefore to this lease as the first protestant discoverer was, under the Irish popery acts, clear and undeniable. That the examination of witnesses in the cross cause on the part of the

appellants, after publication in the original cause had so long been passed, and after an express refusal by the court in that cause, was an absolute nullity; and therefore the depositions taken on that occasion were very justly rejected. None of them could be made use of to contradict the testimony of the respondent Gilbert's witnesses as to the yearly value of the lands, so as to lay a foundation for directing an issue to try such value: and indeed the directing of such an issue now would be as great an inlet to perjury, as to have directed a new commission, after publication had passed in the original cause.

As to the securities executed to the appellants by Ford, they had admitted by their answer, that they never gave any consideration for them. Indeed, they were not able to give any. Ford was proved to have considered them only in the light of poor relations, whose chief dependance was upon him, and to have at several times lent the appellant James small sums of money to enable him to buy wood. It was also proved, that for a considerable time before [472] his death, they in his state of dotage gained such an influence and ascendancy over him, that he did whatever they pleased. Then it was that they obtained the bonds in question, for giving a colour, if possible, to the lease; but for securing to themselves, at all events, a good part of his effects, which were proved to have amounted to between £5000 and £6000. That this series of fraud, and the settled intent to evade the popery laws, appeared as well upon the face of the will made for Ford, as by the subsequent conduct of the parties. His will was dated on the 15th of July 1745, when he was proved to be 92 years old, and in a state of the greatest debility both of mind and body: he died in four months afterwards; and though debts and legacies and funeral expences require immediate payment and satisfaction, the trust for that purpose remained unexecuted at the end of 25 years; and the appellants had all along remained in the perception of the rents and profits of the trust estate, by the connivance of the trustee and his representatives. There could not surely be a stronger evidence of this trust in Darcy being a mere sham, and calculated only for securing to the papist *cestui que* trust, the enjoyment of the estate, in direct opposition to the popery acts; no creditor, legatee, or undertaker having ever appeared to compel an execution of the trust. In fact there was no creditor but the appellants, and only a few trifling legacies, whereof that of £40 to the late respondent Gilbert was the principal.

After hearing counsel on these appeals, it was ORDERED and ADJUDGED, that the original appeal should be dismissed, and the decrees therein complained of affirmed: and it was further ORDERED, that the cross appeal should be dismissed, the same being abated by the death of Robert Gilbert, the original appellant in that appeal. (MS. Jour. *sub anno* 1773. p. 141.)

CASE 17.—DAVID POWER,—*Appellant*; SAMUEL WINDIS,—*Respondent*  
[15th May 1775].

[Mew's Dig. xii. 98.]

A lease granted to a papist at the full improved yearly value, but to commence at the next succeeding quarter-day, is not such a future or reversionary lease as papists are by the popery laws precluded from taking.

DECREE of the Irish Chancery REVERSED.

This decision is an evidence of the increase of that liberality of spirit which, not long after, dictated the repeal of the laws which gave rise to the preceding series of cases. They afford evidence, if it were needed, as well of the ingenuity that will ever be practised to secure property, as of the frauds resulting from penal laws of too severe a nature; the former through a motive surely defensible, the latter frequently through an unjustifiable spirit of avarice and oppression.

Thomas Wyse, deceased, being seised in fee of the town and lands of Ballydavid in the barony of Gualtior, did, by deed duly executed by him, empower Nicholas Wyse, one of his agents [473] and receivers, to demise and let the lands of Ballydavid for such term and at such yearly rent as he should think proper; and Nicholas Wyse.

under this power, by lease, dated the 16th of January 1764, in the name and as the act and deed of Thomas Wyse, demised these lands of Ballydavid to the appellant for 31 years, to commence from the 25th of March then next, at the yearly rent of £78 for the first three years, and £80 sterling for the residue of the term; under which lease the appellant entered into possession of the lands, and regularly paid the reserved rent, from time to time, to Wyse or his agents, and took receipts for the same.

Thomas Wyse afterwards died, leaving Francis Wyse his eldest son and heir at law, who became entitled to the fee and inheritance of these lands, and to the rent payable thereout under the lease.

By an act of parliament made in Ireland, in the 2d year of Queen Anne, c. 6. s. 6. "for preventing the further growth of popery, every papist, or person professing the popish religion, from the 25th of March 1703, is disabled to purchase, either in his own name or in the name of any other person, to his use or in trust for him, any manors, lands, tenements, or hereditaments, or any rents or profits out of the same, or any leases or terms other than any term of years not exceeding 31 years, whereon a rent not less than two-thirds of the improved yearly value, at the time of making such lease, shall be reserved and made payable during such lease; and all estates, terms, or any other interests or profits whatsoever, other than such leases as aforesaid, purchased by or for the use of such papist, or upon any trust or confidence, mediately or immediately, to or for his use and advantage, shall be utterly void."

The respondent, in Michaelmas term 1770, filed his bill in the Court of Chancery in Ireland, stating the matters aforesaid, and that the appellant was at the time of taking the lease a papist; that he the respondent was a protestant, and as such, and as the first real protestant discoverer, was entitled to have the benefit of the articles or lease, in regard the same was made to commence in reversion, or on a future day; and to an account of the rents, issues, and profits of the said lands of Ballydavid since the making thereof. And he accordingly prayed to be decreed to the benefit of such estate and interest as the appellant had therein under the said lease or agreement, and to be quieted and established in the possession thereof.

The appellant put in his answer to this bill, and thereby admitted the lease, and that he was a papist; but insisted, that the rents reserved by the lease were the full improved yearly value of the demised premises.

The cause being at issue (but no witnesses examined on either side) was heard on the 28th of April 1773, when the Lord Chancellor was pleased to decree, that the respondent, as being the first protestant discoverer, within the intent and meaning of the popery [474] laws, was entitled to the benefit of the said lease; and therefore ordered an injunction to issue, for putting him in possession of the said demised premises.

From this decree the defendant appealed, and on his behalf it was contended (A. Wedderburn, A. Forrester), that the decree was not warranted by the act 2d Anne, which does not in any express terms preclude papists from taking leases in reversion; all it requires is, that a lease taken by a papist shall not, in point of duration, exceed 31 years, nor in point of value be subject to a less rent than two-thirds of the improved yearly value, at the time of making such lease. That the present lease came not within this prohibition, the rent thereby reserved being sworn to be not barely two-thirds of the value, but the full improved yearly rent, not only at the time of making, but at the time of the commencement of the lease, so as to preclude all possibility of doubt respecting the value; and it is the usual method of demising lands, both in England and Ireland, to make the leases commence from the next succeeding quarter-day, the intervening time being of no value either to landlord or tenant. That the popery acts, being evidently penal laws, must receive a strict and rigid construction, and not be extended beyond the letter, to disable the papist against common right; but must be expounded to the utmost extent of the exception of 31 years leases, in favour of the papist, so as to give him the full benefit of the exception; and especially in the present case, where there manifestly was not the least intention of infringing on or evading those acts. The question being a mere matter of law, was not cognizable in a court of equity; but the bill should have been dismissed, and the respondent left to his legal remedy; here being neither a secret trust, or any other impediment in his way, requiring the interposition of a court of equity, and which alone give it a jurisdiction upon the 2d and 8th

of Anne; as hath been determined in several instances, and particularly in the case of *Stephen's Hospital v. Swan* (ante, Ca. 11).

But it was objected, that this was a lease in reversion; and if a lease be made to commence at the end of a month, it may equally be made to commence at the end of a year or years, and so on *ad infinitum*, for there is no drawing the line; and the value can never be certainly known and ascertained upon a reversionary lease.

To this it was answered, that the lease in question was not a lease in reversion within the act, nor did any words in it warrant such a conclusion; which would most essentially affect protestant landlords, by disabling them, upon a tenant's quitting at Lady-day, from contracting with a new one, should he happen to be a papist, for a 31 years lease, to commence at the Midsummer following. Thus would these acts, contrary to their avowed intent, restrain the protestant's exercise of his right over his own property; and lay both landlord and tenant under difficulties, no way conducing to the purposes of the acts.

[475] On the other side it was said (E. Thurlow, J. Madocks), that the single point in the case was, whether a lease for 31 years, to commence at a future day, (the rent thereby reserved being ascertained at the date of the lease,) is such an interest as a papist can purchase? It is clear that, independent of the exception, the statute contains a universal disability on papists to purchase any estate or interest in lands, present, future, or contingent; that it extends to all estates and interests, whether of inheritance, of freehold, for terms of years, or at will, whether in possession, or to commence at a future day, and consequently extends to an *interesse termini*; which is the interest that a tenant hath between the date of the lease and the commencement of the term. The exception in the statute is, "other than any lease for any term of years, not exceeding 31 years, whereon a rent not less than two-thirds of the improved yearly value, at the time of making such lease, be reserved and made payable during such term;" so that the only excepted interest is a pure single term of 31 years, at a rent to be measured according to the value of the land at the time of making the lease. But a lease to commence at any future time is inconsistent with the exception; because, as the value of the lands, which is to give the measure of the rent, is by the act to be ascertained at the time of making the lease, and such rent is to be reserved payable during the term, it implies, that the term is to commence at the time the lands are valued; for otherwise, as lands are subject to fluctuate in value, instead of two-thirds of the value being reserved payable during the term, according to the act, the reservation may not be one-third of the value, arising from the increase in the value of the land, between the date of the lease and the commencement of the term.

But further: the purchase of an *interesse termini* is expressly prohibited by the positive clause; and as a lease to commence at a future time cannot exist without an *interesse termini* in the mean time, and the exception goes no further than a simple lease for 31 years; therefore, as a lease to commence at a future day carries a larger interest than the exception allows, there was no occasion to add in the exception to the words, "leases for 31 years," the words, to "commence from the time of making;" for these words were not wanting in the text to shew, that leases to commence at a future day are not within the intent and meaning of the legislature in the exception. If the exception is not confined to pure single leases for 31 years in possession, why may not a papist take at one time so many 31 years leases in succession, each to commence upon the expiration of the former, as will make up a term of 1000 years, to the disappointment of the general view of the legislature; which was to prevent papists from taking any other or greater interest in lands than for 31 years. But admitting that no one papist can take more than one single lease for 31 years, but that any one papist may take a lease to commence *in futuro*, then one papist may take a lease in possession for 31 years, another may take a lease for 31 years from the expiration of the [476] first papist's lease, and then another, and so on; all which leases will make successive terms in the hands of papists, to endure to the amount of all the terms; and therefore no found construction can be given to the statute to answer the intent of the legislature, but to construe the exception to extend to no other leases but leases in possession, to commence from the making. It is to be presumed, that the exception was introduced for the sake of landlords in some counties in Ireland, where protestant tenants were difficult to be had; and also for the sake of papists who were by profession farmers, and for the sake of continuing

cultivation. With these views leases in possession are consistent; but leases to commence at future times might be used for purposes to evade the act, totally variant from the intent of the legislature in inserting the exception, which had only the present occupation of lands in view. In the present case, the shortness of the interval between the date of the lease and the commencement of the term made no difference; for if the lease was not warranted by the exception, it was null and void by a positive law, by which all courts, both at law and in equity, are bound.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed; and that the respondent's bill should be dismissed. (MS. Jour. *sub anno* 1774/5, p. 793.)

## PARTNERS.

CASE 1.—VISCOUNTESS DOWAGER FALKLAND and others,—*Appellants*; LORD CHENEY and others,—*Respondents* [12th December 1704].

[Mew's Dig. xiii. 50. See Partnership Act 1890 (53 and 54 Vict. c. 39), s. 24 (8).]

In all sea adventures, the acts of a majority of the partners shall bind the whole.

DECREE of the Master of the Rolls and Lord Somers, C. REVERSED.

Sir William Phipps having discovered certain wrecks upon the coast of Hispaniola in America, acquainted the appellants and the Duke of Albemarle therewith, and requested them to be concerned with him in the recovery thereof; and it being necessary to obtain leave from the crown for this purpose, application was made; and, on the 18th of July 1786, a grant was obtained in the Duke's name, authorizing him, and those appointed by him, to search for, seize, and take up all such wrecks and riches as should be discovered in the Gulph of Florida, and other places [477] therein mentioned, from the said 18th of July 1686, to the 18th of July 1689; rendering to the King a tenth part of what should be got.

In order to ascertain each party's share and interest in these wrecks, a certain deed was, on the 17th of January 1686, entered into between the duke and the several other parties; reciting, that they had, at their joint charge, equipped several vessels for the expedition; and that the duke, in whose name the grant was taken, had appointed Sir William Phipps his deputy, with full power to adventure to sea with the ships agreed on; and reciting the several other proceedings which had been had in relation to the adventure, the duke assigned to each of the parties his and their parts of the said ships, tackle, etc. and of what should be got out of the said wrecks; and each party covenanted to bear his proportional part of all charges and losses.

By another deed, dated the 23d of March 1686, all the parties agreed to pay their respective shares of the charges then or then after to be laid out and employed in and about the execution of the power granted by his Majesty, and maintaining the several ships and company in the intended voyage, or any other voyage after to be made, by the *major part* of the parties concerned; who were, from time to time, to transact and settle all things in relation to the adventures.

The ships accordingly sailed on their first voyage, and, in June 1687, returned with great success; the duke's share of the profits of this voyage amounting to upwards of £40,000.

This encouraged the parties to resolve upon a second voyage; but having information that what had been already done was taken notice of by the Spaniards and others, and fearing that an attempt might be made on such ships as should be sent, which were not of force sufficient to defend themselves, application was made to the King for a ship of war to assist in such further adventure; and his Majesty accordingly granted the *Foresight* frigate for that purpose.

On this occasion, another deed was made between the parties, dated the 12th of

August 1687, whereby they respectively covenanted, that the duke should have one full fourth share of all such riches and treasure as should be recovered in the said expedition, *or in any other voyage* thereafter to be made for the same; and the duke covenanted to bear, pay, and defray one full fourth part of all such costs, charges, losses, and damages as should be incident to the recovery of the said riches and treasure, and in relation thereto, or to the *voyage or voyages*; and that all things should be managed *by the majority of the said parties, or their substitutes*, as before.

But, before this second voyage was undertaken, the duke was appointed governor of Jamaica; and, being obliged to go to his government, he, by letter of attorney, dated the 22d of August 1687, empowered John Earl of Bath, Paul Bowes esq. and others, or any one or more of them, to meet and act with the [478] rest of the partners, on his behalf, and *to advise and determine about the second voyage*.

And by indenture, dated the 20th of October 1687, between the Earl of Bath, Mr. Bowes, and the other partners, the duke's share was increased, by one two and thirtieth part of all such riches as should be recovered *in that or any other subsequent or future voyage or voyages*, bearing a proportional share of all charges and losses which should be expended in that *or any other subsequent voyage or expedition*.

The second voyage, by the death of Sir John Narborough, turned out unsuccessful, so that a considerable loss was sustained; but the parties, being still encouraged, determined on a third voyage, and fitted out ships for that purpose; the Earl of Bath still acting as the duke's deputy, and having executed a deed, dated the 5th of September 1688, to that effect; but this voyage proving also unsuccessful, an end was put to the adventure.

Before the accounts of these three voyages were settled, the duke died, possessed of a very large personal estate, and having made his will, and thereof appointed the respondents executors.

Soon afterwards, an account of the duke's share of the charges of the three voyages was stated and delivered to the respondents, who directed Mr. Montague, the duke's auditor, to examine the same, without starting any objection to the duke's being concerned in *all* the voyages; and Mr. Montague having accordingly examined this account, certified, that there was due for the duke's share of these charges £2484 6s. 1d.

But the duke's executors declining to pay this money, the appellants, in Michaelmas term 1693, filed their bill in the Court of Chancery, in order to compel such payment.

The cause was first heard by the Master of the Rolls, on the 16th of June 1696, when his Honor directed an issue at law, to try whether the defendant, the Earl of Bath, executed the deed of the 5th of September 1688 conditionally or not, and whether any of the parties had notice of it. And, upon a re-hearing, this decree was confirmed.

Whereupon the plaintiffs appealed to the Lord Chancellor Somers; and this appeal being heard on the 30th of May 1698, his lordship, upon consideration of the deeds, etc. dismissed it, and affirmed the former decree. But the plaintiffs, being still dissatisfied, applied to have the cause re-heard; and the same coming on before the Lord Keeper Wright, on the 14th of December 1700, his lordship dismissed the bill, as to any allowance for the *third* voyage, but directed an account as to the first and second voyages.

From this decree of dismissal the present appeal was brought; and, on behalf of the appellants, it was insisted (W. Norris), that the adventure was of great advantage to the duke, and that all things touching the same were to be governed by the act of a majority of the partners, which was to be conclusive; and, though the duke had been present and dissented, he would, nevertheless, [479] have been bound by what was done by the majority. That in all sea-adventures the act of the majority of the part-owners concludes the rest; and this rule ought more especially to obtain in the present case, because it was so expressly agreed in writing, and the covenants would otherwise be of no validity; and if one party dissented, or acted conditionally, nothing could be transacted in things of this nature. That what my Lord Bath did respecting the *third* expedition was absolute, and without restraint, and not conditional; nor is it so pretended by the respondents, save only with regard to his executing the deed of the 5th of September 1688, which was for the hire of the ship



*Foresight*, but which, on account of the revolution that soon afterwards happened, never went that voyage; and therefore no other charge was, on that account, occasioned to the partners, than merely the expence of obtaining that deed from the crown. That all the three voyages were made, within the time granted by his Majesty's letters patent; and, as in case the third voyage had turned out successful, the duke would most clearly have been entitled to his share of the profits; so, as it proved otherwise, he ought, for the same reason, to bear his share of the loss; and that, therefore, so much of the decree as dismissed the appellants's bill ought to be reversed.

On the other side it was contended (N. Courtney), that the respondents ought not to come to any account for the third voyage, because the Earl of Bath executed the deed of the 5th of September 1688, conditionally, that the duke's assent thereto should be obtained, and that the appellants, by declining to try the issue, admitted the fact, and that they had notice: besides, if the earl, or any other of the duke's trustees, had made any absolute contract, it could not have bound the duke, because they had no authority from him for that purpose. That the general words of binding by majority, in the deed of the 23d of March 1686, was only a covenant between the other partners, in which the duke was not included; and the general words in the other deed of the 12th of August 1687 referred only to the ships and voyages therein particularly mentioned, and to such other things as should be thought fitting in relation thereto. That all these general words of binding by majority ought to be construed as relating to the other partners, who had six parts in eight; and not to include the duke, who had the other two eight parts, and stood singly by himself; for otherwise, any two of the six would be a majority upon the duke, who was single; and they might have charged his estate with as many more expeditions as they had thought fit.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of dismissal therein complained of should be reversed; and that the executors of Christopher [480] late Duke of Albemarle should account with the appellants for the charge of the third voyage\*. (Jour. vol. 17. p. 597.)

CASE 2.—GEORGE BALL,—*Appellant*; LORD LANESBOROUGH and others,—*Respondents* [13th May 1713].

[Mew's Dig. x. 424.]

One of several partners, who is treasurer for the whole, enters into contract with A., and afterwards failing, his estate is vested in trustees. Though the contract with A. concerns the partnership business, yet he is not entitled to any satisfaction out of the treasurer's share of the partnership effects, but must come in equally with the rest of his creditors; the money due to A. upon the contract not being for wages.

DECREE of Lord Keeper Harcourt AFFIRMED.

In consequence of the determination on a former appeal in this cause (see *ante*, tit. Agreement, Ca. 7. i. 140), an order was made by the Court of Chancery, referring it to a master to take an account of what was due to the appellant for his salary of 3s. 6d. per hundred for wire, made since he was discharged from the partner's works; and, in pursuance of that order, the master reported, that there was due to

\* The appellants afterwards petitioned the House for an explanation of this judgment, as to their having interest for the duke's share by them advanced towards the third voyage, in such manner as they had interest for the duke's share of charges by them advanced in the two former voyages; and, after hearing one counsel on each side, it was, on the 28th of February 1704, ordered and adjudged, that the following words should be added to and made part of the judgment, viz. "And that the respondents shall account with the petitioners for the charge of the third voyage; and that what shall appear to be due to the appellants upon such account shall be paid to them, with interest, in such manner as is directed in the court below as to the account of the two former voyages." (Jour. vol. 17. p. 681.)

him for wire, made to the 12th of January 1709, at the said rate of 3s. 6d. per hundred, £5108.

While this account was taking, an act of Parliament passed, whereby all the estates and effects of Coggs and Dann were vested in the respondents and several other persons, for the purpose of paying their respective debts. Besides the interest which Coggs had in the works, as one of the partners, he was also constituted perpetual treasurer of the partnership; and therefore the appellant, soon after he had obtained the master's report, filed his bill of revivor against the respondents as standing in Coggs's place, for a satisfaction of his said liquidated demand.

The cause was heard before the Lord Keeper Harcourt, on the 25th of January 1711, when it was ordered, that the former decree, and all subsequent orders and proceedings thereupon, should be carried into execution; and *in regard the plaintiff's demands were for wages, which ought to have been paid out of the money belonging to the said works*, it was ordered, that so much money as [481] the defendants had received for the produce of the said works that did belong to Coggs, or was due to him, on the 12th of January 1709, should be applied, *in the first place, to the plaintiff's satisfaction*; and if that money should not be sufficient, the defendants were decreed to pay the plaintiff what should remain due to him, out of the separate estate of Coggs, in proportion with the other separate creditors, and also his costs.

The defendants being dissatisfied with this decree, applied for and obtained a rehearing of the cause on the 8th of November 1712; when his Lordship declared that the act of parliament had considered the estate of Coggs and Dann, to be but one joint fund for the satisfaction of their or either of their joint and separate creditors; and that the plaintiff's debt arising upon the covenants entered into by Coggs and his partners, the proprietors of the said brass works, *and not as wages*: he ought to come in equally with the rest of the creditors of Coggs and Dann, or either of them, for satisfaction of the money reported due to him.

From this last decree the plaintiff appealed; insisting (J. Pratt, S. Dodd), that his money was not due from Coggs and Dann as goldsmiths, or from Coggs merely in his own right, but *as treasurer to the said partnership*; nor even in that capacity upon any separate agreement of his own, but on the covenants entered into by him and other proprietors, on behalf of themselves and all the partners of the said brass works. That the 3s. 6d. per hundred was declared by the *original* decree to be a *reward attending the produce of the said works*, and was always looked upon by the company as *wages or salary*, and allowed as such in their treasurer's accounts, and so considered also by *their Lordships* on the hearing of the former appeal. That the present proprietors and partners still reaped the full benefit of the appellant's service, the works being carried on according to his method, and in a very flourishing condition; and the appellant was still obliged by his articles, and the original decree, to repair again to the works whenever required, and to teach the said company's servants during his life. And that though the separate estate of Coggs should be liable in the first place (as it ought) to the satisfaction of the appellant's demands, yet the estate of Coggs and Dann, which was vested in the respondents as trustees for their creditors, would not be thereby lessened; because the proprietors and partners of the brass works were obliged to make good the same to the respondents, as they were the representatives of Coggs.

On the other side it was argued (F. Page), that the original decree was not made against Coggs, as *treasurer* of the works, but only as he had covenanted with the appellant, by the articles, to pay him the money absolutely; and not issuing out of or depending upon the profit or loss of the works. And as to the pretence, that the estate of Coggs or Dann, or their creditors, would not be lessened by payment of the appellant's debt, it was founded on a mistake, for the partners of the brass works were no ways obliged to make [482] the same good to the respondents. That the words of the act of parliament were plain, positive, and express, *That as well the joint as separate estates of the said Coggs and Dann shall be, in the first place, for the benefit of all and every the creditors of the said John Coggs and John Dann; and the respective executors and administrators of such creditors, and every of them, in proportion to their several and respective debts, justly and truly due and owing to them from the said John Coggs and John Dann, upon the 12th of January 1709; until all and every the creditors, or their respective executors or administrators,*

shall be fully satisfied and paid the full sum of 20s. in the pound for all such debts as were then really, justly, and truly due and owing to the said creditors. And therefore it was insisted, that the decree of the 25th of January 1711, so far as it gave a preference to the appellant, was a repeal of the said act of parliament; and that as the respondents were only trustees for the creditors, under that act, it would have been a breach of trust in them to have complied with such a decree, which could not have indemnified them against those creditors, they being no parties to the suit.

After hearing counsel on this appeal, and due consideration and debate of what was offered thereupon, the question was put, "Whether the said decree or order should be reversed?" which being resolved in the negative; it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree or order therein complained of affirmed. (Jour. vol. 19. p. 537.)

CASE 3.—JACOB JACOBSEN,—*Appellant*; BALTHASAR MENO HENNEKENIUS and others,—*Respondents* [20th April 1714].

[Mew's Dig. x. 368.]

A. agreed to take his nephew H. into partnership with him, and with his own hand made the following entry in a new set of books, viz. *Debtor to account of stock in trade, for so much stock I put into the company's trade, with my nephew H. £10,000.*—The name of H. was, for some time, used as a partner in all the transactions of the trade; but no articles were ever entered into between his uncle and him, nor was any part of the stock or profits received by or made good to him. This was held to be only a *nominal* partnership, and H. entitled to no account.

ORDER of the Court of Chancery REVERSED.

Theodore Jacobsen was a merchant of considerable business in London; and having a brother at Hamburgh, who had four children, he was desirous of breeding up Henry, the eldest of those children, as a merchant, with an intent that he might succeed him in his business.

[483] For this purpose, he sent for the young man to London; and, after some time, agreed to take him into partnership; accordingly, on the 25th of March 1695, Theodore opened a new set of books, and therein made an entry with his own hand, in the following words, viz. *debtor to account of stock in trade, for so much stock I put into the company's trade, with my nephew Henry Jacobsen, commencing from his day, to which God grant his blessing, £10,000.*

From this time, the name of Henry was used as a partner in all the transactions of the trade; but no articles were ever entered into between his uncle and him, nor was any part of the stock or profits received by or made good to him.

In the course of about two years, Theodore found that his nephew Henry had not that turn to business which was likely to prove advantageous to either of them; and therefore, on the 31st of December 1697, he took one Peter Selcken, his book-keeper, into partnership, and agreed to allow him one fourth of the profits from that time.

In 1700, Henry returned back to Hamburgh, and soon afterwards intermarried with the respondent Tetha Catherina; but, as this lady had no fortune, Theodore declined giving Henry that fortune which he had often promised him, namely, 10,000 rix-dollars, on condition of his marrying a woman of equal fortune; so that nothing but Henry's patrimonial estate was settled upon his wife and the issue of the marriage.

On the 1st of January 1701, the partnership books were cast up and balanced, and one fourth of the profits was answered to Selcken, and the other three fourths to Theodore; but no part of the stock or profits was ever answered to Henry, although he had then a separate account in his uncle's books, to which it might have been applied, if the partnership between them had been considered as real. But, so far from it, that on this balancing of the books, the name of Henry was left out, and the name of the appellant his brother inserted in its room: However, though the appel-

lant was capable of, and applied himself to business, yet, he had no part of the stock or profits until Michaelmas 1704; when, in consideration of his marriage to his uncle's liking, he was admitted as a real partner, and proper articles were executed on that occasion.

In 1704, Henry Jacobsen died intestate, leaving Tetha Catherina his widow, and two children by her, namely, the respondent Theodore Balthasar and Anna Eleanora; but Henry, in his lifetime, never demanded any part of the stock or profits of his uncle's trade, nor did his representatives ever make any claim on that account during his uncle's lifetime.

By deed, dated the 21st of January 1704, Theodore conveyed the Steel-Yard in London, for the then residue of his term therein, to the appellant and his brother Theodore, subject to the payment of several annuities, and particularly £75 per anna a-piece to the said two children of his deceased nephew Henry; and by his will, which he soon afterwards executed, he gave one fourth part of his [484] estate to those two children, and the residue to the appellant, and made him sole executor thereof.

On the 17th of July 1706, the testator died; and about three years afterwards the respondents thought proper to exhibit their bill in Chancery against the appellant, for an account of the testator's estate, and to have a sum of £10,000 settled, according to what was alleged to have been the testator's agreement upon Henry's marriage; also to have a moiety of the £10,000 stock, and of the profits of the trade during the partnership between Henry and the testator; and to have the annuity of £75 settled on the respondent Theodore Balthasar, (his sister Anna Eleanora being dead,) and the arrears thereof satisfied, together with a fourth part of the surplus of the testator's estate.

On the 2d of May 1712, this cause was heard, when the bill was dismissed as to the demand of the £10,000; but the Court declared that the testator and his nephew Henry ought to be looked upon as partners, and that such partnership did not arise by contract, but by the testator's bounty; and was a partnership in moieties for the said £10,000, and ought to be so carried on from Lady-day 1695 to January 1701. And therefore, an account was decreed to be taken thereof accordingly, and that what should appear to be the capital stock of the said partnership, and the produce thereof, after a deduction of Salcken's one fourth part of the profits, for the time he was to have the same, in lieu of his salary, should be divided into moieties; one moiety whereof was to be paid to the respondents, with interest from the end of one year after the testator's death, out of his personal estate; and an account of such personal estate was directed, and the surplus thereof was decreed to be divided according to the testator's will; and the appellant was decreed to account for and pay the arrears and growing payments of the annuity of £75 to the master, for the benefit of the respondent Theodore Balthasar, who was then an infant.

Some time after pronouncing this decree, the appellant, on searching into some old trunks and boxes which belonged to the testator's brother, the father of his nephew Henry, and which upon his death had been sent to the appellant from Hamburgh, found two letters, one of which was written by the testator to his brother, concerning his son Henry, and the other was written by Henry himself to his father, with a postscript added thereto by the testator: the first letter was dated the 6th of March 1693, and therein the testator, after speaking of the age, education, and weak constitution of Henry, expressed himself as follows: "It is not as yet advisable for marriage, which notwithstanding, to please his humour, you can keep his fancy up with.—I stand in thoughts to have his name used with mine; that, if he lives, his name may be known, and succeed me. To tell you for your comfort, I set apart for him 20,000 rix-dollars whenever he marries, if I live; and if I die before, to inherit the same as a patrimony, which he is to expect from you, renouncing and [485] acquitting you, what has been stipulated and agreed, after his mother's death; so that his estate is not diminished. If a good match present, of a woman with an equivalent portion of 20,000 rix-dollars, it might be proposed, that both their fortunes may be settled on trustees, for the benefit of them and their children." The testator then added, "That if Henry and his wife would come over, he would give them their diet; and half commission to Henry for ten years, until his brother Jacob (meaning the appellant) should be of age." The other letter was dated the 17th of the

same month, and the testator's postscript thereto was in the following words: "As to your son Henry, I refer to what I write to you on the 6th instant; pray let your thoughts be employed thereon. It is upon those conditions and design, I intend to use his name with mine; but, on the contrary, if he doth not succeed in such a match, then he is to expect no benefit from the trade, etc., but what I intend, shall leave him by will."

The decree having been signed and inrolled, the appellant could not, upon the discovery of these letters, rehear the cause; and therefore, in Easter term 1713, he led a bill of review, assigning several errors in the body of the decree; and insisting on the new matter contained in the letter and postscript, as an evidence that the partnership between the testator and Henry was merely nominal.

To this bill the respondents put in a general demurrer; and the same being argued on the 19th of June 1713, the court were pleased to allow it, and order the bill of review to stand dismissed with costs.

But from this order, and also from so much of the former decree as declared the partnership to be real, and directed an account to be taken of the stock and profits hereof, the present appeal was brought; and, on behalf of the appellant, it was said P. King, N. Lechmere) to be extremely clear, from the two letters above-mentioned, that the testator, before he inserted the name of Henry in partnership, declared, that he using his name was with no other intent or design than to make him known in the world, and succeed him in his business; explaining it to be only a nominal partnership, by saying, that he would make him a real partner in commission; and this too, under a condition which was never performed on the part of Henry, viz. his marrying a woman with a fortune of 20,000 rix-dollars. That if, by the expression in the first letter, of using Henry's name with his own, the testator had intended him to be a real partner in the whole business; he would not afterwards in the same letter, and by way of reward to Henry to come from Hamburgh, have made him an offer of a partnership in commission only; which was but a part of the business, for a limited time, and subject to the above condition. That when these two letters were considered together, it should seem as if the testator thought the patrimony settled on Henry by his father [486] sufficient; for the intentional gift of 2,000 rix-dollars was on two conditions; the one of marrying an equal fortune, the other of relinquishing that patrimony; or, in other words, the testator's bounty was meant to ease his brother of the settlement, and give his nephew an opportunity of succeeding him in business, with a present reward of commission, if the nephew could come over to him. That in the style of the supposed partnership, the stock as declared to be brought in solely by the testator, and no gift or allotment was made any part of it to the nephew; but if the testator had made him a real partner, he must have carried one half of the stock and profits, till Selcken was taken in, to the account of Henry, who had a separate account in the testator's books; and in that case, the testator could not have given away to Selcken any part of Henry's half of the stock, or carried the whole profits to his own account, as he had done. That it was expressly in proof, that the partnership was apprehended and taken to be merely nominal; that the testator finding Henry incapable of business, and consequently unfit for his purpose, had taken the appellant in his stead, as a nominal partner also, in the same books and stock, and the increase thereof; that Henry's name was then omitted, and no credit given him for any part, either of the stock or profits; and that all this was done without the intervention of Henry, or any objection made to him on his behalf. That the testator's personal estate would not answer a moiety of the stock of £10,000, with its profits and interest; and therefore, it was not to be conceived that so exact an accountant as the testator was, and who knew what he was worth, would, within a month of his death, have given so many legacies by his will, without leaving any thing wherewith to satisfy them. That there was no proof tending to shew that Henry was a partner, either real or nominal, but the style in the books, and the using his name with the testator's; but this was not, among merchants, deemed sufficient of itself to constitute a real partnership, much less when opposed by several plain facts and circumstances, explaining it to be but nominal; and therefore it ought not to have been decreed a real partnership, or at least not till an issue at law had been tried, and a verdict found in affirmance of it. That if Henry should be esteemed a real partner, without articles or any valuable

consideration, the appellant, for the same reason, ought to be so likewise before his articles; the title and interest of each subsisting exactly upon the same foundation, consequently the claim of each upon the testator's estate was equally just, and ought to have been alike provided for by the decree, before any distribution was ordered to be made of the surplus. That the decree was also erroneous, in ordering the appellant solely to pay the arrears and growing payments of the annuity of £75; for by the deed which granted that annuity, it was to be paid jointly by the appellant and his brother Theodore, to whom the premises subject to it were conveyed. Lastly, that the bill of review ought not to have been dismissed, [487] or the demurrer thereto allowed; on the contrary, the respondents ought to have been compelled to answer the new matters contained in that bill, so that the appellant might have had an opportunity of proving the same, and have had his cause heard on the merits: it was true indeed, that the two letters and postscript were in the appellant's custody at the time of making the decree; but it was also true, that he knew nothing of them till after the decree was signed and inrolled, and therefore their being in his custody without his knowledge, was the same as if they had not been in his custody at all; as it could not be presumed that he would have wilfully neglected to produce such very material evidence: besides, if these letters should, through the appellant's omission, be precluded from being read, a third person, who was no party to the decree, would be thereby prejudiced; for the appellant himself was no farther concerned in interest, than barely as it tended to increase or diminish his one fourth of the surplus of the testator's personal estate; but his younger brother Theodore would be the sufferer, to whom the testator had by his will given upwards of £9000 to be paid before any division of the surplus.

On the other side it was contended (S. Cowper, W. Norris), that the books, letters, etc. made no distinction in the partnership; because both the appellant and Selcken, who brought him nothing, were let into the partnership in the same manner and in the same books. That there were no proofs in the cause, by which a mere nominal partnership could be evidenced; for as to the testator's taking in all the stock and profits to his own use, and carrying them to his own private account, without giving Henry credit for any part thereof; it was so far from being true in fact, that, in every year the accounts of profit and loss were stated in the books of the partnership; expressing how the monies had been paid, what the clear profits amounted to, how the testator had from time to time endeavoured to improve the same, and in what manner the alteration of the partnership between himself and his two nephews had been made: To suppose, therefore, that the testator never intended Henry should have any payment in respect of the £10,000 stock, or the produce of it, was to suppose a matter directly contrary to what appeared under the testator's own hand, and in all his books; and as Henry was doubtless subject to all the partnership debts, it could not be presumed that he was not a real partner. And as to the appellant's objection, respecting the payment of the annuity of £75, he was the only person against whom this payment could be decreed, being the sole executor of the testator's will: wherefore, as the bill of review was in every part of it frivolous, veratious, and inconsistent with the rules and practice of a court of equity, it was with great propriety and justice dismissed.

BUT after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order of the Court of Chancery of the 19th of June 1713, whereby the demurrer was allowed, and the bill of review ordered to stand dismissed, should be reversed; and [488] it was further ordered, that the Court of Chancery should proceed to rehear the cause, when the same should be ready for rehearing.\* (Jour. vol. 19. p. 662.)

\* On searching the register's office, it appears, Lib. A. 1716. fo. 103. that in pursuance of this order, the cause was heard on the 26th of February 1715; when, upon reading the two letters, and the entries in the testator's books, the Lord Chancellor declared the case to be dubious; and therefore ordered, that the parties should proceed to a trial at law in the Court of King's Bench, upon this issue, viz. "Whether the nephew Henry was really or only nominally a partner with his uncle the testator; and if really a partner, whether he was a partner for any and what part of the said stock of £10,000, or the profits thereof, and from what time;" and after such trial, either party was to be at liberty to resort back to the Court: but the Master was.

[489] CASE 4.—JOSHUA MINNIT,—*Appellant* ; JOHN WHINERY,—*Respondent*  
[21st June 1721].

Three persons entered into partnership in the trade of sugar-boiling, and it was agreed, that no sugars should be bought without the consent of the majority; one of them afterwards withdraws himself from the partnership, of which he gives public notice; and, subsequent to this, the two other partners make a contract with A. for a large quantity of sugar, who had full notice that the third partner had withdrawn: Held, that such third partner was not answerable for any part of the sugar so purchased.

DECREE of the Irish Chancery REVERSED.

The determination is stated to the above effect in MSS. Tab. and 16 Vin. The case seems too clear for dispute.

Viner, vol. 16. p. 243. ca. 12. by the name of *Minnit v. Whitney*.

In September 1716, Thomas Minnit, Joseph Jopson, Richard Boles, and James Ylar, of the city of Dublin, merchants, agreed to become partners for carrying on the trade of sugar-boiling; and by certain articles entered into on that occasion, dated the 21st of September 1716, it was, *inter alia*, stipulated, "That none of the said partners should buy any sugars for the trade in partnership, without the consent of a majority of the partners; and that if any of them should buy sugars without such consent, the same should be at the risk of the person so buying them, and the other partners should not be any way liable to the payment of the same."

The trade was carried on for some time pursuant to these articles; and in June

the mean time, to take an account of the testator's assets, pursuant to the directions of the former decree; to the end that the fourth part of what should appear to be the value of the testator's personal estate might be set apart and preserved for the intestate's benefit, according to the said former decree: And the £50 deposited with the register on the bill of review, were to be paid back to the (then) plaintiff Jacob Jacobson; but the £10 deposited by him with the register on the rehearing, pursuant to the order of the House of Lords, were to remain with the register till after the trial. That a trial was accordingly had, when a verdict was found, that the partnership was nominal only, and not real.—That on the 3d of November 1716, the cause was ordered upon the equity reserved; when his Lordship ordered, that as to any account of the partnership the matter of the original bill should stand dismissed, and that so much of the decree of the 23d of May 1712, as related to that matter only, should be set aside; but that the rest of the decree should stand with this addition, that the said Jacob Jacobson should be examined upon interrogatories, touching the account thereby directed, as the Master should appoint; and that the Master should state any matter in dispute, on the account by the former decree directed to be taken, as he should think fit.

And the counsel for the said Jacob Jacobson alleging, that the plaintiffs in the present cause did, by their bill, demand the sum of £10,000 as the marriage portion of the said Jacob Jacobson's daughter, promised him by the testator, touching which demand, the bill was upon the rehearing dismissed; and that they had since failed in their demand relative to the dissolved partnership; the said counsel therefore prayed, that the said Jacob Jacobson might have his costs, to be paid by the other side: his Lordship ordered, that both parties should have their costs out of the testator's estate, to be taxed by the Master; the said testator having by a formal fiction in his books of account occasioned this expense: but if the Master could distinguish the costs which related to the demand of £10,000 portion from the other costs, it was ordered, that as the plaintiffs in the present cause were not to pay costs, they were not to have any costs in respect of the demand, but they were to have their costs in respect of the question relative to the dissolved partnership; and if, since the former decree, the said Jacob Jacobson had paid any sum or sums to the defendants, or any of them, in consequence thereof, such sums were to be allowed him by the Master, in the accounts still remaining to be taken pursuant to that decree; and he was also to be paid the £10 deposited with the register, on obtaining the rehearing.

1717, Thomas Minnit having purchased Fylar's share, became entitled to a moiety of the whole; but being dissatisfied with the conduct of Boles and Jopson, the other partners, he gave them notice in September following, that he would be no longer concerned in the joint trade, and would withdraw or dispose of his share of the stock; and he also caused an advertisement to that effect to be fixed and published on the Exchange.

Subsequent to this notice, viz. in October 1717, Boles and Jopson treated with the respondent for the purchase of 100 casks of raw sugar, at the price of £1000; and Minnit being informed of this treaty, went to the respondent and told him that he (Minnit) was no longer concerned in the said partnership, and would not therefore be accountable for any sugars which Boles and Jopson might buy, under colour of the said partnership or otherwise; to which the respondent answered, that he was satisfied with the security of Boles and Jopson only, and would sell them his sugars on their own account and credit.

The respondent accordingly sold the sugars to Boles and Jopson, and took four promissory notes in their own names only, for the money, payable by instalments; but a separate account was kept [490] of the sugars, and they were not blended with the common stock of the partnership.

In January 1717, Thomas Minnit, for a valuable consideration, assigned all his share and interest in the stock to the appellant; and about the same time Boles became a purchaser of all Jopson's share and interest therein; and soon afterwards the appellant and Boles entered into a new partnership together, on which occasion Boles took credit for 18 hogsheads of raw sugar, which was the then residue of the sugar bought of the respondent.

Before the notes which the respondent had taken from Boles and Jopson for the amount of the sugar were all paid, they failed and absconded; whereupon, in June 1718, the respondent filed his bill in the Court of Chancery in Ireland against the appellant and Thomas Minnit, in order to recover payment of £600 and upwards, which he alleged to be remaining due upon these notes; suggesting, that he sold the sugars on account of the partnership.

The appellant, by his answer, stated the several facts above-mentioned, relative to the purchase of the sugar; and insisted, that he was not liable to the payment of any thing which might remain due on that account.

The said Thomas Minnit also answered the bill, and swore that he gave notice to the respondent not to trust Boles and Jopson with the sugars on the partnership account. But, upon hearing the cause on the 28th of January 1720, the Lord Chancellor was pleased to decree, that the appellant should pay the respondent the money remaining due for the said 100 hogsheads of sugar so sold to the said Boles and Jopson; and referred it to a Master to ascertain how much remained due to the respondent on the aforesaid notes, and the interest of the same, from the time the said notes were respectively payable.

From this decree the defendant Joshua appealed; insisting (T. Lutwyche, C. Phipps), that he was never concerned in the original partnership, but only purchased Thomas Minnit's share of the stock for a valuable consideration, after the respondent had sold the sugars to Boles and Jopson, on their own credit, and after the partnership between them and Thomas Minnit was discontinued. That the sugars were bought without the consent of Thomas Minnit, after the respondent had full notice of the partnership being discontinued, and was warned not to trust the sugar on the partnership account. That the respondent sold and delivered the sugar to Boles and Jopson, on their own separate account and credit, and took their own promissory notes for the same, declaring himself satisfied with their security; and was accordingly paid part of the money by them, or one of them. That the sugars were kept separate from the stock of the partnership, and distinct accounts were kept concerning them, and no part thereof brought to the appellant's account as a partner. That Boles, in a general account between him and the appellant, esteemed and charged these sugars as his own property; and accordingly had credit given him for the 18 hogsheads there [491] of which remained unsold. But if either the appellant or the said Thomas Minnit were any way chargeable with the money, or any part thereof, it was not a matter properly determinable in a court of equity, but a mere action



at law, for goods sold and delivered ; in which action the merits might properly have been tried.

On the other side it was argued (R. Raymond, S. Mead), that the sugars were bought of the respondent for the benefit of the partnership, *by a majority of the partners* ; and particularly by Jopson, who had the chief management and direction of the sugar-house, and were accordingly put into the common stock ; and that the appellant, becoming assignee of the partners, and standing in their place, ought, in justice and equity, to pay the respondent the remainder of his said debt. And the rather, because the appellant became concerned in the partnership, directed these sugars to be mixed and worked up with the other common stock, and thereby converted the same to his own use ; and expressly agreed to make good what remained due to the respondent out of the old and new stock of sugar.

BUT, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree should be reversed, as to the appellant ; and that the respondent's bill, as to him, should be dismissed with costs : And it was further ORDERED, that the proper officer of the Court of Chancery in Ireland should tax and ascertain the said costs accordingly ; and the same, when ascertained, were forthwith to be paid to the appellant by the respondent ; and that the said Court should take care to put this judgment into effectual execution. (Jour. vol. 21. p. 548.)

CASE 4.—HENRY BROWNE and others,—*Appellants* ; RICHARD GIBBINS,—*Respondent* [21st February 1725].

[Mew's Dig. x. 424. See *Croxton's Case*, 1852, 3 De G. and S. 432.]

- A. on behalf of himself and his partners, enters into contract with B. for the purchase of a certain commodity, but the name of A. only was made use of in the contract. This contract not being performed by A. an action was brought, and a verdict recovered against him. On a bill filed by A. against his partners, to contribute their shares of the damages and costs ; held, that they were liable so to do, having paid a proportion of the deposit, and being entitled to an equal share of the profit if any had been made.

DECREE of the Master of the Rolls and Lord Macclesfield, C. AFFIRMED.

The respondent, getting his living in Exchange-alley by selling lottery tickets and India bonds, became acquainted with the appellants in the month of August 1720, who agreed to become partners with him in the purchase of fifteen shares of Welsh copper ; and, in pursuance of such agreement, the respondent on the [492] 19th of that month, bought of one Miller a broker, who was agent for Francis Sawle, those fifteen shares at £50 per share, amounting to £750 ; and Miller and the respondent were each to deposit £100 a-piece, to secure the performance of this contract ; and the shares were to be transferred at the next opening of the books. Whereupon the appellants and the respondent jointly, advanced equal proportions of the £100 being each a seventh part thereof, amounting to £14 5s. 8½d., which was accordingly paid into the hands of Messrs. Green and Eades, goldsmiths, as a deposit to secure the performance of the agreement on the part of the appellants and the respondent ; Miller at the same time also depositing the like sum of £100.

Soon afterwards, a proclamation issued to prevent persons making or accepting of any assignment or transfer of any stocks, of any company, without legal authority by act of parliament or charter, to warrant such body corporate to transfer shares therein ; and a *scire facias* issuing against the Welsh copper company, the respondent, for fear of incurring the penalty mentioned in the proclamation, if he accepted the said stock at the opening of the books, did not accept the same : Whereupon Sawle commenced his action in the Court of King's Bench against the respondent, upon which he was arrested and held to bail in £800 and kept in custody for want of bail, three days ; and after he had put in bail, he acquainted Browne and Clarkson, two of the appellants, with the same, who agreed that the action should be defended,

## PARTY.

CASE 1.—JAMES REILLY and others,—*Appellants*; ROBERT WARD,—*Respondent*  
[7th May 1717].

Where a person is made a party to a bill, but not served with any process, no decree ought to be made, and much less a decree affecting the right of such person.

DECREE of the Irish Chancery REVERSED.

It is plain that the very intent of a person being made a party is merely frustrated if no process is served on him. See note at the end of this case.

Viner, vol. 16. p. 254. note to ca. 46. 2 Eq. Ca. Ab. 631. ca. 3.

In the year 1636, Luke Earl of Fingall married Mabel Countess of Fingall; and in consideration of that marriage, and of the lady's portion, the lands of Stirropstown, Clangowna, and Killallan in Ireland, were settled on Mabel for life, for her jointure, with remainder to the Earl in tail male.

After the death of Earl Luke, the said Mabel Countess Dowager of Fingall, in the year 1650, married one Colonel Barnewall, and he being afterwards attainted of high treason, on account of the Irish rebellion in 1641, the jointure lands of his said wife became forfeited, and were afterwards sequestered and distributed amongst the soldiers and other adventurers; from some of whom one Stirrop obtained some lease, or other conveyance thereof.

[496] In 1663, Luke Earl of Fingall, who was the issue in tail male, was declared and decreed an innocent person, by the commissioners appointed to put the *act of settlement* in execution; in consequence whereof, he was restored to all his lands in Ireland, and particularly to the reversion and inheritance of the jointure-lands from and after the death of the said Countess.

Earl Luke afterwards died, leaving issue Peter Earl of Fingall, whose constant residence was in England.

In 1707 Countess Mabel died, whereupon Earl Peter sent directions to his agent in Ireland to take possession of the jointure-lands, and this was accordingly done in a quiet and peaceable manner; for, the occupiers thereof being sensible of his lordship's title, readily agreed to attorn tenants to him; and he, consequently, received the rents and profits of the premises for several years after, without interruption.

But in Easter term 1713, the respondent exhibited his bill in the Court of Chancery in Ireland against the appellants, and also against the said Peter Earl of Fingall and one Garrett Hogan and Christopher Murphy, stating, that the plaintiff had possessed of the said lands of Stirropstown, Clangowna, and Killallan, by virtue of a lease made by one Sarah Peppiat for 21 years, commencing from the 1st of May 1704, demised the same to the said Garrett Hogan for seven years from Lady-day 1705, who granted under-leases of several parcels thereof to the defendants James Hogan, Charles Bessey, and James Lamb.—That Joseph Gibson, the plaintiff's agent, did, in 1706, demise other part of the premises to the defendant Christopher Murphy for a term of five years; and which lease was, by assignments, become vested in defendant James Reilly:—and, that the plaintiff having no counterparts of the leases so granted by him and his agent, the defendants and their under-tenants, the determination of their said several terms, not only refused to pay him any rent but attorned tenants to the defendant the Earl of Fingall, who pretended some right or title to the premises, and had made a lease thereof to some of the other defendants and therefore the bill prayed, that the plaintiff might be restored to the possession of the said lands, and that the defendants might account with him for the rents and profits thereof.

The defendant Garrett Hogan, by his answer to this bill, admitted that the plaintiff had granted him a lease of part of the premises, for six years only, from Lady-day 1705, and that he demised the same to the defendant Charles Bessey and others, who, without his consent or privity, gave up the possession thereof to the Earl of Fingall in March 1711, and who (as the defendant was advised) was the true owner and proprietor of the premises so demised.

between the respondent and Miller, as the agent of Sawle, nor knew any thing of it till afterwards, and even then were strangers both to the respondent and Sawle. That the only agreement which the appellants entered into was, to advance their respective shares of the deposit, after the respondent had made the agreement in his own name only, and without taking any notice of them; and they were to run no other risk in that agreement than the forfeiture of their proportions of the deposit, in case the stock should not be worth acceptance; but were not to be obliged, in all events, to take the stock: Besides, the appellants had no receipt for the money which they advanced, nor any note or agreement under the respondent's hand, to oblige him to give them their proportionate shares of the advantages of the bargain, in case any should arise. That the action between Sawle and the respondent was apprehended to be collusive, in regard Sawle offered to acquit the respondent from the contract for twenty guineas, but which he refused to give: Sawle likewise offered to acquit the respondent, upon his allowing him to take the deposit, but which he also refused, and never communicated either of these proposals to the appellants. That the suit in Chancery, as between the respondent and Sawle, was amicable; the respondent having neither replied to Sawle's answer, or moved for an injunction, or examined any witnesses; although by his bill he not only prayed an injunction, but also to have the contract delivered up. That there was no proof in the cause that the contract was registered in time, or that Sawle was possessed of stock according to the act of 7 Geo. I. *for restoring public credit*; neither was it in proof that Sawle ever transferred or tendered the stock in question to the respondent; but which ought to have been proved to the satisfaction of the Court. That the appellants not being parties to the action at law, and therefore not able to make a defence thereto, ought at least to have the benefit of a trial at law; not only as to the validity of the contract in the several respects aforesaid, but also as to the point, whether the appellants forfeiting their shares of the deposit would not or did not avoid the contract, as between them and the respondent.

On the other side it was contended (T. Lutwyche, C. Talbot), that the contract for the purchase of the stock, though made in the respondent's name only, was so made on account of all the partners; that the appellants, in pursuance thereof, paid each their proportion with the respondent of the deposit, and would have been entitled to an equal share of all profit, if any could have been made thereon; and therefore ought, in equity and justice, to bear their proportion of all loss by the contract, and not leave the same wholly upon the respondent, who, as to the shares of the appellants therein, acted only as their trustee. That the appellants having suffered the respondent alone to be prosecuted at law upon this [495] contract, and having previous notice of the trial given to each of them respectively, ought to have assisted the respondent in making a defence; but as they neglected to do so, they ought to be equally bound with him by the event of the trial. That Sawle having, upon the trial made all the proofs required by law, and having thereupon recovered a verdict for £650 it was but just and reasonable that the appellants should pay their proportions thereof, the respondent having done all that lay in his power to prevent the same, and especially as it was not in his power to make any composition with Sawle without the joint consent of all the appellants, who never could be prevailed upon to meet together for that purpose. It was therefore hoped that the said decrees, report, and proceedings would be affirmed, and the appeal dismissed with exemplary costs.

ACCORDINGLY, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and that the decree, affirmance, and order therein complained of should be affirmed. (Jour. vol. 22. p. 601.)

CASE 2.—EDWARD EDGORTH,—*Appellant* ; ROBERT EDGORTH,—*Respondent*  
[26th June 1721].

Where a person derives title under a dormant settlement, all the remainder-men in that settlement, as well as all mesne incumbrancers on the estate, must be made parties to the suit.

ORDERS of the Irish Court of Exchequer REVERSED. See note to Case 3.

Viner, vol. 16. p. 254. ca. 52. 2 Eq. Ca. Ab. 632. ca. 8.

Sir Edward Tyrrell bart. being seised in fee of the town and lands of Longwood and several other lands in the counties of Meath, West-Meath, Kildare, and King's County in Ireland, died in the year 1690, leaving issue Catherine his only daughter and heir, the appellant's mother.

The said Sir Edward Tyrrell was, after his death, outlawed for high treason; by means whereof, the said lands, which would otherwise have come to Catherine his said daughter and heir, were seised into the hands of their Majesties King William and Queen Mary.

But there being a prospect of reversing that outlawry, as being erroneous, the respondent proposed to marry the said Catherine; and having obtained the consent of Dame Elinor Tyrrell, her mother, certain articles were entered into, between the respondent of the one part, and the said Dame Elinor Tyrrell, on behalf of herself and her said daughter Catherine, of the other part, dated the 5th of July 1692, whereby it was agreed, that whenever the said Catherine, or the respondent in her right, should be restored to the estate of the said Sir Edward Tyrrell, or any part thereof, [499] the same should immediately be settled on the respondent and the said Catherine, for their lives, and the life of the longer liver of them; remainder in tail male to the first son of the respondent by the said Catherine, with other remainders over: and that there should be a provision for the said Dame Elinor, during her life.

The marriage soon afterwards took effect, and Sir Edward's estate being by the act of resumption vested in the trustees appointed for sale of the Irish forfeitures, it was afterwards, by a private act of parliament made in the first year of Queen Anne, enacted, that the said trustees should convey all the estate forfeited by the said Sir Edward Tyrrell to the respondent and the said Catherine, and their heirs, discharged of all forfeitures. And by deeds of lease and release, dated the 8th and 9th of October 1702, the said trustees conveyed the same accordingly.

The respondent and Catherine being thus seised, did, by deeds of lease and release, dated the 24th and 25th of December 1703, in pursuance of the said articles, and for the considerations therein mentioned, convey unto Francis Edgorth esq. and his heirs, all the said premises, by the particular denominations in the said deeds expressed, to the use of the respondent and the said Catherine for their lives, without impeachment of waste; and from and after the death of the said respondent and Catherine, to the use of the appellant, their eldest son, during his natural life: remainder to the said Francis and his heirs, for preserving the contingent uses: remainder to the appellant's first and other sons in tail male, with several remainders over. With a power for the respondent and the said Catherine to charge portions for younger children, not exceeding £1000; and a power for the appellant, after the death of the respondent and the said Catherine, to settle a jointure on any wife he should marry, not exceeding £300 per ann.

In 1707 the said Catherine died, and the respondent, in some few months after, married a second wife; and notwithstanding the said articles and settlement, took upon himself to make fee-farms and other long leases of part of the premises at small rents; and to mortgage and sell other part thereof, and publicly notified, that he intended to sell the residue of the said premises.

By these means, and also on account of the appellant's marrying against the respondent's consent, great misunderstandings subsisted between them, insomuch that, on the 21st of December 1717, the respondent exhibited his bill in the Court of Exchequer in Ireland against the appellant, alleging, that neither he, the respondent, or the said Catherine, ever made or executed any articles before their intermarriage.

or any settlement of the said premises; and therefore prayed that if the appellant did insist on any articles and settlement, he might be obliged to shew cause why the same should not be brought into court and lacerated.

[500] To this bill the appellant put in his answer, and thereby insisted, that the respondent and the said Catherine were but tenants for their respective lives, with remainder to the appellant for life, with several remainders over, as aforesaid; and that the respondent and the said Catherine, or either of them, had not any power to sell or incumber the premises, or any part thereof, any longer than during their respective lives.

The cause being at issue, witnesses were examined on both sides; and on the part of the appellant the reality of the articles and settlement was not only proved by a living subscribing witness to the articles, who was half-sister to the said Catherine, and examined on behalf of the respondent himself, but also manifested by many other concurring evidences; such as the confession of the respondent, recitals in several deeds executed by him and Catherine, some whereof were of his own hand-writing, indorsements written by the respondent on the back of the articles, and on another parchment which contained the said articles and settlement, mentioning the same to be papers and deeds of value; several letters written by the respondent and the said Catherine, some whereof had been exhibited in a cause depending in the said Court of Exchequer in the year 1706, wherein Bryan Kernan and his wife were plaintiffs, and the respondent and his wife were defendants, as appeared by the depositions and certificate of Mr. Garstin the examiner: It also appeared in proof that the respondent attempted to destroy the said articles and settlement, and that the appellant's mother having prevented the same, the respondent used harsh methods in order to compel her to join with him therein, and in sales and mortgages of part of the said premises; and one Constantine Molloy, formerly clerk to the attorney who was concerned for the respondent in the management of his affairs, proved that the said deeds of settlement were all of the said Molloy's own hand-writing, and were written by him, on or about the time they bore date, by the direction of the respondent's said attorney.

On the part of the respondent it was proved, that the person pretended to be the living witness to the marriage-articles had frequently declared, on the appellant's first making his pretensions, that she never was a witness to any such articles, nor did she believe any settlement was ever made; and that she was well assured, the Lady Tyrrell, never after the death of her husband, was able to maintain herself, without the respondent's assistance: That the other pretended witness to the articles, who was dead, held no correspondence with Lady Tyrrell, or the respondent, or his wife, at or near the time when he is supposed to have been a witness to the articles: That Francis Edgworth, the only trustee named in the settlement, was at great variance with the respondent at, and both before and after the date of that settlement, and was not at Longwood, where the settlement was pretended to have been executed at or near that time: That both the articles and settlement appeared to be of one and the same hand-writing with [501] eight letters, proved to have been written by the appellant: That from many declarations made by the respondent, and his late wife the appellant's mother, and even by the appellant's own witnesses, at several times in the year 1704, and afterwards, it appeared that no such pretended settlement was ever made: And, that the appellant had often written the respondent's name so like his hand that it could not be distinguished from his own writing.

On the 13th and 14th of November 1719, the cause was heard; when, on reading part of the appellant's proofs, the Lord Chief Baron declared, that the appellant had made sufficient proof of the reality of the articles and settlement; and that, as this case was circumstanced, it would be a dangerous precedent to direct an issue to try the reality of them: But it was nevertheless ordered, that the appellant should be examined on personal interrogatories, in relation to the said deeds, articles, letters, and exhibits read on that hearing.

In pursuance of this order, the appellant was personally examined on interrogatories exhibited to him by the respondent: And the cause coming again to be heard on such examination, as well as on the pleadings and proofs, on the 20th of February 1719, the Lord Chief Baron then declared his opinion, that the respondent being only tenant for life under the said articles, with remainder to the appellant, and

no purchasor being before the Court; no more could be regularly done, than to put the deeds into safe hands: however, it was ordered, that the cause should stand over, and that the respondent should, in the mean time, make all the tenants in possession, and all the incumbrancers and purchasors deriving under him, parties to the bill.

On the 27th of May 1720, upon the respondent's motion, and in the absence of the Lord Chief Baron, it was ordered, that such only of the tenants as had leases exceeding 21 years, in possession or reversion, on the 20th of February 1719, should be made parties to the bill; notwithstanding it was urged by the appellant's counsel, that the aforesaid order was made on a hearing, that it could not be altered, on a motion, without a re-hearing; and that the respondent might have made leases for 21 years, before and since the 20th of February 1719, contrary to the power reserved to him by the articles and settlement.

The respondent accordingly amended his bill; but immediately obtained an order, in the absence of the Lord Chief Baron, for setting down the cause to be further heard, without bringing any of the purchasors or incumbrancers before the Court.

On the 16th of November 1720, the cause was accordingly heard before Mr. Baron Pocklington and Mr. Baron St. Leger, in the absence of the Lord Chief Baron; and upon reading several of the appellant's proofs, the Court was pleased to order a trial at law on the following issues, viz. Whether the articles, bearing date the 5th day of July 1692, were perfected by the respondent and Elinor Tyrrell, previous to the intermarriage of the respondent [502] and the said Catherine, or at any other and what time? and whether the deeds of lease and release, bearing date the 24th and 25th days of December 1703, were perfected by Catherine Edgworth, Francis Edgworth, and the respondent, at Longwood in the county of Meath, on the day they severally bore date, or at any other and what time?

The appellant, on the 23d of February following, applied to the Court, that the several proofs and letters read in the cause might be duly entered in the notes, in pursuance of a former order: but Mr. Baron St. Leger, in the absence of the Lord Chief Baron, was pleased to declare, that the order for having the letters entered as read, was made on a further hearing, and that was no ingredient on the hearing: and therefore not only refused the motion, but at the same time ordered the issues to be taken as found against the appellant; notwithstanding the appellant's counsel urged, that a hearing and further hearing were but as one hearing; and that the said proofs and exhibits were admitted and read as evidence in the cause, before the Lord Chief Baron, and that there could be no objection to them: and on the same day, the Court was pleased to refuse, that the several exhibits which were proved *vivâ voce* at the hearing of the cause, might be marked and signed by the officer, to shew that the same were proved and read.

The appellant therefore appealed from these several orders of the 27th of May, 16th of November, and 23d of February 1720, insisting (T. Lutwyche, S. Mead) that the bill ought not to have been retained or countenanced in a Court of Equity, unless the charge had been supported by some evidence sufficient to found a decree upon, or at least to induce a suspicion; but the respondent having failed therein, and not having suggested any matter proper for the cognizance of a Court of Equity, his bill ought to have been dismissed, with costs. That it was apprehended, the appellant had made out his case so clearly, that there was no ground or foundation for directing any issue, nor any room left for the Court to conceive or entertain the least doubt. That the several incumbrancers and purchasors claiming under the respondent were not brought before the Court according to the orders of the 20th of February 1719, and 27th of May 1720, neither were the persons who appeared to be entitled to estates in remainder, by virtue of the said articles and settlement, made parties to the suit; without which, no trial or decree could be effectual, available, or conclusive. That the issue was so worded, as to leave room for a jury to find against the appellant, although the reality of the articles and settlement had been ever so well proved; for the issue was to try whether the deeds of lease and release of the 24th and 25th of December 1703, were perfected by Francis Edgworth, Catherine Edgworth, and the respondent, at Longwood in the county of Meath, when it appeared, that the subscribing witnesses to those deeds were dead; so that it was impossible to give any evidence of the place where they were executed: besides, it was altogether

immaterial to make the place [503] any part of the issue, and there was still the less reason for doing so, as this case was circumstanced, because the respondent's house at Longwood happened to be situate in two counties, one part thereof being in the county of Meath, and the other in the county of Kildare. That the Court, on the 23d of February 1720, not only refused to admit some of the appellant's proofs, read in the cause, to be regularly entered in the minutes, but at the same time ordered the issues to be taken as found against him, though no declaration had been filed or delivered by the respondent, and though these issues were directed in an improper manner, and without any foundation. That the denial of the appellant's motion for obliging the officer to mark the exhibits, to shew that they were read in the cause, was apprehended to be a practice of very dangerous tendency; and such as, if tolerated in inferior Courts, might prevent persons from appealing against their orders or decrees, or shewing their grievances in a full and clear light. And therefore it was hoped that the said orders would be reversed, and the respondent's bill dismissed with costs.

On the other side it was contended (C. Phipps, T. Bootle), that the order of the 27th of May, directing the lessees of the premises in question to be made parties, was a favour to the appellant, to the end that they might be affected with notice of the articles and settlement, in case the same could be established; and that directing issues to try the validity thereof, would be establishing by a judgment at law a right in the appellant, which otherwise he could not bring in issue till after the respondent's death. That the last order of the 23d of February was likewise just, as the appellant, by refusing to try the point in question upon the issues directed, tacitly owned, that he could not support either the articles or settlement, and therefore it was but reasonable that the respondent's title should be quieted. That from the nature of the respondent's proofs, as well as from the variations in the matters and powers contained in the pretended articles and settlement, it was evident, that neither of them were duly made or executed, or at least that they lay under the greatest suspicion of being forged. That the purchasers, lessees, and mortgagees, were all made parties, and served with subpoenas, and appeared before the issues were directed; and as to the making the remainder-men parties, the appellant was overruled by the Court, and acquiesced till the filing of his appeal: besides, in case the settlement should be found to be valid, the remainder-men would have the benefit of it, though they were no parties to the suit. That Longwood was relied upon by the appellant in his pleadings, to be the place at which the indentures of lease and release were executed, and for that reason (as presumed) it was inserted in the issue: but if the appellant had complained to the Court of that circumstance, it would no doubt have been left at large, for the respondent never insisted further than to have the validity of the articles and settlement fairly put in issue.

AFTER hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the said three orders complained of should be re-[504]-versed; and that the respondent should be at liberty to bring on the cause again to hearing in the said Court of Exchequer, as he should be advised, making proper parties to the suit; and that the said Court should take care that he proceeded without any unnecessary delay. (Jour. vol. 21. p. 553.)

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CASE 3.—CHARLES GREEN,—*Appellant*; ELIZABETH POOLE,—*Respondent*  
[1st February 1733].

[Mew's Dig. iv. 724, viii. 1244, xiii. 1862.]

A lease of lands is granted, with an exception of mines, etc. and a power of working the same, and a covenant from the lessor to make satisfaction for all damages and spoil of ground, to arise by working the mines. At the time of granting this lease, certain coal mines upon the premises were demised to J. R. In a bill brought for a performance of this covenant against the representatives of the lessor, it is necessary to make the lessee of the coal mines a party. But when at the hearing of the cause, an objection is taken for want of parties, the Court ought not for that reason to dismiss the bill with costs,

but should order the cause to stand over, with liberty for the plaintiff, on payment of costs, to amend his bill by adding proper parties.

ORDER of the Court of Exchequer REVERSED.

All persons *concerned* in the demand, or who may be *affected* by the relief prayed, ought to be parties; if within the jurisdiction of the Court: But if any necessary parties are omitted, or unnecessary parties are inserted, the Court upon application will, in general, permit the proper alterations to be made; and this even after the allowance of a demurrer for such want of parties upon argument; or on the allowance of such a plea with or without argument; but in these cases the amendment is always upon payment of costs.

It is the constant aim of a Court of Equity to do *complete justice*; by deciding upon and settling the rights of all persons interested in the subject of the suit; to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose it is, that all persons materially interested in the subject, ought to be by themselves, or others on their behalfs, made parties to the suit, plaintiffs or defendants, however numerous they may be, so that a *complete decree* may be made between those parties. See Mitford's Treatise on Chancery Pleadings, where the exceptions to, and modifications of, this rule are also stated.

Sir John Delavall being seised in fee of the manors of Seaton-Delavall and Hartley in the county of Northumberland, and of the coal mines and collieries there, by indenture dated the 19th of December 1698, demised to John Ord all his coal mines and collieries within his said manors and lands of Seaton-Delavall and Hartley; to hold to the said John Ord, his executors, etc. from the 19th of December 1698, for the term of 31 years; in which lease there was a covenant from the lessee in these words, viz.

"And further also, that he the said John Ord, his executors, administrators, and assigns, shall and will now, and from time to time hereafter, during the continuance of this present indenture of lease, well and truly pay or cause to be paid, unto Henry [505] Green, and the other tenants and farmers of the lands and grounds within the manors of Hartley and Seaton-Delavall aforesaid, for the time being, such satisfaction and recompence for damage and spoil of ground done, or hereafter to be done, made or occasioned by the said John Ord, his executors, administrators, or assigns, by sinking any new pit or pits, laying or leading of coals, and making or using any way or ways, drift or drifts, or doing any other thing, touching the premises, as by the judgment of two indifferent persons shall be thought fit and reasonable; one whereof to be named by and on the part and behalf of the said John Ord, his executors, administrators, or assigns, and the other of them to be named by and on the behalf of the said Henry Green, or the said other tenants, who shall sustain such damage and spoil of ground."

This lease was made in trust for one Mr. Rogers; and Henry Green, the appellant's father, was tenant from year to year of all the lands within the manor of Hartley, and died so; after whose death, the appellant entered and continued tenant until November 1714, when Sir John Delavall, by indenture of lease dated the 12th of November 1714, demised to the appellant, his executors, etc. all the messuages, tenements, farm-holds, lands, and grounds within the said manor of Hartley, but with the following exception, viz. "Except, and always reserved unto the said Sir John Delavall, his heirs, lessees, or assigns, all mines and minerals, of what kind soever, in and under the said premises, with liberty from time to time, and at all times during the said term, for him the said Sir John Delavall, his heirs, lessees, or assigns, to dig, sink, and make pit and pits in the said premises, and to manage and carry on the same, and all those already sunk and won, to lead and carry away the coals to be gotten forth and out of the same, and also to make pit-rooms, build hovels and lodges, and to lay waggon-ways, and to repair the same; and to do every other act and thing convenient and necessary in and about the same, *he the said Sir John Delavall, his heirs, lessees, or assigns, paying and allowing such reasonable satisfaction for damages and spoil of ground, as is and are mentioned and agreed and set down in the indenture of lease of the said coal-mines, granted by the said Sir John Delavall to John Rogers Esq. deceased, or some in trust for him, and under which the said collieries are now held and enjoyed.*" To hold the same (except as before excepted) to the appellant, his executors, administrators, and assigns, from May-day 1715, for 21 years, at and under



the yearly rent of £325 payable at May-day and Martinmas, by equal portions.— And it was by this indenture also agreed, that the appellant, his executors, etc. should, during the term, uphold and keep the roofs and covers of the houses belonging to the demised premises, which were then covered with thatch, well covered and water tight, and all the hedges, gates, and stiles, in good and tenantable repair; and that Sir John Delavall, his heirs and assigns, on their part, [506] should keep in repair all the walls and timber belonging to the roofs of such houses.

Soon after the execution of the colliery lease, Mr. Rogers, for whom Mr. Ord was trustee, entered and wrought the collieries; and after his death, Mr. Rogers his son, as his devisee or administrator, in the year 1725, determined the lease according to a power therein; and from that time Sir John Delavall entered and wrought the collieries, until the 4th of June 1729, when he died; having first made his will, and thereof appointed the respondent executrix and residuary legatee.

Mr. Rogers dying in November 1709, and his son continuing to work the colliery till Michaelmas 1725, the appellant, from time to time, applied to him and his agents for satisfaction for spoil of ground, and proper persons were appointed by each of them, to view and settle the damages; but the persons so named could not agree in their estimates till Michaelmas 1720, when a general estimate was made from Michaelmas 1708, to that time, at £130 10s. which the appellant refused to accept, though Mr. Rogers the son was content to pay the same.

Mr. Rogers the son was always willing to pay the appellant what should be settled for damages, according to Mr. Ord's covenant; but the appellant, being dissatisfied therewith, applied to Sir John Delavall, and, at his request, Mr. Rogers the son and the appellant again appointed persons to make an estimate, but they could not then agree; yet the appellant, from time to time, received coals of Mr. Rogers to the amount of £200 and upwards, on account of damages, and Sir John, during the continuance of the colliery lease, never apprehended himself liable to make any satisfaction whatsoever for damages or spoil of ground, nor did the appellant ever demand satisfaction of him.

The appellant being half a year's rent in arrear to Sir John at his death, amounting to £162 10s., he, without making any demand on the respondent for damages, immediately afterwards filed his bill in the Court of Exchequer against the respondent, for a discovery of the assets of Sir John; and that the respondent might come to an account, and make him satisfaction not only for damages for spoil of ground, during the time Sir John Delavall wrought the colliery, but also for all the time the same was wrought by Mr. Rogers; and for satisfaction for several houses, part of his farm, which he suggested Sir John suffered to fall down for want of reparation in the walls and timber: and the bill also prayed an injunction to stay the respondent from proceeding against him at law for the rent in arrear, and for coals which he had received from Sir John.

The respondent by her answer insisted, that she, or Sir John Delavall, were not liable to make the appellant any satisfaction for spoil of ground during the continuance of the colliery lease to Mr. Ord, and that she believed the appellant either did receive satisfaction from Mr. Rogers, or might have received the same if [507] his demands had been reasonable; she admitted assets of Sir John Delavall, and offered to appoint an indifferent person, if the appellant would appoint another on his side, to adjust the damages during the time Sir John wrought the colliery, and to pay in money what should be so adjusted, to prevent further litigation or taking any account; but insisted that if the houses became ruinous, it was through the appellant's own neglect to repair them in thatch, and to keep them water tight.

On the 9th of November 1732, the cause was heard, when the counsel for the respondent objected, that the appellant wanted proper parties; for that he ought to have made Mr. Rogers, the son, and the executors of Mr. Ord, parties to his bill, and that the appellant's remedy, if any, was at law, and insisted on several other matters as reasons for dismissing the appellant's bill; whereupon, and on hearing the appellant's counsel, and upon reading the colliery lease made to Mr. Ord, and the lease of the lands to the appellant; the Court ordered and adjudged, that the appellant's bill should be dismissed with costs.

From this order of dismissal the present appeal was brought; and on behalf of the appellant it was argued (D. Ryder, N. Fazakerley), that Sir John Delavall, by his

lease, expressly agreed to pay and allow to the appellant such reasonable satisfaction for damages and spoil of ground, as were mentioned in the lease of the coal mines, and thereby made himself immediately liable to make the appellant satisfaction; and these damages as well during the time that Sir John wrought the colliery himself, as while the same was wrought under the lease, amounted to a very considerable sum. That the agreement under which the appellant was entitled to such satisfaction being made with Sir John Delavall only, and the lessees of the colliery not being parties or privy thereto, it was not necessary to make the executors either of Ord or Rogers parties to the bill, and the doing of it might have subjected the appellant to the payment of their costs; but if it was really necessary to have the executors of Ord and Rogers, or either of them, parties, it was apprehended that the Court ought to have directed that the appellant on payment of the usual costs, might have been at liberty to amend his bill by adding parties; and not upon the making of an objection for want of such parties, to dismiss the bill absolutely with costs, that being the usual direction in Courts of Equity, when it appears at the hearing of a cause, that proper parties are wanting. That there could be no reason to dismiss the bill for want of parties, touching so much of the appellant's demand as arose during the time that Sir John Delavall himself continued to work the mines, which was from the 29th of September 1725, till his death in June 1729; and yet the dismissal was general, and the appellant was thereby precluded from bringing a new bill for a satisfaction, at least during that time. That Sir John by his lease to the appellant, agreed to keep in repair during the term, all the walls of the houses, and all the timber belonging to the roofs of such houses; and it was fully proved in the cause, [508] that Sir John did not perform that part of the agreement, but that for want of his repairing the houses, several of them fell down and became ruinous, to the great loss and damage of the appellant, who was under the necessity of laying out considerable sums in repairing the walls and timbers of others of the houses, which should have been repaired by Sir John Delavall; and yet, if this order of dismissal should stand, the appellant would be deprived of all satisfaction for the loss he had sustained by the want of repairs, and of having any allowance for the money he had expended in the making repairs: and therefore it was prayed that the said order might be reversed.

On the other side it was contended (J. Willes, T. Lutwyche) that the appellant had a legal remedy against Sir John Delavall, and against the respondent as his executrix, upon his covenant for repairing the walls and timber which supported the roofs of the houses, in case the same had been out of repair by Sir John's neglect, and therefore the appellant ought not to have come into a Court of Equity to seek satisfaction for such damages. That he had also the same remedy against the respondent for damages for the spoil of his ground during the time that Sir John wrought the colliery; and both Sir John and the respondent were always ready to make him such satisfaction for the same, as should be ascertained by two indifferent persons, according to the agreement in the appellant's lease; but which he had not offered by his bill, or prayed that the same might be done. That by virtue of the clause in that lease, the appellant might have recovered satisfaction against Mr. Ord and his representatives, for damages and spoil of his ground, during all the time that the colliery was wrought under Mr. Ord's lease; and as Mr. Rogers and his son who did those damages, and were the *cestui que* trusts of Mr. Ord were answerable for them; so the appellant made his election to receive damages from Mr. Rogers and his son, and actually received from them a satisfaction for part of those damages, and therefore he ought to have made Rogers the son, who with his father had committed the spoil, and the representatives of Mr. Ord, who had covenanted to make satisfaction, parties to this suit; whereby the Court might have been able to decree, and from whom the appellant should receive satisfaction; the respondent being only answerable from the time of Sir John's entry. It was therefore hoped that the order of dismissal would be affirmed, and the appeal dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of should be reversed; and that the appellant should be at liberty to amend his bill, by adding proper parties, on paying the costs of the day in the Court of Exchequer. (Jour. vol. 24. p. 337.)

[509]

## PEERAGE.

CASE 1.—EX PARTE ELIZABETH PERRY [17th June 1782].

[Mew's Dig. x. 306. Parl. Pap. 1895, 272, p. 5.]

The grandchild and heir of a person summoned to, and sitting in, Parliament as a baron and peer of the realm by writ, in his father's (a peer's) lifetime is not entitled to the barony for which his grandfather was so summoned.

His Majesty King James the First, in the first year of his reign, created, by letters patent, Sir Robert Sydney knight, a baron and peer of the realm of England, by the title of Lord Sydney of Penshurst in Kent, to him and the heirs male of his body; and afterwards by several letters patent, in the third and sixteenth years of his reign, created him Viscount Lisle and Earl of Leicester, with limitation as aforesaid: all which honours descended to Robert his son and heir, and from him to Philip his son and heir.

Robert, by courtesy Viscount Lisle, the claimant's grandfather, and whose heir she is, eldest son of the said Philip, was summoned to Parliament in the first year of the reign of King William and Queen Mary, as a baron and peer of the realm of England, the writ being directed "Roberto Sydney de Penshurst Chevalier," and being also summoned to the next ensuing parliament in the said reign, sat and voted in both parliaments by the title of Lord Sydney of Penshurst, in the lifetime of his father the said Philip Earl of Leicester.

Upon the death of Philip Earl of Leicester, the said Robert Lord Sydney of Penshurst succeeded to the titles and dignities of Baron Sydney of Penshurst, Viscount Lisle, and Earl of Leicester, and died seised thereof to him and the heirs male of the body of Robert first Earl of Leicester, and of the barony of Sydney of Penshurst, created by writ to him and his heirs.

Upon his death the aforesaid titles and honours descended from him to Philip his son and heir, who dying without issue, was succeeded therein by his brother John who dying unmarried, the barony in fee descended, and was in abeyance between the claimant and her sister Mary, his heirs general, and also heirs general of the said Robert their grandfather, they being the daughters and heirs of the honourable Thomas Sidney, next brother to the said John. The titles, limited by patent to heirs male, descending to Jocelyne the youngest brother, and on his death becoming extinct.

The claimant's said sister married Sir Brownlow Sherrard, Baronet, and died in the year 1758, without issue, leaving the claimant sole heir to the said barony of Sydney of Penshurst, created [510] by writ, as well as the inheritrix of all the lands and seignories thereunto belonging.

In the month of February 1780, the claimant presented her humble petition to his Majesty, stating as above, and praying, That his Majesty would be graciously pleased to confirm the said barony of Sydney to the claimant and the heirs of her body, with all its rights, immunities, and privileges, as in like cases hath been usually granted to several families of the kingdom by his Majesty's royal progenitors and predecessors.

In the same month the petition was referred by his Majesty to his then Attorney General, who was created a peer before he had made his report thereon; and the petition was then referred to his Majesty's late Attorney General; who, on the 15th of April 1782, made his report to his Majesty, to the effect after-mentioned; and thereupon his Majesty was pleased to refer the said petition to the House of Peers.

The writ under which this dignity is claimed, issued 11th July 1689, and was in the following words: "Gulielmus & Maria, Dei gratia, Angl. Scot. Franc. & Hib'niæ rex & regina, fidei defensores, &c. Prædilecto & fideli nostro Rob'to Sydney de Penshurst Chevalier, salutem: Cum parlamentum nostrum, pro arduis & urgentibus negotiis, nos, statum & defensionem regni nostri Angliæ & Ecclesiæ Anglicanæ concernen apud civitat. nostram Westm. nunc congregat. existit, vobis, sub fide & ligeantia quibus nobis tenemini, firmiter injungendo, mandamus, quod, consideratis dictorum negotior, arduitate, & periculis imminentibus, cessante excusatione

quacunq̃ue, ad parliamentum nostrum prædict. personaliter intersitis, nobiscum, ac cum praelatis, magnatibus, & proceribus, superdictis negotiis tractatur. vestrumque consilium impensur. Et hoc, sicut nos & honorem nostrum ac salvationem & defensionem regni & ecclesiae prædict. expeditionemque dictor. negotior. diligitis, nullatenus omittatis.

"Testibus nobis ipsis apud Westm. xi die Julii, anno regni nostri primo.

"BARKER."

The said Robert took his seat in the House of Lords on the same day, immediately after Lord Berkeley's son took his seat. The journals state these facts in the following words: "This day Charles Berkeley Lord Berkeley, Chevalier, eldest son of George Earl of Berkeley, having received his Majesty's writ to summon him to sit in this present parliament, was this day introduced in his robes by the heralds, and the Gentleman Usher going before him between the Lord Delawarr and the Lord Ousulston. In like manner Robert Sydney de Penshurst, Chevalier, eldest son to Philip Earl of Leicester, was introduced in his robes, between the Lord Delawarr and the Lord Ousulston, and having presented his writ of summons to the speaker on his knee, who delivered the same to the clerk of the parliament, it was read at the table, and afterwards he was placed on the Baron's bench in his father's barony, next to Lord Chandois." And the above [511] writ being read, "next the Lord Berkeley and the Lord Sydney took the oaths, and made and subscribed the declaration in pursuance of the statutes."

The said Robert Lord Sydney of Penshurst, being summoned to the next ensuing parliament, by the same title, sat and voted therein by the above title, in his father's lifetime. (Lords Journals, Vol. 15. p. 603.)

On the part of the claimant it was insisted (R. S. Sadler, J. Spranger, J. Scott), that a writ of summons to parliament, directed to any temporal person who sits in pursuance of it, although it contains no words of limitation, ennobles the person to whom it is directed, and his lineal descendants, or, as it has been sometimes expressed, gives a barony in fee, is a general rule of law so fully established, and is so little liable to be controverted at present, that it is presumed to be unnecessary to refer to the innumerable authorities contained in the books of law, and the resolutions of the House of Peers in support of it. (12 Report 70. Lord Abergavenny's case. Selden's Titles of Honour, p. 746. Co. Lit. 9. b. 16. b. 2 Black. Comm. 108. 1 Black. Comm. 400, 401. Holt. Skin. Rep. 520.)

The present claim therefore must be admitted, unless it can be shewn that the effect of a writ of summons directed to the eldest son of an Earl or Viscount, by the same title as that of his father's barony, or to the eldest son of a Baron who has two or more baronies, by a name the same as that of one of his father's baronies, is different from the effect of a writ of summons directed to other commoners. His Majesty's late Attorney General adopted a notion of this sort, and stated in his report, that the effect of a writ of summons in such cases is to accelerate the succession of the son to the barony, which, on his father's death, would descend to him, and that the extent of the inheritance depends on the nature of his father's title to the barony, whether in fee or tail male. It was admitted by the late Attorney General, that a writ of summons so addressed, if its effect was such, forms an anomalous case, and a case which has never been precisely determined. It is contended further, that this doctrine of acceleration is perfectly novel; that it never occurred before to any of the great lawyers of this country, that a writ of summons in such cases had such an operation; and that there is nothing of authority to be found in any law book or in the journals of parliament, to countenance the notion.

The practice of thus calling to parliament the sons of peers, was stated by the report to have existed as far back as the reign of Edward the Fourth; and if the doctrine of the report could be maintained, it was extremely singular that every lawyer, who, since the law of parliament upon this subject has been considered as settled, has treated upon the effect of a writ of summons to parliament in which there are no words of limitation (with exception only of the author of a tract upon the origin and manner of creating peerages—written on purpose to overturn all peerages created by writ at the time of the peerage bill, 1719—whose reasoning the report seemed to abandon, though it adopted the result of it, and who contended against many of the most acknowledged principles of the law relating to peerages) should

have stated in general terms, without reserve, qualification, or exception, that such a writ operates to ennoble the person to whom it is directed, if he sits in consequence of it, and [512] his lineal descendants. By all writers of authority it has been observed, that letters patent in which there are no words of limitation, give the grantee a dignity for life only; but it does not seem to have occurred to any such writer, that a writ of summons where there are no such words, could enure to the person to whom it is addressed for his life only, or could enure, where there are no special words in the writ so to direct the course of the inheritance, to him and his heirs male, or any other particular line of descendants. It might be safely assumed, that the doctrine is not to be found in any law book of authority; and is so extremely singular, that it may be very confidently asserted, that if the law acknowledged the doctrine, it could not have been unknown or unnoticed by the several great lawyers who have considered the nature and effect of these writs.

There are no principles of law to be found in the books which countenance this doctrine; but on the other hand it is apprehended to be a principle of law capable of being fully established, that the effect of a writ of summons where there are no special words to direct the course of the inheritance, is necessarily such as Mrs. Perry contended for, and that this prerogative act of making a peer must be taken as intended to have its usual known and general effect, unless there are special words in the writ to denote that it is intended to have a different, special, more limited, or more enlarged effect. That the decisions and determinations of the House of Lords, upon the effect of those writs, it was conceived, agreed with the doctrines in the books of law in which the subject has been considered; and the merits of claims like the present have in fact been decided upon in several cases.

First. In the case of the barony of Clifford of Launsburgh, which was granted by patent to the Earl of Cork, with limitation to heirs male; (and who was also created Earl of Burlington, and with like limitations;) his son was in his lifetime called up by writ, and having sat and voted, died; his son, the grandson of the Earl of Burlington, upon his father's death, claimed to be entitled to the said barony to which his father had been called, and, living his grandfather, it was confirmed to him by the following resolution (Journals, Die 20 Nov. 1694): "The lord president reported from the lords committee for privileges, to whom it was referred to consider, whether if a lord called by writ into the father's barony shall happen to die in the lifetime of his father, the son of that lord so called be a peer, and hath right to demand his writ of summons? that their lordships find no precedent in this case. A debate arising, whether Charles Lord Clifford, (son and heir of Charles late Lord Clifford, of Launsburgh, deceased,) who was called by writ to parliament in the lifetime of his father, the present Earl of Burlington, hath right to sit in parliament; this house was of opinion, that the said Charles now Lord Clifford, by virtue of his father's writ, hath right to a writ of summons to parliament, as Lord Clifford of Launsburgh." Accordingly, [513] "This day (Die Mercurii, Nov. 1694) Charles Lord Clifford of Launsburgh sat first in parliament upon the death of his father Charles late Lord Clifford of Launsburgh, and took the oaths, and made and subscribed the declaration pursuant to the statutes."

Second. In the case of the barony of Hervey of Ickwork (Journals, 1733), John Hervey, of Ickworth, in the county of Suffolk, chevalier, eldest son of John Earl of Bristol, having received his Majesty's writ to summon him to sit in this parliament, was in his robes introduced between the Lord Delawarr and the Lord Walpole, also in their robes, etc. *as in all creations*." And in the year 1743, on the death of the said John Lord Hervey, his son was summoned of course as his heir, and as inheriting the barony obtained by that writ: "and George William Lord Hervey sat first in parliament after the death of his father John Lord Hervey."

Third. The Duke of Athol claiming through a female the barony of Strange, to which James the son of William Earl of Derby had been called in his father's lifetime by writ, dated the 17th February 1627-8, it was confirmed to him.

Fourth. Upon which the Earl of Burlington claimed, as heir to Henry Clifford, son of Francis Earl of Cumberland, the barony of Clifford, which had been gained by his great grandfather Henry, by his having been called by writ, dated 16th February 1627-8, and sitting in pursuance thereof, in the lifetime of his father Francis Earl of Cumberland. This claim was allowed.

The Attorney General indeed, in his report as to the two last mentioned cases, stated, that it was insisted that William Earl of Derby, and Francis Earl of Cumberland, were not seised of the baronies at the time their respective sons were summoned to parliament, and therefore that the writs of summons must operate as new creations. Whether they were or were not so seised, it was apprehended that the writs must have that operation: but the fact was, that the sons had precedence according to their fathers supposed ancient baronies; and if the fathers were not seised, the crown certainly issued its writs (January 1628, March 1628) under the idea that these two earls were seised of the said baronies; and the sons had the precedence in the House accordingly, and therefore the descendants of these peers owe their titles to their peerage to a mistake, in case the Attorney General's state of the fact was correct.

These authorities would certainly have great weight, as it was believed that no resolution of the House could be cited to warrant the doctrine stated in the late Attorney General's report, and which doctrine was most certainly no where asserted in terms in its proceedings. If a writ directed to the son of a peer, calling him to parliament by the same stile as that of his father's ancient barony, or of one of his father's ancient baronies, does not ennoble him and all his lineal descendants, it should seem to be its most natural effect to give dignity to the son only for life; but the authorities above referred to, prove that the dignity is descendible, and that the writ, without words of inheritance, creates a fee [514] even in this case. This, the late Attorney General was obliged to admit; but he further stated, that it is descendible only to the same line of heirs as are in the succession to the father's ancient barony. As the report contended against the general rules of the common law, and of the law of parliament, it was insisted on the part of Mrs. Perry, that it was incumbent upon those who maintained the doctrine stated in it, to prove clearly from the principles of the common law, and the law of parliament, that a dignity thus granted is not generally descendible, and that the grantee hath only a qualified fee; till that was made out, she was entitled to the benefit of those general rules.

The resolutions of the House, whenever the precedence of the sons of peers called by writ in the father's lifetime, hath been questioned, consider them as being barons by a new creation, and not by acceleration, transfer, or conveyance, terms not as yet applied in parliament to this subject; and this fact, as well as the forms upon introducing such peers into the House, shews, though the report seemed to intimate the contrary, that the writ does operate to *create* a new dignity, as well in cases where the father of the person summoned was seised of a barony by the same title as that by which the son is called, as in cases where the father was not seised. The fair inference from the resolutions of the House touching precedence, though the report contended otherwise, seemed certainly to be, that the House had been anxious to distinguish between the matter of right, and what its curtesy had permitted.

"Lord Percie being summoned by writ in his father's lifetime, and claiming precedence of Lord Abergavenny, on reference to the committee a question arose, and the House referred it to the committee to consider, whether, since the statute of 31st Henry VIII. an earl's eldest son, called by writ to his father's ancient barony, is to take place in the House according to his father's barony, or not; and so also of the son of a viscount; and so also of the son of a baron having two baronies?—And it was agreed, that the said committee should proceed on Monday next to determine the precedence of the two baronies of Abergavenny and Percie, but not to meddle with other matter referred unto them at that time." (Lords Journals, Jovis 19th Feb. 1628.)

Had there been the least idea, that a writ of this sort did not operate as a *new creation*, and as a grant of a barony in fee, it was impossible that such doubt could have occurred to the House; for, had it been understood as clear, that its effect was to give only an interest in the father's barony by acceleration or otherwise, the House could not possibly have doubted about the precedence; but the House considering peers of this class as claiming by new creation, seemed only desirous to have it settled, whether the precedence, which before the statute was given in such cases as matter of mere curtesy, could, after the statute, be allowed in all cases, or in any case? It was extremely probable, that the same [515] doubt suggested the propriety of the reference in 1694, mentioned below; and the proceedings of the House that year afford much argument in favour of the present claim.

For on the 19th March 1694 (Lords Journals, 19th March 1694), it was resolved, 'That if a person summoned to parliament by writ, and sitting, die, leaving issue two or more daughters, who all die, one of them only leaving issue, such issue has a right to demand a summons to parliament.'

The terms of this resolution state no distinction in the case of peers called by writ by the name of their fathers baronies; and it is very singular, that the terms of such a resolution should not state an exception with respect to the issue of a daughter of such a peer, as the issue of such daughter, if the grandfather's baronies had been granted in tail male, could not, consistent with the doctrine opposed to Mrs. P.'s claim, have any right to demand a summons to parliament.

The House could not overlook the case of the issue of the daughter of such a peer; for on the very next day (Lords Journals, 20th March 1694) "they refer the question of precedence of such peers as should be summoned to the House by writ into their fathers baronies, and of the descendants of such peers, to the opinion of the twelve judges; who were summoned to attend the House accordingly."

The report taking notice that this question was not afterwards resumed, stated it to be probable, that the lords satisfied themselves without consulting the judges, that these peers were entitled to the same precedence and rights, as they would have been if they had succeeded to their fathers ancient baronies by descent, and that the writs only accelerated the possession.

This question was made in 1628, it was resumed in 1694; and it seemed just as rational to infer from the fact, that no steps were taken during that long period, to decide the point, that the lords had satisfied themselves on the point before 1694, as it was to draw the inference made by the late Attorney-General, from what has passed since. The truth is, that the reference rests on conjectures merely. The question of precedence, as matter of right, has been a second time dormant for near a century; it will now be decided; but Mrs. Perry claimed precedence only from the day on which her ancestor, created by writ, was introduced into the House.

What the late Attorney-General calls an "acceleration of the son's succession to the father's barony," the writer from whom the notion is borrowed, hath termed a "transfer or conveyance of the father's barony to the son in the father's lifetime." The report, though it adopts the notion in substance, has not expressed it by the same term; and to have insisted that the effect of the writ was to transfer or to convey the father's dignity, would certainly have been a proposition too manifestly repugnant to the known law of the land and of parliament, to be stated in *terms*.

It is clear (Lords Journals, 1st Feb. Lord Ruthen's case), no dignity or honour can be transferred, aliened, granted, surrendered, or lost by non-claim, or the smallest interest [516] therein parted with, but by attainder or act of parliament. It cannot (Lords Journals, 18th June Lord Purbeck's case) be merged in a higher dignity, as a barony in an earldom, and much less can it be drowned in another barony or dignity of equal degree. This notion, however of a transfer or conveyance of a peerage, is in fact included in the term "acceleration," used in the report. (Page 437. 527, 528. 355.) For it must be admitted that as no two persons can at the same time enjoy the same honour, though two persons may at the same time have baronies of the same name, it is impossible that the son's succession to the father's honour *can be accelerated*, unless the father parts with the honour, or with some interest in it, which he cannot do.

There is one remarkable instance, when two different persons had baronies of the same name at the same time. The title of Ross of Hamlake was carried by a female from the family of Manners Earls of Rutland, to that of the Cecils Earls of Exeter; yet King James the First created the Earl of Rutland Lord Ross of Hamlake, by patent 22d July, in the fourteenth year of his reign. The ancient title of Ross soon after reverted to the Earls of Rutland, by the death of Cecil Lord Ross without issue.

If the succession of the son to the father's dignity cannot be accelerated, unless the father parts with it, it will follow, that if the son commits treason, or dies in the father's lifetime without issue, the dignity would be lost to the father and his descendants, and to any heirs of the body of the father by a second wife; to both which, if the father's eldest son was in the father's lifetime attainted or died without issue, the father's honours, the succession to which had not been thus accelerated,

would certainly descend. On the other hand, it is conceived, that if after the succession is accelerated, the father should commit treason, by which all his honours would be forfeited, and the descent of them to his son barred, yet the son and his posterity would enjoy the honour of the barony given by the writ; which proves, that the father hath nothing in the dignity of the son, for otherwise it would be forfeited, and therefore that acceleration, if the son really hath the same dignity that the father had, must operate in truth as an actual transfer of the dignity, which cannot legally be.

If this acceleration cannot operate without having the effects of a transfer, the king by accelerating might deprive the father of his honours; for it is clear, and indeed stated by the report, that upon acceleration the son would take all the father's inheritance in the barony; and this might be done against the father's consent, and in that case in direct violation of those resolutions on which, and on which almost alone, the inheritance of the peerage, and the subjects interest in that inheritance depends.

If the crown can accelerate the son's succession to one barony, where the father has two or more, it will be difficult to state the principle which could restrain the crown from accelerating the son's succession to all, or to the only one, where the father has but one. Whenever the eldest son of a peer is originally summoned to parliament by writ, he is introduced as another com-[517]-moner, newly created, with all the forms of creation; but when the heir of the son so called takes his seat on his father's death, he takes it as all the other ancient lords do at the commencement of a new parliament, without any of the forms.

Suppose a peer seised of two baronies, the one an ancient barony in tail male, the other a more modern one in tail general; and that such a peer hath a son and a daughter, and the son is called to parliament in the father's life by the name of the barony of which the father is seised in tail general. If the son is a peer by acceleration, having the same dignity which his father before had, and he should be attainted, it must follow that the daughter could succeed to neither barony, for that which was capable of descending from the father to the daughter would have been by acceleration conveyed or transferred from him to the son and his lineal descendants.

In case these writs to the eldest sons of peers shall be decided, to give them and their descendants a barony, there is no reason to apprehend any considerable increase in the number of peers. It is three hundred years since the first of these peers was called, viz. 22 Edward IV. the number in Dugdale's list amounts only to forty-two, and of such others as can be collected from that time amounts to seventeen; the whole number in three centuries is but fifty-nine. Above half of these baronies are extinct; there being no issue descended from the person so ennobled, a very great number of them are held by persons seised of more ancient baronies in fee, or having higher titles, and some are in abeyance among the nobility. The Duke of Bolton has four of them, each by the title of St. John of Basing, together with the ancient barony created by writ. The Duke of Leeds has two of them, viz. Osborne of Kiveton, and these will descend to Lord Osborne of Kiveton, his son, who was called by writ. The Duke of Devonshire has three of them, viz. Clifford, Clifford of Lansborough, and Cavendish of Hardwicke; Lady Willoughby three of them, all Willoughby of Eresby, with the ancient barony created by writ. In truth it is very unlikely that any of them should descend to any other than peers. This barony of Sidney was, in fact, the first claimed by a female, or by any person not being heir to higher titles; but though the claimant was not such heir, she was nevertheless the representative of a very noble family.

If the precedence of these peers was matter of right, and not, as is here asserted, matter of courtesy, this sort of claim could not greatly affect the rank of the peers: there having been but four peers to whom it has been extended who had not precedence out of the house before all the barons, viz. Lord Conway, son of Viscount Conway; Lord Lynn, son of Viscount Townsend; Lord Monteagle, son of Lord Morley and Monteagle; and Lord Conyers, son of Lord Darcie Meinill and Conyers (4th Inst. 361, on stat. of precedence); which four were all heirs to higher titles by descent: and it is to be remarked, that this courtesy began at a time when the king gave precedence at pleasure; Henry the Sixth gave the Earl of Warwick precedence of all earls, and he gave precedence at his pleasure in many other instances.



[518] The peers therefore, when the titles of peers sons called by writ put the House in mind of their descent, have always seated them according to the curtesy; and when noblemen's sons have been called by titles which did not put them in mind of their descent, they have been generally, but not always (as in case of the Lord Boyle of Lansburgh) placed as junior barons; as Lord Butler of More Park, Lord Manners of Haddon, and Lord Powlett of Basing, their fathers having no title of the same name. (Lords Journals, 18th Sept. 1666. Ibid. 2d May 1679. Ibid. 18th July 1689. Ibid. 6th May 1717.)

It seems at least as reasonable that the favour of a barony in fee by writ should be granted to the sons of the ancient nobility, as to other commoners. The favour of the crown has often by patent given more than what is contended to be the effect of these writs; the title of Lucas of Crudwell, enjoyed by the present Marchioness de Grey, can never be in abeyance, but always will be held by the eldest daughter on want of heirs male; the title of Duke of Marlborough was granted by patent to Churchill and his daughters, according to seniority, and their heirs male; and by patent, often more than the issue male of the person ennobled, is included, for they are granted with remainder to others, either male or female, and their male heirs. (Dugdale's Baronage, 2 vol. title, Lucas of Crudwell. Collins's Peerage, 1st edit. title, D. of Marlborough.)

A barony in fee, in effect seldom bestows dignity upon those who would not derive it under a grant of a barony in tail male; it does where there is but one daughter, if there are more, it is in abeyance, in which it may remain for ever; and if confirmed to one co-heir, by favour of the king, the confirmation of the ancient title is as great a favour as the creation of a new peerage; and if it descends to an only daughter, it generally falls by marriage among the peerage, and the issue of the marriage inherit to both father and mother; if an only daughter is married to a commoner, it is generally to one by whom the peerage is not disgraced.

With respect to the instances alluded to in the late Attorney-General's report, of persons summoned by writs to parliament by the titles of their wives, whose descendants were not considered as ennobled, although such persons sat in pursuance of the summons; it was not contended by Mrs. Perry, that in the very early periods of our history every writ of summons to parliament, where the seat was taken in consequence of it, ennobled all the descendants of the persons to whom it was directed; for a very slight attention to Dugdale's History of Writs of Summons will afford many instances to the contrary. But it was insisted, on the behalf of Mrs. Perry, that for above a century before the writ of summons issued, by which the present barony is claimed, and down to the present time, it hath been established law, that all writs of summons (except such as are directed to spiritual persons) where a seat is afterwards taken, have the effect of ennobling the persons so summoned and their descendants.

It is likewise further to be observed (Selden's *Titles of Honour*, p. 571, 586. 3d edit.), that so long as all baronies were purely by tenure, which was the case until some time in the latter end of the reign of king John, the husbands of *femes covert* seized of baronies, were considered as seized of such baronies in the right of their wives, and therefore entitled to a writ of summons for and liable to perform the services annexed to such baronies; but that such writs of summons would not ennoble any of their descendants any more than the writ of summons ennobled the descendants of the bishops, who now are what all originally were, barons purely by tenure. (Black Bishops.)

But according to Dugdale (List of persons summoned in right of their wives, at the end of his summons to parliament), the last person summoned to parliament by the title of his wife's barony, was so long ago as the third year of King Henry the VIIIth; and in this particular the law is clearly altered since that time. And it was submitted, that no fair inference could be drawn to the prejudice of Mrs. Perry's claim, from the instances so alluded to by the late Attorney-General, because the House of Peers have clearly determined, in the instances before mentioned, that a writ of summons to the eldest son of a peer, gives an estate of inheritance of some sort in the barony to which such person is summoned; which in the case of such husbands, hath never been determined; nor can it ever well come in question, for if no issue of such marriage, there could be no person to claim, and if issue, they would inherit to the mother's more ancient barony.

The claimant claimed precedence from the day that her grandfather was introduced into the House by creation by writ without patent, viz. 11th July 1689, which was strictly regular, according to the statute 31st Henry VIII. and hoped, that upon producing such proofs of her pedigree as their lordships should think sufficient, they will be of opinion, that she was entitled to the barony of Sidney of Penshurst; and that the said dignity and honour would be confirmed and allowed to her, and the heir of her body, with precedence, according to the date of her grandfather's taking his seat in the House of Lords, 11th July 1689.

But after hearing counsel on this claim, it was Resolved and Adjudged, that the claimant had no right in consequence of her grandfather's summons and sitting. (MS. Jour. *sub anno* 1782. p. 851.)

CASE 2.—JAMES EARL OF LONSDALE,—*Plaintiff* (in Error); HENRY LITTLEDALE,—*Defendant* (in Error) [26th May 1794].

A Peer of parliament, having pleaded in chief to a bill filed against him, in the Court of King's Bench, cannot afterwards assign for error, that he ought to have been sued by original writ, and not by bill.

*Quere?* Whether the Court of King's Bench has jurisdiction to proceed against a peer of parliament by bill.

Judgments of the Courts of King's Bench and Exchequer Chamber AFFIRMED.

2 H. Black. Rep. 267—274: and 299—306.

The defendant in error, in Easter Term 1791, commenced an action of trespass upon the case in the Court of King's Bench, by exhibiting his bill in that court against the plaintiff in error, having privilege of parliament, to recover damages sustained by [520] the defendant in error, by reason and in consequence of a certain message or dwelling house with a coach house, stables, out-houses, buildings, yards, and garden thereto belonging, with the appurtenances, situate and being at the parish of Saint Bees in the county of Cumberland, whereof the defendant in error was seized in his demesne as of fee, being very much damaged, and rendered unfit for use or habitation; which injury the defendant in error, by the first three counts of his declaration, charges to have been occasioned by the negligent, incautious, and improvident manner in which the plaintiff in error dug, searched for, and worked, and caused to be dug, searched for, and worked, his mines and seams of coal, and conducted, managed, and carried on, and caused to be conducted, managed, and carried on, the digging, searching for, and working of the same, and for want of due care and caution in that behalf. So much of which said bill, entered on record on the roll of Trinity Term 1791, as relates to the exhibiting thereof, and to the privilege of parliament of the plaintiff in error, is as follows:

"Cumberland (to wit).—Be it remembered, That in Easter Term last past, before our Lord the King at Westminster, came Henry Littledale, by Anthony Adamson his attorney, and brought in the Court of our said Lord the King, then there, his bill against the Right Honourable James Earl of Lonsdale (having privilege of parliament) of a plea of trespass on the case; and there are pledges for the prosecution, (to wit,) John Doe and Richard Roe."—Which said bill follows in these words, (to wit.) "Cumberland (to wit).—Henry Littledale complains of the Right Honourable James Earl of Lonsdale (having privilege of parliament) in a plea of trespass on the case," etc.

To this action the plaintiff in error, after an imparlance to Trinity Term 1791, made his defence, and pleaded thereto not guilty. Which said imparlance, defence, and plea, entered on record on the said roll of that term, is as follows:

"And now at this day, that is to say, on Friday next after the morrow of the Holy Trinity in this same term, until which day the said Earl had leave to imparle to the said bill, and then to answer the same, etc. as well the said Henry by his said attorney, as the said Earl by Thomas Tindal his attorney, do come before our Lord the King at Westminster; and the said Earl defends the wrong and injury, when, etc.

and says, that he is not guilty of the premises above laid to his charge, in manner and form as the said Henry hath above thereof complained against him; and of this he puts himself upon the country," etc.

Issue being joined on the above plea, the cause came on to be tried at the assizes holden on the 26th day of August 1791, at the city of Carlisle, in and for the county of Cumberland, by a special jury, who found a verdict for the defendant in error on the first three counts of the declaration.

By an order of *Nisi-prius*, made on the said trial, it was ordered, with the consent of the parties, that such verdict should be for [521] £5000 as nominal damages, and 40s. costs; and that it should be referred to some one person, to be named by James Mingay esquire, and William Cockell esquire, serjeant at law, to ascertain the value of the defendant in error's said house and premises at the time the accident happened; and that, on payment of the sum so ascertained, with costs to be taxed, the defendant in error should convey all his right and title in the premises to the plaintiff in error; and that either party should be at liberty to apply to the Court of King's Bench for any purpose they should be advised.

On the 4th day of May 1792, the said James Mingay and William Cockell appointed one Robert Golden to ascertain the value of the defendant in error's said house and premises, in pursuance of the said order of *nisi prius*; who valued the same at the sum of £3517.

On the 15th day of August 1792, judgment was signed in the Court of King's Bench against the plaintiff in error for the said sum of £3517, and 40s. costs; and also for £480 increased costs; amounting in the whole to £3999.

Upon this judgment the plaintiff in error brought a writ of error in the Exchequer Chamber, and assigned for error (amongst other things) that the plaintiff in error, being a peer of this realm, ought to have been sued by original writ, and not by bill. This objection was not taken in the Court of King's Bench, either by plea in abatement, or by motion in arrest of judgment; but was for the first time made by the above assignment of error.

The case was solemnly argued by the counsel for the plaintiff in error before the judges of the Court of Common Pleas, and the Barons of the Exchequer, on the above error only; and the judgment of the Court of King's Bench was, in Michaelmas Term 1793 (without hearing counsel for the defendant in error) unanimously affirmed by the Court of Exchequer Chamber.

The plaintiff in error brought another writ of error, returnable in parliament; which, together with a transcript of the record, being brought up, the plaintiff in error, besides the general errors, assigned for error, that the plaintiff in error being a peer of this realm, the Court of King's Bench had no jurisdiction to proceed by bill against the plaintiff in error, as it appears by the record that court has proceeded; and prayed a reversal of the said judgments.

The counsel for the Plaintiff in error argued (J. Mingay, E. Law, A. Chambre, G. Wood) that these judgments ought to be reversed;

1st. Because the jurisdiction assumed by the Court of King's Bench, of proceeding against a peer *by original bill*, is not warranted either by the common or statute law of this realm.

By the common law, that court has power to hold plea by bill against two descriptions of persons only, viz. against the attornies, officers, ministers, or clerks of the court, who are supposed to be present in court, and the course always has been to exhibit original bills against them, as being present in court in their proper persons, and against persons in custody of the marshal [522] of the Marshalsea of the court, and in such bills it is necessary to allege that the defendant is in the custody of the marshal of the Marshalsea of that court: this last mentioned branch of its jurisdiction, in process of time, has been extended to all persons against whom the process of *capias* could issue by the following fiction, viz. The Court, having an original jurisdiction in trespasses *vi et armis*, issues a writ called a bill of Middlesex or *latitat*, commanding the sheriff to take the body of a defendant, as for a supposed trespass, *vi et armis*, which the defendant never has in reality committed, and the defendant being taken and brought into the custody of the marshal of the court upon this writ, the plaintiff may exhibit a bill against him as in the custody of the marshal for any cause of action whatsoever, upon which fiction rests this branch of its jurisdiction at

this day: this writ, except in cases where an *ac etiam* for bail is inserted, is not executed upon the defendant's person, but he is served with a copy of it, and appears, and files common bail, which is a proceeding by which a defendant, instead of being committed to the custody of the marshal, is supposed to be delivered on bail upon a *cepi corpus* to John Doe and Richard Roe, which is the same as a commitment to the custody of the marshal: *it is evident this mode of proceeding never could apply to a peer, because his person could never be arrested and brought into the custody of the marshal by a capias in trespass, as no such capias lies against a peer*; and, therefore, Lilly in his Entries, page 21, observes in a note, that a peer cannot be sued in the King's Bench by bill, by reason he is therein alleged to be in the custody of the marshal: the next, and only other jurisdiction which the King's Bench has in civil actions, is by an authority delegated to the court by an original writ, issued from the Court of Chancery, returnable in the King's Bench, and this applies to peers, as well as other persons, with this difference as to the process, by which the defendant is brought into court to answer as against all persons, (except peers, or privileged persons during the time of privilege,) the process is *summons, attachment, and capias*, against peers, summons and *distringas in infinitum* only *as no capias lies*: the common law having given no jurisdiction to the King's Bench of proceeding against peers, except by original writ only; the next question is, whether the statute of the 12th and 13th W. 3. has given that court a jurisdiction of proceeding against them by original bill: "That statute enacts, that from and after the four and twentieth day of June, one thousand seven hundred and one, any person or persons shall and may commence and prosecute any action or suit in any of his majesty's courts of record at Westminster, or high Court of Chancery, or Court of Exchequer, or the Duchy Court of Lancaster, or in the Court of Admiralty, and in all causes matrimonial and testamentary in the Court of the Arches, the prerogative Courts of Canterbury and York, and the delegates, and all courts of appeal, against any peer of this realm, or lord of parliament, or against any of the knights, citizens, and burgesses of the House [523] of Commons for the time being, or against their or any of their menial or other servants, or any other person entitled to the privilege of parliament, at any time from and immediately after the dissolution or prorogation of any parliament, until a new parliament shall meet, or the same be re-assembled, and from and immediately after any adjournment of both houses of parliament for above the space of fourteen days, until both houses shall meet or re-assemble; and that the said respective courts shall and may after such dissolution, prorogation, or adjournment as aforesaid, proceed to give judgment, and to make final orders, decrees, and sentences, and award execution thereupon, any privilege of parliament to the contrary notwithstanding; provided nevertheless, that this act shall not extend to subject the person of any of the knights, citizens, and burgesses of the House of Commons, or any other person entitled to the privilege of parliament, to be arrested during the time of privilege; nevertheless, if any person or persons having cause of action or complaint *against any peer of this realm, or lord of parliament*, such person or persons after any dissolution, prorogation, or adjournment as aforesaid, or before any sessions of parliament, or meeting of both houses as aforesaid, shall and may have *such process* out of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer, against such peer or lord of parliament, *as he or they might have had against him out of the time of privilege*; and if any person or persons having cause of action *against any of the said knights, citizens, or burgesses, or any other person entitled to privilege of parliament*, after any dissolution, prorogation, or such adjournment as aforesaid, or before any sessions of parliament, or meeting of both houses as aforesaid, such person or persons shall and may prosecute such knight, citizen, or burgess, or other person entitled to the privilege of parliament, in his Majesty's Courts of King's Bench, Common Pleas, or Exchequer, by summons and distress infinite, *or by original bill, and summons, attachment, and distress infinite thereupon to be issued out of any of the said courts of record.*"

They concluded that it was sufficient to read only the act above mentioned, to see that the form of proceeding against a peer is not thereby varied; *and that the original bill is not given against peers, but only against knights, citizens, or burgesses, or other persons entitled to privilege of parliament*, which words, other persons can by no rule or construction be contended to apply to peers, but only to inferior degrees

of persons, as officers, ministers, and clerks of the houses of parliament, etc. And what they considered as the most convincing proof that the peers did not mean to give a jurisdiction, by original bill against them was, that the bill originally sent up to the Lords by the Commons, at the parts above marked, had the words "Peer of this realm, or lord of parliament;" and the lords struck out those words—*vide Journals of the House of Commons*, vol. 13, 567. Notwithstanding the above, the Court of King's Bench, in a case of [524] *Gosting versus Lord Weymouth*, determined, that the original bill was the common law mode of proceeding against peers of parliament before the statute of 12 Will. 3. on the authority of a case of *Say versus Lord Byron* (Cowper, 844)—Lord Mansfield gives the judgment thus: "The note I have of the case of *Say versus Lord Byron* is as follows: Mich. 26 Geo. 2. B. R. Mr. L. Robinson moved, (upon an affidavit, that the plaintiff had sued out two writs of *distringas*, whereupon the sheriff had levied 40s. and 4d.; and that no bill was filed,) for a rule to shew cause why the said two writs should not be quashed, and the money levied thereon be restored; he objected that a peer ought not to be sued by bill, but by original writ; and that the statute 12 and 13 Will. 3. c. 3, does not make any variation in the proceedings against peers, but respects in this particular commoners only: Mr Stowe shewed cause, and the rule was enlarged. Upon shewing cause at a further day, the Court declared that there were many precedents of actions against peers of parliament, for many years before the statute of Will. 3. as certified by the Master and Mr. Day, the clerk of the rules, and said, Why could not the court support its ancient jurisdiction, as well as the Court of Exchequer hold plea as debtor *domini regis*? And the court in that case discharged the rule. This is an authority in point. The original bill was the common law process. *Per Curiam; Judgment quod defendens respondeat ouster.*"

They thought it a singular thing, that if the proceeding by original bill, as against peers, was the common law proceeding before the statute of Will. 3. *that it should not have been also the mode of proceeding against members of the House of Commons*; and yet that was not pretended; if it were so, it was also singular it should not have been known to some writer upon the law, or that it should not be found in some case, or book of reports or practice; and yet they asserted, that no such thing is noticed in any book of law or practice, neither was it consistent with any principle of law; they therefore trusted that neither a supposed certificate of a master and clerk of the rules in the King's Bench, in a matter in which they were materially interested, in point of emolument, to establish the proceeding which they certified, nor any erroneous practice which might have followed from the precedent of *Gosting versus Lord Weymouth*, would be sufficient to establish this jurisdiction.

2d. To the objection that the plaintiff in error, by not having pleaded his peerage in abatement, had precluded himself from taking any objection in a Court of Error to the mode of proceeding by bill; they answered that the want of jurisdiction is matter of error; and that if a court has no jurisdiction, even the defendant's consent could not give it jurisdiction: *that the want of jurisdiction in this case appeared on the record*, and therefore as the court saw there was no occasion for a plea to disclose it, as there is of a matter dehors the record. They concluded with insisting, that the proceeding by original bill inverts the whole course of pro-[525]-ceeding against peers from the beginning to the end of the suit. The returns of writs in every stage of the suit are totally different where the proceeding is by original writ, and where by bill, and not only so, but a new jurisdiction in error is created by proceeding by bill, instead of original; for where the proceeding is by original bill in the King's Bench, a writ of error is given to the Court of Exchequer Chamber, which is not the case where the proceeding is by original writ in the King's Bench, as there the writ of error is returnable in parliament only.

The counsel for the Defendant in error submitted (T. Erskine, W. Cockell, G. S. Holroyd), on the other hand, that the said judgments ought to be affirmed, and urged the following reasons:

1st. The Court of King's Bench has jurisdiction to proceed against a peer of the realm by bill. This appears by the statute 12 and 13 Will. 3. c. 3, which authorizes against a peer such process, during the times there limited (which limitations are since removed, and extended to all times, by statute 10 Geo. 3. c. 50.), as might have been had against him out of the time of privilege. Before that statute, peers were

by the practice of the court (and the practice of the court constitutes the law of the court) sued there out of the time of privilege by this form of proceeding, namely, by bill and by summons, and distress thereupon; and may now therefore, by virtue of the above statutes, be so sued at any time. That this was the practice of the court before the statute of King William, not only is to be inferred from the same continued subsequent practice, the legality of which has till the present case been unobjected to, (except in the two instances after mentioned, by which its legality is established,) but also appears from precedents certified to that court when this very point was there agitated, in the case of *Sayer* against *Lord Byron*, so long since as Michaelmas Term. 26th Geo. 2. (Sayer's Reports, 63; and Cowper's Reports, 845.) The court in that case, on reference being made to the statute of King William, confirmed the precedents and practice; and that decision was afterwards confirmed by the same court in the case of *Gosting* against *Lord Weymouth*, in Trinity Term, in the 18th year of his present Majesty. (Cowper's Reports, 844.)

2d. These two cases are not only determinations in point, but are even stronger than the present case; as in both those cases this objection to the mode of proceeding was taken as it ought to be (if a valid objection) in the first instance; in the one case by motion before defence to the action, and in the other by plea in abatement. There appears not any appeal from either of those decisions, and they have ever since been acquiesced in, and acted upon by the same continued practice as the law of the land.

3d. But even if these cases could be over-ruled, and allowing that the plaintiff in error, being a peer, might in the present action have objected to this mode of proceeding against him by bill; yet the objection cannot now be taken as matter of error: It is merely an objection of form. The objection is, that although [526] the court has jurisdiction over the subject matter of the suit, and over the party, though a peer, and has power to proceed by bill, yet this is not the proper form of proceeding in the present case against a peer. The objection cannot be extended to every case of proceeding by bill against a peer; for if a peer were in the custody of the marshal of the King's Marshalsea, (as he may by law be upon a criminal charge,) whilst he remains in such custody a bill may be exhibited against him in the Court of King's Bench as against any other person. In that case the objection could not hold. In other cases, if it could avail, it should be taken by plea in abatement as a reason for not answering to the bill. If not so taken, but the party makes defence and answers to the bill, the jurisdiction of the court is admitted, and the objection waived; and it cannot afterwards be received. The party, by making a full defence, by praying an imparlance, and pleading to the merits, submits to answer; and by praying that those merits may be inquired of by a jury, admits that the court has on those very proceedings power to direct and take the inquiry. Even in ancient times, when the jurisdiction of the Court of King's Bench to proceed by bill seems to have been confined to the case of persons actually prisoners of the court, so that others (except, perhaps, the officers of the court) were not compellable to answer to a bill; yet it was in the election of others so to answer if they would; and if they did answer, the proceeding against them by bill was good. This appears by Brook's Abridgment. tit. Bill, pl. 6. and Responder, pl. 30. As this objection might be thus waived by a common person, so a peer in this case may waive his privilege; and he does waive it, if he does not insist upon it at the proper time. The objection cannot now be allowed in this action, without determining, not only that every judgment that has been had against a peer, where the proceeding has been by bill, is illegal; but that all such judgments given within the last twenty years, though upon the authority of adjudged cases, and the constant practice of the Court of King's Bench, are liable to be reversed by writ of error.

After argument at the bar of the House, the following questions were proposed to the Judges. (2 H. Black, Rep. 306.)

1. Whether the Court of King's Bench has any jurisdiction to hold plea, in a personal action, against a peer of the realm, and lord of parliament, who is neither in the custody of the marshal, nor is an officer or minister of that court, without the King's original writ issuing out of his Chancery, to warrant such action?

2. If the court has no such jurisdiction, can it derive such jurisdiction from the acquiescence of the defendant, by pleading to issue, and proceeding to trial, in an action commenced without the King's original writ?

In answer, Lord Chief Justice Eyre stated the unanimous opinion of the judges, that the first question would have admitted considerable doubt, if the objection had been made in an earlier [527] stage of the cause; and that the cases of *Say* versus *Lord Byron*, and *Gosling* versus *Lord Weymouth*, were not to be considered as decisive authorities on the subject. But that after pleading in chief, it was too late for the defendant to object to the jurisdiction of the court.

It was accordingly ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench, and the judgment of the Court of Exchequer Chamber, *affirming the same*, be and the same are hereby AFFIRMED. And that the record be remitted back to the Court of King's Bench. (MS. Jour. *sub anno* 1794.)

## PENAL LAWS.

CASE 1.—WALTER GROSSET,—*Plaintiff* (in Error); WILLIAM OGILVIE,—*Defendant* (in Error) [20th February 1753].

[Mew's Dig. x. 943. See *Bradlaugh v. Clarke*, 1883, 8 A. C. 354: *Huntington v. Attrill* (1892) A. C. 150.]

An information was exhibited by an officer of the customs against A. for the penalty of privately relanding *certificate* goods, contrary to the statute 8 Ann. c. 13. Some time afterwards an act passed, 18 Geo. 2., indemnifying all persons from the penalties of running, landing, etc. any *prohibited* goods. The defendant pleaded this act in bar. But it was held, that the offence, laid in the information, was not released or discharged by the act of indemnity. It is a known rule in law, that on filing an information the informer has a right to the penalty vested in him; and that though the King may pardon the offence, so as to discharge his own share, yet he cannot discharge the share of the informer. For that would be to punish the officer instead of the offender.

JUDGMENT of the Court of Exchequer in Scotland REVERSED.

An act was made 8th Ann. c. 13, "for continuing several impositions, additional impositions, and duties, upon goods imported, and for better preventing frauds in the drawbacks upon certificate goods." The 16th section of which act is as follows:—"And whereas by the laws of this realm, every person exporting tobacco and other foreign goods from any part of Great Britain is entitled to a drawback of part of the duties paid or secured at the importation thereof; and it hath been found by experience, that great quantities of such tobacco and other foreign goods, after they have been shipped for exportation, have been privately relanded in this realm; and the remedies already provided by law have not been sufficient to obviate a practice so very prejudicial to her Majesty's revenue, and to all fair and honest traders in such goods: For the better prevention whereof for the future, be it further enacted by the authority aforesaid, That from and after the 27th day of March 1710, in case any tobacco or other foreign goods, contained or specified in any certificate, whereupon any such drawback is [528] to be made, or whereupon any debenture is to be made forth for any such drawback, shall not be really and *bona fide* shipped and exported (the danger of the seas and enemies excepted), or shall be landed again in any part of Great Britain, unless in case of distress, to save the goods from perishing, which shall be presently made known to the person or persons, which are or shall be appointed by her Majesty to manage her customs, or principal officers of the port; then not only all such tobacco and other certificate goods shall be forfeited and lost, but also the person or persons (being the exporters, or any others) who shall bring back, or cause or procure to be relanded, such tobacco or other certificate goods, or any of them, in any part of Great Britain, or be assisting, or otherwise concerned in the unshipping the same, or to whose hands the same shall knowingly come after the unshipping thereof, or by whose privity, knowledge, or direction, the said tobacco and other goods, or any part thereof, shall be so relanded; shall forfeit double the amount

of the said drawback for such goods, together with the vessels and boats, and all the horses, or other cattle and carriages whatsoever, made use of in the landing, removing, carriage, or conveyance of the same; one moiety of all which penalties or forfeitures shall be to the use of her Majesty, and the other moiety to him or them that shall inform, seize, or sue for the same; to be recovered by bill, plaint, or information in any of her Majesty's courts of record at Westminster, or in the Court of Exchequer in Scotland, at any time or times within five years after the offence shall be committed; wherein no essoin, protection, or wager of law shall be allowed."

By the 17th section of the same statute, any officer of the customs conniving at any fraud relative to such certificate goods, as aforesaid, over and above any other penalties to which he may be liable by that or any other act, forfeits his office, is incapacitated, and is to suffer six months imprisonment, without bail: and any master, or other person, belonging to any ship, assisting in, or conniving at, the fraudulent landing any such certificate goods, over and above all other penalties by that and other acts, is likewise to suffer six months imprisonment, without bail.—By section 18th, for preventing the running of tobacco into this kingdom, under pretence of exporting the same to Ireland, it is enacted, That no debenture shall be paid or allowed for any tobacco exported from Great Britain to Ireland, till a certificate be produced under the hands and seals of the Collector and Comptroller, or Surveyor of the Customs of any port in Ireland, or any two of them, where such goods shall be landed, testifying the landing thereof (the danger of the seas and enemies excepted); which certificate the Collector and Searcher of the Customs of each port in Ireland are required to deliver upon the discharge of such tobacco.—And as a further security for her Majesty's revenues both in England and Ireland, the 19th section enacts, That the [529] master of every ship carrying such certificate goods to Ireland shall take from the collector of every respectable port of Great Britain, a duplicate of his consent in writing, certified under the hand and seal of the collector and comptroller of such port; and shall deliver such duplicate to the officers of the customs in Ireland, on his arrival, before he be permitted to land such goods there.

Several indirect practices having been for some time carried on at the port of Leith, by privately relanding tobacco, and other foreign goods, after the same had been shipped for exportation, upon certificates obtained from the officers of his Majesty's customs at that port, and the drawbacks made thereon; and the defendant having been principally assisting, or otherwise concerned, in unshipping and landing again a large quantity of tobacco, after the same had been shipped out for exportation into parts beyond the sea, by virtue of certificates obtained from the proper officer of the customs, upon which a drawback had been made of the whole duties; the plaintiff, as being an officer of the customs at that port, exhibited an information, as well for his Majesty as himself, before the Barons of the Court of Exchequer in Scotland, in Hilary Term 1744, founded upon the said statute of the 8th of Queen Anne, against the defendant; thereby charging, that 46 hogsheads, containing 39,949 lb. weight of British plantation tobacco, were imported by certain merchants unknown, from persons beyond the seas into Great Britain; to wit, at Leith in the county of Edinburgh, within the port of Leith; for which goods, certain duties due to his Majesty were paid, or secured to be paid to his said Majesty; and that the said merchants, whose names were then unknown to the plaintiff, did, between the 1st of March then last, and the day of exhibiting that information at Leith aforesaid, procure proper certificates in writing from the officers of his Majesty's customs, who had sufficient authority for that purpose, within the said port, for the exportation into parts beyond the seas of the said several parcels of British plantation tobacco; upon which certificates certain drawbacks were to be made, or debentures to be made forth for such drawbacks, or several sums of money, amounting to £879 8s. 7d. of lawful money of Great Britain, being the whole of the duties paid or secured to his said Majesty, for the said several parcels of tobacco upon the importation thereof: And that the said several parcels of tobacco, by virtue of the certificates, were within the time aforesaid, at Leith aforesaid, by the said merchants unknown, shipped out in a certain ship or vessel called the *Jean of Alcoa*, for exportation into parts beyond the seas: And that the said several parcels of tobacco were afterwards, to wit, within the time aforesaid, at Leith aforesaid, and within the said port of Leith, unshipped and landed again, (the said unshipping or landing again of the said several parcels of



tobacco not being done in case of distress, to save the said tobacco from perishing, nor any such distress made known to any person or persons appointed by his said Majesty to manage his customs, [530] or to the principal officers of the port aforesaid,) contrary to the tenor of the statute in that behalf made and provided: By reason whereof, the said several parcels of tobacco became and were forfeited, and being so forfeited, the defendant, at the time of the unshipping and landing again of the said several parcels of tobacco, was assisting or concerned in the unshipping of the same; or by his privity, knowledge, or direction, the said several parcels of tobacco were so relanded, and within the said port, he the said defendant, at the time of unshipping and landing again of the said tobacco, well knowing that the same were shipped out for exportation into parts beyond the seas, by virtue of the said certificates, and were unshipped and landed again, (the said unshipping or landing again of the said tobacco not being made in case of distress, to save the said tobacco from perishing, nor any such distress made known to any person appointed by his Majesty to manage his customs, or to the principal officers of the port aforesaid,) contrary to the form of the said statute: By reason whereof, the defendant had forfeited £1758 17s. 2d. of lawful money of Great Britain, being double the amount of the said drawbacks for the said several parcels of tobacco: Wherefore the plaintiff, as well for his Majesty as himself, prayed the consideration of the court in the premises; and that the said several parcels of tobacco, and the sum of £1758 17s. 2d. being double the amount of the said drawback for the said several parcels of tobacco, might, for the reasons aforesaid, remain forfeited; and that the plaintiff might have the moiety thereof, according to the form of the said statute.

The defendant appeared and pleaded to this information on the 1st of June 1745; but instead of pleading the general issue, and denying the several charges in the information, he insisted, that by an act made in the parliament held at Westminster in the 18th year of his present Majesty's reign, intitled, "An act to indemnify persons who have been guilty of the unlawful importing, landing, or running of prohibited and uncustomed, or other goods and merchandizes," it was, *inter alia*, enacted, "That all and every his Majesty's subjects of this his Majesty's realm of Great Britain, who before the 1st day of May 1745, had incurred any penalty or forfeiture in, by, or for the clandestine running, landing, unshipping, concealing, or receiving any prohibited goods, wares, or merchandizes, or any foreign goods liable to the payment of the duties of customs and excise, or either of them, or who were or might be subject to any information or other prosecution whatsoever for the penalties, for the running, landing, unshipping, concealing, or receiving thereof, or for landing any goods without the presence of an officer; should be and were, by the authority of the said act, acquitted, indemnified, released, and discharged against his said Majesty, his heirs and successors, and all and every other person and persons, bodies politic and corporate, and any officer or officers of the customs and excise, and [531] every of them, of and from all the said offences (not excepted in the said act), and of and from all penalties, forfeitures, indictments, outlawries, convictions, and judgments not therein after excepted) incurred, had, or given, or that might arise or accrue or by reason or means of any the said offences, or other matters or things in the said act mentioned or expressed." The defendant further pleaded, that he was a subject of his Majesty's realm of Great Britain; and that it appeared by the information, that the offence therein mentioned and alleged to be by him done, contrary to the form of the statute in that case made and provided, was one of the offences in the said act mentioned, and not therein excepted; and that the said offence was, by the said information, alleged to be done and committed by him before the said 1st of May 1745; wherefore he prayed the benefit of the said act, and that he might be acquitted, indemnified, released, and discharged of and from the said offence, penalties, and forfeitures in the said information mentioned, by virtue of the said act.

The offence of the defendant's relanding the certificate goods, as charged by the information, being, according to the known course of pleading, admitted and established by this plea; his Majesty's Advocate General, who prosecuted for his Majesty, in order to take the judgment of the court upon the point of law arising from the construction of the act of indemnity, (and which only remained to be determined between the parties,) demurred generally to this plea, in behalf of his Majesty; insisting, that the said plea, and the matters therein contained, were

insufficient in law to acquit, indemnify, release, or discharge the defendant from the said offence, or from the said forfeiture incurred thereby, in the said information mentioned; whereupon he prayed judgment for the insufficiency of the said plea, and that the said £1758 17s. 2d. in the said information mentioned might, for the reasons therein contained, remain forfeited.

The defendant joined in demurrer, insisting, that his plea was sufficient, for the purposes aforesaid, to discharge him from his said offence, and the forfeiture thereby incurred.

The information, having stood three years for judgment on this plea and demurrer, at last came on to be argued before the Chief Baron, and other three Barons of the Court of Exchequer in Scotland, on the 1st of February 1749; when the Court were divided in opinion, two of the Barons being of opinion to allow the demurrer, and the other two Barons to over-rule the same: And the Chief Baron being of the latter opinion, judgment was accordingly given by his casting voice, that the defendant's plea was sufficient in law to discharge him from the offence and forfeiture thereby incurred, in the information mentioned, by virtue of the said act; and the demurrer was accordingly over-ruled.

By an act of the 6th of Ann. c. 26. a Court of Exchequer was erected in Scotland, and established upon the same plan and principles as the Court of Exchequer in England; and by the 12th section of that act, a writ of error is given from any judgment of the said Court, returnable into the parliament of Great Britain, upon which the like proceedings are to be had as upon writs of error in parliament, on any judgment in any of the Courts in England.

The prosecutor therefore in the present case brought a writ of error to reverse this judgment; and on his behalf it was insisted (D. Ryder, W. Murray), that the defendant, by pleading the act of indemnity, had admitted the several charges in the information, viz. that he was concerned in the landing of 39,949 lb. weight of tobacco, after the proper certificates had been obtained for exporting the same: That upon these certificates a drawback had been made of the whole duties payable upon the importation, amounting to £879 8s. 7d.: That the relanding was not known to the officers of the customs, nor occasioned by distress; and consequently, that he was become liable to all the penalties imposed by the act of the 8th of Queen Anne, unless those penalties should appear to have been released by the indemnity act of the 18th George 2.: That the several offences of landing uncustomed or prohibited goods, and the relanding certificate goods, were all separate and distinct offences, within the purview and provision of the revenue laws: And as the denominations of customable, prohibited, and certificate goods were different, so the terms of landing and relanding were differently applied; the term landing being used to express the offence of unshipping customable or prohibited goods, and relanding being applied only to certificate goods: Nor was this distinction verbal only; the offence of relanding certificate goods, besides the forfeiture of the commodity, vessel, etc. in common with the other species of goods illicitly landed, being attended with an additional forfeiture of double the amount of the drawback; and the several penal laws have given different processes, and different periods for prosecuting the same, according to the different offences; many of those laws which have specified offences of the first sort, have been silent as to the latter; and *vice versa*, certificate goods have been frequently the object of the provisions of laws, which have not extended either to prohibited or uncustomed goods. That the act of the 18th George 2. pardons all forfeitures and penalties for the running, landing, and unshipping of prohibited goods, or goods liable to the payment of duties upon importation: But certificate goods are neither prohibited goods, nor goods liable to the payment of duties; they have been once legally imported and landed, and consequently are not prohibited; they have paid the duties, and therefore are no longer liable to the payment of duties; but they may be relanded, which is a different species of offence from the former; and as being the greater offence, is not pardoned either by the letter or spirit of the above act, which extends only to the lesser offences. Neither will the indemnity granted by this act, in respect of goods not landed in the presence of an officer, [533] extend to the case of certificate goods, because they can never be landed in the presence of an officer; for the certificate which gives a title to the drawback is obtained upon the express condition, that the goods shall not be relanded upon any terms except in distress; and then it would be absurd

to require the presence of an officer, as the vessel might perish before an officer could be called; and the law in that case requires no more than a notification of the distress to an officer as soon as may be; but does not prohibit the landing of the goods till an officer comes down to the shore, which would be highly unreasonable.

But it is objected, that admitting it to be doubtful whether the act comprehends the goods specified in the information; yet it being an act of indemnity, ought to be construed most beneficially for the subject. To this it may be answered, that notwithstanding there are clauses inserted in all the acts of general pardon since the restoration, directing judges to construe those acts most beneficially for the subject; yet this clause is omitted in the act for indemnifying runners: a plain indication, that the legislature were not so solicitous to extend their bounty to the runners, as to the whole body of the nation. That the plaintiff's information was exhibited a year before the act passed: and it is a known rule in law, that on filing an information, the informer has a right to the penalty invested in him, to which the statute ought not to be extended, as being a private interest; and though the king may still pardon the offence, so as to discharge his own share, yet he cannot discharge the share of the informer, who has put himself to great expence in prosecuting his information; as that would be to punish the officer instead of the smuggler. That if the king could not, and yet the legislature had by this particular act discharged offences touching which informations were exhibited even before it took place; the act, as it derogates from the common law, ought at least to be construed strictly; and therefore if certificate goods were not clearly within the words of the act, they ought to be so adjudged; and the indemnity of the act not extended to the offences in the information, which were no way within the purview or provision of it. It was therefore hoped, that the judgment allowing the defendant's demurrer would be reversed; and that his Majesty and the plaintiff would have judgment for the penalties sued for, according to the plaintiff's information.

On the other side it was said (A. Hume Campbell, K. Evans), that the offence charged in the information was the importation, or landing and unshipping of tobacco, which having been once duly imported, the duties paid, and afterwards entered for exportation with a certificate, was contrary to and prohibited by law. The tobacco therefore, on the case stated by the information, was a prohibited commodity, and by the landing it in the manner stated and charged, the defendant incurred a heavy penalty, and became subject to an information for landing and unshipping of prohibited goods, contrary to act of parliament. And it was from such penalties and [534] forfeitures, as well as from all prosecutions on account thereof, that persons are expressly indemnified, acquitted, released, and discharged, by the act which the defendant had pleaded. That if the landing of tobacco exported by certificate was not within the words of the statute, yet it was within the intent and meaning of the legislature. Smuggling, in the strict sense of the word, was not the only object, but every landing and unshipping of goods prohibited; to the prejudice of the public revenue, contrary to any of the laws relating to the customs or excise, was within the view of parliament; the evil was general, the inducement to reform was intended to be equally extensive, and if every commodity unlawfully landed was required to be expressed, the statute would be nugatory; and it would be equally so if construed not to extend to offences which were not precisely described in all the circumstances attending them. Lastly, That the statute being for pardon and indemnity, as well for the benefit of the kingdom in general as of the offending subjects in particular, it ought to receive a liberal, large, and beneficial construction.

After hearing counsel on this writ of error, it was proposed that the judges should be directed to deliver their opinions upon the following question, viz. "Whether the offence of being assisting or concerned in the unshipping and relanding of the tobacco, charged in the information in this cause, was released or discharged by the act of parliament, 18th George 2." And the Lord Chief Justice of the Common Pleas having delivered the opinions of the judges, that the offence was not released or discharged by the said act; it was thereupon ORDERED and ADJUDGED, that the judgment given in the Court of Exchequer in Scotland should be reversed; and that judgment should be given in this cause for the king and the informer. (Jour. vol. 28. p. 22, 23.)

CASE 2.—DAVID PATRICK,—*Plaintiff* (in Error); His Majesty's Advocate General, who prosecuted by Information,—*Defendant* (in Error) [23d April 1792]

[1 Scots R. R. (H. L.) 680.]

The retailers of *aquavita* in Scotland are *not*, under stat. 30. Geo. 3 c. 38. and the statutes therein referred to, obliged to have, besides what is called a county or stamp-office licence, an excise licence also.

This case is inserted, not so much for its decision on the above point, as for the principles urged, by the plaintiff in error, as to the Revenue Statutes incorporating the provisions of each other.

The object of this information was to have it solemnly and finally determined, whether the retailers in Scotland of spirits made or distilled from malt, commonly called and known by the name of *aquavita*, are or are not required and obliged to have, [535] besides what is called a county or stamp-office licence, an excise licence also, under the sound construction of the act 30 G. 3 c. 38. and former statutes therein referred to? This is a question of very great and general importance, not only to the revenue, but to the police of the country; and the decision of it rests upon the words and import of the act above stated, and falls within a very narrow compass: yet as reference may, perhaps, be made to various prior statutes, the defendant thinks it necessary to state certain clauses of these statutes.

By acts passed in the 9th of Queen Anne, c. 23. sect. 23. in the 29th of G. 2. c. 12. sect. 1. and in the 24th of G. 3. c. 30. sect. 1. there are imposed stamp duties amounting to £1 11s. 6d. on every piece of vellum or parchment, or piece or sheet of paper, on which shall be engrossed, written, or printed, any licence for selling beer, ale, or other excisable liquors, by retail.

By stat. 29th G. 2. c. 12. sects. 10, 11, 12, and 25. it is enacted, "That no person shall keep any ale-house, tippling-house, or victualling-house, to sell ale, beer, or other excisable liquors, by retail in Scotland, but such persons who shall be annually thereto admitted, allowed, and licensed, according to the directions contained in this act." Power is given to the justices of the peace to admit such persons as they shall judge proper to keep ale-houses, and to sell ale, beer, or other excisable liquors, to whom they are to grant licences stamped as by the act directed. The like power is given to the magistrates of burghs to license persons residing in burghs.

By stat. 5th G. 3. c. 46. sects. 27, 28, 29, 30, 31, and 33. it is enacted, That when justices of the peace or magistrates of burghs shall not attend to licence retailers, pursuant to the above recited act, the clerks of the peace and of the royal burghs may issue such licences, being first duly stamped, and paying such duty as by the before-mentioned act is directed.

By an act passed in the 2d G. 2. c. 28. sect. 10. it is enacted, That no person or persons whatsoever shall sell any brandy or other distilled spirituous liquors by retail, to be drank in his, her, or their house or houses, but such persons only as shall be thereunto licensed and allowed in the same manner as common ale-house keepers; and every person or persons so selling brandy or other distilled spirituous liquors by retail as aforesaid, shall be subject to such rules, penalties and forfeitures, as common ale-house keepers now are, for selling drink without licence: and the several justices of the peace of this kingdom, and other officers, are hereby empowered and authorised to have and exercise the same jurisdiction, powers, and authorities, over such retailers of brandy or other distilled spirituous liquors which they now have, or exercise, over common ale-house keepers by any law or statute whatsoever."

By stat. 9th G. 2. c. 23. (anno 1736), reciting the pernicious effects which had arisen from the immoderate use of spirits, it was for remedy thereof enacted, by sect. 1, 2, 3. That no person or [536] persons shall retail any spirituous liquors without taking out a licence for that purpose, to be granted as thereby directed, on which was imposed a duty of £50 per ann. under a penalty of £100 and a duty of 20s. per gallon was imposed on all spirits retailed; but these were afterwards repealed by 16th G. 2. c. 8. By sect. 10. no persons were allowed to be licensed, except such as kept public victualling-houses, inns, coffee-houses, &c. and used no other trade. By sect. 11 and 16, persons paying wages in spirits, or giving away spirituous liquors to servants or apprentices coming to their shops or houses, are deemed retailers. By

sect. 12, the act was declared not to extend to physicians, apothecaries, surgeons, or chemists, as to any spirits or other spirituous liquors which they may use in the preparation or making up of medicines for sick, lame, or distempered persons only; and by sect. 22. it was *Provided that nothing in this act contained shall extend to charge with any of the duties directed to be paid, levied, or received as aforesaid, any spirits made or distilled from malt, and retailed and consumed in that part of Great Britain called Scotland, which spirits are commonly called and known by the name of aquavita in that part of the kingdom, or to subject the makers, sellers, or retailers thereof, within that part of the kingdom, to take out such licences as are hereinbefore directed.*"

The stat. 10 G. 2. c. 19. sect. 2, 3, 4, and 5, provided that the privileges of the two Universities of Oxford and Cambridge should not be affected by the stat. 9 G. 2. c. 23.—allowed distillers and wine sellers in the town of Cambridge to be licensed, provided that no fees for licences were to be taken at Oxford,—and the usual payments to be made at Cambridge,—and saved all the privileges of the city of Oxford.

By stat. 16 G. 2. c. 8. (anno 1743), repealing the duties on spirituous liquors, and on licences for retailing the same, granted by 9 G. 2. and granting other duties in lieu thereof, it was enacted, by sect. 8. That no person or persons whatsoever shall presume by him, her, or themselves, or by any person or persons whatsoever employed by him, her, or them, or for his, her, or their benefit, to retail any brandy, arrack, rum, usquebaugh, geneva, aquavita, or any other distilled spirituous liquors, or strong waters, unmixed or mixed with themselves, or any other ingredients, and by whatsoever name or names they are or may be called, publicly or privately, without first taking out a licence for that purpose, for which licence a duty of 20s. is to be paid, and directions are given for the manner of issuing the licences, and paying the duty for the same. Sect. 9. enacts a penalty against persons retailing without such licence; and sect. 11. provides, "That nothing in this act shall extend or be construed to enable any person or persons to sell any spirituous liquors, or strong waters, by retail, unless such person or persons be first licensed to sell ale, or spirituous liquors, by two or more of his Majesty's justices of the peace for the county, riding, division, city, or liberty wherein such person or persons shall sell the said liquors, under the hands and seals [537] of the said justices." Sect. 12. contains the same exceptions as before mentioned, with respect to physicians, surgeons, etc. and further enacts, "That no person or persons shall be deemed or taken to be a retailer of spirituous liquors, who doth not by him, her, or themselves, or by his, her, or their servants, or other person, retail the same, to be drank or consumed in his, her, or their warehouses, storehouses, shops, cellars, vaults, rooms, sheds, or other places, to him, her, or them belonging, or that shall otherwise retail the same abroad out of their said warehouses, storehouses, shops, cellars, vaults, rooms, or other places, in less quantities than one pint." Sect. 13. contains an exemption, in the same words as above recited, from the licence and licence duty "*on spirits made from malt retailed or consumed in Scotland.*"

Stat. 17 G. 2. c. 17. sect. 19. enacts, "That every person or persons who shall by him, or herself, or themselves, or by his, her, or their servant, or other person employed by him, her, or them, or for his, her, or their benefit, retail any spirituous liquors, mixed or unmixed with any ingredients, to be drank or consumed in any quantity whatsoever in his, her, or their houses, warehouses, shops, cellars, vaults, sheds, or other places to him, her, or them belonging, or that shall retail or send the same abroad out of their said houses, warehouses, storehouses, shops, cellars, vaults, sheds or other places in less quantity than two gallons, without first taking out a licence for that purpose, and renewing the same, as in the act of 16 G. 2. is particularly directed, shall be deemed a retailer of spirituous liquors within the meaning of the said act, and, as such, shall forfeit and lose the sum of £10 for every such offence." By sect. 21. it is further enacted, "That no licence for retailing spirituous liquors shall empower any person, to whom the same may be granted, to sell such spirituous liquors in any other place, except in such houses or places thereunto belonging, wherein he, she, or they, shall inhabit and dwell at the time of granting such licence."

By stat. 24 G. 2. c. 40. (anno 1752), an additional duty of 20s. is laid on licences for retailing spirituous liquors. By sect. 7. it is enacted, "That the penalty of £10 for retailing spirits without licence shall not in any case, either by the commissioners or justices, be mitigated or reduced below the sum of £5." By sect. 8. the licences shall be granted in any parts of the country where there are church and poor rates only

to persons who are assessed to church and poor. By sect. 26. the same exemption as before recited is provided in favour of "*spirits made from malt retailed, or consumed in Scotland, commonly known there by the name of aquavivæ.*"

By stat. 26 G. 2. c. 13. sect. 9. the penalty of £10 shall not be mitigated below £5 as above; and by sect. 12 (as well as by former acts of the 11 G. 2. c. 26. sect. 8., and 24 G. 2. c. 40. sect. 22.), distillers or sellers of spirits, brewers, victuallers, and maltsters, are disqualified from acting as justices of the peace in [538] matters relative to the execution of the acts respecting the retailing of spirituous liquors.

By stat. 26 G. 2. c. 31. sect. 11. it is enacted, That if any person shall be disabled by conviction to sell ale, beer, cyder, or perry, such person, by the same conviction, shall be also disabled to sell any spirituous liquors, or strong waters, any licence before obtained for that purpose notwithstanding.

By stat. 29 G. 2. c. 12. sect. 22. no licence shall be granted by the commissioners or officers of excise for retailing spirituous liquors, or strong waters, except to such person or persons as shall produce a licence for retailing beer, ale, or other excisable liquors, stamped as by the act 9th of Anne, before recited, and by this act is directed.

Stat. 13 G. 3. c. 56. sect. 1. after reciting the inefficacy of former laws, from the smallness of the penalties, enacts, "That if any person or persons shall, after the 5th of July 1773, presume by him, her, or themselves, or by any other person or persons whatsoever employed by him, her, or them, or for his, her, or their benefit, to retail any distilled spirituous liquors, or strong waters, without first taking out a licence in manner as by the several statutes in that case made and provided, and now in force is prescribed and directed, he, she, or they, so offending, shall respectively forfeit and lose the sum of £50 for each offence." And sect. 4. enacts, That this penalty shall not in any case be mitigated below the sum of £5.

By stat. 27 G. 3. c. 30. the following *additional* duties were imposed upon all licences to be taken out annually by all persons who shall retail any distilled spirituous liquors, or strong waters, within Great Britain; that is to say, every person, who shall retail distilled spirituous liquors, or strong waters, shall (over and besides any licence or licences to which such person was liable before the 11th of May 1787) take out a licence, and pay down for the same the sum of £2 8s. if the house in which he resides, or retails, is rated to the house tax under £15; £2 16s. if it be at £15 or upwards, and under £20; £3 4s. if at £20 or upwards, and under £25; £3 12s. if at £25 or upwards, and under £30; £4 if at £30 or upwards, and under £40; £4 8s. if at £40 or upwards, and under £50; and £4 16s. if at £50 or upwards. These sums to be paid in the proportion of one-eighth part every six weeks; and these licences to be granted in the same manner as the former spirit licences, and renewed annually, under a penalty of £50.

By stat. 30 G. 3. c. 38. (intituled, "An act for repealing the duties upon licences for retailing wine and sweets, and upon licences for retailing distilled spirituous liquors, and for granting other duties in lieu thereof;") sect. 2 and 3, the several duties imposed on licences for retailing spirits by statutes 16 G. 2. c. 8., 24 G. 2. c. 40. (with the 5 per cent. duties thereon), and the 27th G. 3. c. 30. are taken off, and cease and determine from the 10th of October 1790, except as to arrears unpaid, [539] and penalties incurred on account of them. By sect. 4. all such licences, formerly granted, and unexpired on the 10th of October 1790, became null and void from that date. But by sect. 5. every person, whose licence so becomes void, upon taking out a licence of the same kind under the new act, is allowed a deduction, out of the duty to be paid for it, of a rateable proportion of the sum paid for the licence so become void, according to the unexpired period at the time of its so becoming null.

By sect. 6 it is enacted, "That, from and after the said 10th day of October 1790. *all and every person and persons who shall retail foreign wine, or British-made wines, or sweets, or distilled spirituous liquors, or strong waters, shall, before he, she, or they shall retail any foreign wine, or any British-made wines, or sweets, or any distilled spirituous liquors, or strong waters, take out such licence as hereinafter mentioned authorizing such person or persons to retail foreign wine, or British-made wines, or sweets, or distilled spirituous liquors, or strong waters, as the case may require.*" The same sect. provides the manner of taking out and paying for these licences in England and Scotland respectively; and it fixes the rates of the licence duty as follows: "*For every licence which shall be granted to authorise any person or persons to retain distilled spirituous liquors, or strong waters, in any part of Great Britain.*"

the sum of £4 14s. if the dwelling-house in which such person shall reside, or retail such distilled spirituous liquors, or strong waters, at the time of taking out such licence, shall not, together with the offices, courts, yards, and gardens therewith occupied, be rated, under the authority of an act, made in the 19th year of the reign of his present Majesty, for imposing duties upon inhabited houses, at a rent of £15 per ann. and upwards: if rated at £15 and under £20 licence duty £5 2s.; if rated at £20 and under £25 licence duty £5 10s.; if rated at £25 and under £30 licence duty £5 18s.; if rated at £30 and under £40 licence duty £6 6s.; if rated at £40 and under £50 licence duty £6 14s.; if rated at £50 or upwards, licence duty £7 2s."

By sect. 9. it is enacted, "*That no person or persons shall retail any foreign wines, or any British-made wines, or sweets, or any distilled spirituous liquors, or strong waters, after the expiration of such his, her, or their licence, unless such person or persons shall take out a fresh licence for the like purpose, in the manner hereinbefore directed, ten days at least before the expiration of such former licence, and so in like manner renew every such licence from year to year; and if any person or persons shall retail any foreign wines, or any British-made wines, or sweets, or any distilled spirituous liquors, or strong waters, without first taking out a licence, authorizing him, her, or them so to do, and renewing the same as is hereinbefore in that behalf directed, he, she, or they shall, for every such offence, forfeit the sum of £50.*"

By sect. 11, 12, and 13. it is provided, "That nothing hereinbefore contained shall in anywise be prejudicial to the privi-[540]leges of the two Universities in that part of Great Britain called England, or either of them, or to the Chancellors or Scholars of the same, or their successors, but that they may use and enjoy such privileges as they have heretofore lawfully used and enjoyed, any thing hereinbefore contained to the contrary notwithstanding:—That nothing hereinbefore contained shall extend, or be prejudicial to the master, wardens, freemen, and commonalty of the vintners of the city of London, or to any other city or town corporate, but that they may use and enjoy such liberties and privileges as they have heretofore lawfully used and enjoyed. —Provided also, That no person who shall be admitted to the freedom of the said company of vintners of the city of London by redemption only, shall be exempted from the obligation of taking out a licence for retailing foreign wine, but that the freemen only of the said company, who shall have been already admitted to their freedom, or who shall be admitted to their freedom in right of patrimony or apprenticeship, shall be entitled to such exemption:—That nothing hereinbefore contained shall in anywise extend to debar or hinder the mayor or burgesses of the borough of St. Albans in the county of Hertford, or their successors, from enjoying, using, and exercising all such liberties, powers, and authorities to them heretofore granted by several letters patent, under the great seal of England, by Queen Elizabeth and King James I. for erecting, appointing, and licensing of three several wine taverns within the borough aforesaid, for and towards the maintenance of the free school there, but that the same liberties, powers, and authorities shall be, and the same are hereby established and confirmed, and shall remain and continue in and to the said mayor and burgesses, and their successors, to and for the charitable use aforesaid, and according to the tenor of the letters patent aforesaid, as though this act had never been made, any thing in this act contained to the contrary in anywise notwithstanding."

By sect. 14. it is enacted, "That no licence to retail foreign wine, or British-made wines, or sweets, or distilled spirituous liquors, or strong waters, shall be granted to any person or persons whatsoever, save and except to such persons only to whom a licence to retail foreign wine, British-made wines, or sweets, or distilled spirituous liquors, or strong waters respectively, might lawfully be granted by the several acts of parliament in force before the passing of this act."

By sect. 15. it is enacted, "*That all and every person and persons who shall sell, offer or expose to sale, any brandy, rum, arrack, usquebaugh, geneva, aquavita, or other distilled spirituous liquors, or strong waters, unmixed or mixed with themselves or any other ingredients, in any less quantity than two gallons, shall be deemed and taken to be a retailer or retailers of distilled spirituous liquors and strong waters, within the meaning of this act; and if any brandy, rum, arrack, usquebaugh, geneva, aquavita, or any other distilled spirituous liquors, or strong waters, unmixed or mixed with themselves or any [541] other ingredients, shall, at any time, be sold, offered or exposed to sale, by any person or persons whatsoever, in any quantity less than two gallons, such selling, offering and exposing to sale, shall be deemed and*

*taken to be a retailing of distilled spirituous liquors, or strong waters, within the meaning of this act."*

By sect. 18. the several acts made in the 16th and 24th G. 2. and 27 G. 3. so far as the same gave any power or authority to the commissioners of excise, in England and Scotland respectively, or to the persons appointed by them, or any of them, or the collectors or supervisors of excise, in England and Scotland respectively, to grant licences to retail distilled spirituous liquors, or strong waters, shall be, and the same are hereby repealed.

By sect. 19. it is enacted, "*That all the powers, authorities, rules, regulations, restrictions, exceptions, provisions, clauses, matters, or things, which in or by any act or acts of parliament relating to the retailing of foreign wine, or British-made wines, or sweets, or distilled spirituous liquors, or strong waters, or to licences to retail the same respectively, in force, immediately before the passing of this act, are contained, provided, settled, or established, for raising, levying, collecting, paying, adjudging, mitigating, ascertaining, enforcing, or securing the rates or duties by law imposed for or in respect of such licences, and for preventing, detecting, and punishing frauds relating thereto, or for the regulating the retailing the said liquors respectively, AND NOT BEING EXPRESSLY ALTERED, REPEALED, CHANGED, OR CONTROLLED BY THIS ACT, or not being repugnant to any of the matters, clauses, provisions, or regulations in this act contained, shall be and continue in full force, and be duly observed, practised, applied, and put in execution, THROUGHOUT GREAT BRITAIN, in and for the managing, assessing, raising, levying, collecting, paying, recovering, adjudging, mitigating, ascertaining, enforcing, and securing the said several duties by this act imposed, and for preventing, detecting, and punishing frauds relating thereto, and for regulating the retailing of the said liquors respectively, so far as the same are applicable thereunto respectively, as fully and effectually, to all intents and purposes, as if all and every the said powers, authorities, rules, regulations, restrictions, exceptions, provisions, clauses, matters, and things, had been expressly inserted and re-enacted in this act.*"

By sect. 20. it is further enacted, "*That all and every the powers, directions, rules, penalties, forfeitures, clauses, matters, and things, which, in and by an act made in the 12th year of the reign of King Charles II. (intituled, "An act for taking away the court of wards and liveries, etc."), or by any other law now in force, relating to his Majesty's revenue of excise, are provided and established, for managing, raising, levying, collecting, mitigating or recovering, adjudging or ascertaining, the duties thereby granted, or any of them, (other than in such cases for which other penalties or provisions are made and prescribed by this act,) shall be practised, used, and put in execution, in and [542] for the managing, raising, levying, collecting, mitigating, recovering, and paying the duties by this act imposed, and for preventing, detecting, and punishing frauds relating thereto, as fully and effectually, to all intents and purposes, as if all and every the said powers, rules, directions, penalties, forfeitures, clauses, matters, and things, were particularly repeated, and re-enacted in this present act.*"

On the 12th day of May 1791, the defendant in error exhibited his information in his Majesty's Court of Exchequer in Scotland, founded on the before recited 9th section of the statute 30 Geo. 3. c. 38. which information set forth, "*That one David Patrick, retailer of spirits in Kilsyth, did, between the 10th day of October 1790, and the day of the exhibition of the information, viz. 12th of May 1791, retail certain distilled spirituous liquors, or strong waters, without first taking out a licence authorizing him so to do, as by the statute, in that case lately made and provided, is particularly directed, contrary to the form of the said statute; whereby, and by force of the said statute, he the said David Patrick, for such offence, hath forfeited and lost the sum of £50 of lawful money of Great Britain.*"

To this information the plaintiff in error appeared, and pleaded the general issue of Not Guilty; and his Majesty's Advocate General for Scotland, the defendant in error, having joined issue, the cause was tried in the Court of Exchequer in Scotland on the 7th December 1791, when the jury returned the following special verdict:

"That during the period mentioned in the information the defendant was a



retailer of spirits, of the species and description after mentioned, at Kilsyth in the county of Lanark.

"That during the said period the defendant did openly and avowedly, at Kilsyth aforesaid, retail certain distilled spirituous liquors, or strong waters, to wit, spirits made or distilled from malt in Scotland, commonly called and known by the name of *aquavita*, or *whiskey*, which spirits were retailed and consumed in that part of the united kingdom called Scotland.

"That during the said period the defendant did not retail any other species or description of spirituous liquors, or strong waters whatsoever.

"That during the said period the defendant had a licence granted to him by the justices of the peace for the county of Lanark, of the following tenor, for which he paid a stamp duty of £1 10s. 6d. per ann. "At Lanark the 10th day of October 1790, the clerk of the peace of the shire of Lanark, in consequence of the powers committed to him by an act passed in the 5th year of the reign of his present Majesty, titled, 'An act for altering the stamp duties, and for further securing and improving the stamp duties in Great Britain,' and in pursuance of another act of the 24th year of his present Majesty, intituled, 'An act for granting to his Majesty an additional duty upon beer, ale, or other excisable liquors,' doth hereby allow and [543] license said Patrick, at Kilsyth, in the parish of Kilsyth and county aforesaid, to keep an alehouse, tippling-house, or victualling-house there, and no where else, and that for the year, from the 10th day of October 1790, to the 10th day of October 1791, with liberty to sell and dispose of all kinds of beer, ale, or other excisable liquors, by retail, during the said space, and no longer. Given under the said clerks hands, and upon stamps, denoting the payment of twenty shillings and ten shillings and pence, agreeable to law.—(Signed) J. Cunnison."

"That during the period mentioned in the information the defendant did not take out, nor had, any excise licence, or any licence, other than that before recited, for retailing spirituous liquors, or strong waters, of any kind.

"That, since the commencement of the statutes requiring licences to be taken out for retailing spirituous liquors till the 10th day of October 1790, it has been the universal practice in Scotland for persons having a stamp-office or county licence, such as is before recited, for retailing beer, ale, or other excisable liquors, to retail spirits, made or distilled from malt in Scotland, commonly called and known by the name of *aquavita*, or *whiskey*, which spirits were retailed and consumed in that part of the united kingdom called Scotland, without taking out any other licence than the retailing of such spirituous liquors.

"But that since the said 10th day of October 1790, the commissioners and officers of excise have conceived, that by the law an excise licence is also required, and necessary, to authorize the retailing of such spirituous liquors in Scotland, and have taken measures for enforcing what they so conceive to be the intent and meaning of the law, or for having the determination of this honourable court thereon.

"That in England it is and always has been the uniform and established practice of every person whatever, who retails distilled spirituous liquors, or strong waters of any kind, to take out and pay duty for both the first-mentioned stamp-office or county licence, for retailing beer, ale, or other excisable liquors, and also the last-mentioned excise licence for retailing distilled spirituous liquors, or strong waters.

"And if, upon the whole matter aforesaid, the court shall be of opinion, that the retailers of spirits distilled from malt in Scotland, commonly called and known by the name of *aquavita*, or *whiskey*, are not subjected or liable to take out an excise licence for that purpose, under the statutes in that case made and provided, then the jury, on their oaths, say, that the said David Patrick is not guilty of the offence in the said information mentioned, as he the said David Patrick has above by his oath alleged; but if the Court shall be of opinion, that the retailers of spirits distilled from malt in Scotland, commonly called and known by the name of *aquavita*, or *whiskey*, are subjected or liable to take out an excise licence for that purpose, under the statutes in that case made and provided, then the jury, on their oaths, say, that he the said David Patrick is guilty of the offence in the said information mentioned, contrary to the form of the aforesaid statute, in manner and manner as by the aforesaid information is above supposed against him."

Upon that argument the plaintiff in error contended, that although the act of the 5th year of his present Majesty, c. 38. did not, like the act of the 24th of the late King,

contain an express exception or provision in favour of the retailers of spirits made from malt in Scotland, and known by the name of *aquavitae*; yet the general clause above recited was sufficient in law to create an exception or provision in their favour: that from the whole terms of the act itself, and the particular and anxious provisions in the excepting clause, it was perfectly evident that the legislature must have had it in view to continue the exception or provision in favour of retailers of spirits of this description; and that the reason why the exception or provision was not inserted *verbatim* as in the former acts, was, that it must have been considered that the general clause above recited would be sufficient to preserve, by a general reference thereto, all the exceptions, as well as all the provisions and regulations contained in the former acts, as much as if they had been expressly inserted in the present act; and that at any rate, whatever may be supposed to have been the intention of the legislature, the words of the clause must have that effect, it being expressly provided, that all the exceptions, provisions, etc. which by any former acts relating to retailing British distilled spirituous liquors, or strong waters, or to *licences to retail the same*, in force immediately before the passing of this act, were provided for regulating the retailing of the said liquors, not being expressly repealed by this act, or not repugnant thereto, should be continued in full force; and that it was perfectly clear, that the exception or provision in favour of the retailers of *aquavitae* was an exception or provision in an act of parliament relating to the retailing of spirits in force before passing of this act; and that it was neither expressly repealed thereby, nor repugnant to any of the matters, clauses, provisions, nor declarations therein contained; and consequently that the plaintiff in error was entitled, by the express words of the act of parliament, to this exception or provision. He contended for as much as if the act had contained the special exception or provision inserted in the former statute.

On the part of the defendant in error, it was urged, that the act of the 30th of his present Majesty, upon which the information was laid expressly, repealed all the former licence acts; and as it expressly enacts that there shall be paid for every licence which shall be granted to authorize any person or persons to retail spirituous distilled liquors, or strong waters, in any part of Great Britain, the sum of £4 14s. 8d. no general clause, however broad and extensive, could preserve particular exceptions or provisions contained in the former statutes thus expressly repealed, so as to limit the express enactment that a licence should be taken out and [545] paid for, in order to entitle any person to retail any kind of spirits in any part of Great Britain.

But to this it was answered for the plaintiff in error, that although the legislature, which had nothing more in view but to substitute one rate of duty for another, had thought fit to do this by repealing the former laws and making the new one, there was nothing to prevent them from adopting any exception, provision, or other regulation in the former acts, by a mere reference thereto, instead of repeating them *verbatim* in the new act: that although the former acts were repealed by the latter statute, they certainly were in force before it was passed, and therefore are and must be the very acts referred to in the general clause above recited; and the exceptions and provisions referred to, can be no other than this and the other particular exceptions and provisions contained in those former acts, which neither are contrary to the word, nor repugnant to the spirit of the act in question.

It was also observed by the defendant in error, That as the act of his present Majesty contained particular exceptions and provisions in favour of the universality of the vintners company, etc., a special exception would have also been inserted in favour of retailers of *aquavitae* in Scotland, had any such been intended. To this observation the plaintiff in error replied, That the exception in favour of the universality, etc. was not created by any former statute, nor was it a privilege granted *ex gratia* by parliament; it was only a declaration that the legal rights of those bodies should not be affected by the act. It was impossible, therefore, to give effect to the intention of the legislature, in this respect, without special clauses for that purpose; whereas, a special clause was totally unnecessary to preserve the exemption to the retailers of *aquavitae* in Scotland, as it could be done just as effectually by declaring that the exceptions and provisions in their favour contained in the former acts should remain in force, notwithstanding the said acts were repealed, as by reading the act with a repetition of these former excepting clauses.

It was farther said for the defendant in error, That the act contains a clause

declaring, "That in case any such licence shall be taken out within the limits of the city of Edinburgh, the same shall be granted under the hands and seals of two or more of the commissioners of excise in Scotland for the time being; or if any such licence shall be taken out in that part of Great Britain called Scotland, out of the limits of the city of Edinburgh, then the same shall be granted under the respective hands and seals of the several collectors and supervisors of excise in Scotland, within their respective collections and districts;" which shewed that the obligation to take out a licence was intended to apply to all spirits retailed in Scotland.

To this observation the plaintiff in error replied, That it was totally without foundation, because the clause applied to all the different licences required by the act; and as retailers of wines, and all kinds of spirituous liquors in Scotland, except that spirit [546] distilled from malt in Scotland, and known by the name of *aquavita*, were obliged to take out licences, it was equally necessary to regulate the manner of giving out licences in Scotland, whether there was or was not an exception in favour of the retailers of *aquavita* in Scotland.

A great deal of argument was also used, founded upon the expediency of restraining the sale of spirituous liquors amongst the lower ranks of people; and the preamble of the act of the 9th of George the 2d was read, to shew the anxiety of the legislature in this respect: But it was answered for the plaintiff in error, That the expediency of granting licences was under the regulation of the justices of the peace, and that arguments of this sort, however plausible, could not be set up against the express words of an act of parliament: That at the very time the legislature were imposing these heavy duties on the retailing of spirituous liquors, amounting almost to a prohibition, every act contained an express exception in favour of the retailers of *aquavita* in Scotland: That even as to other retailers, the legislature had become sensible that it was expedient, and indeed necessary, to take off the heavy duties, which would otherwise have extinguished this branch of the revenue, and to impose a lower licence duty, such as the sale of the commodity could bear: That even then the legislature thought it proper to continue the total exception in favour of the retailers of *aquavita* in Scotland, and that no change has since taken place in the state of Scotland in this respect, that should have led the legislature to take away this exception by the late statute; and that, on the contrary, if the retailers of *aquavita* in Scotland were to be obliged to take out the licence required by the act in question, the inhabitants of the wilder parts of the country would be totally deprived of the use of spirituous liquors, for which they have occasion, not merely as an article of luxury, but as a necessary of life. The act of the 25th of his present Majesty, cap. 22, so anxiously obtained for the benefit of the Highlands of Scotland, authorising the commissioners of excise in Scotland to grant licences to persons living in certain counties or districts, to distil spirits in forty-gallon stills, from barley, beer, or big, the growth of the said counties, would be virtually repealed; for the *aquavita* made by these stills cannot be retailed without taking out an annual licence, and paying £4 14s. for the same. There is not a retailer of *aquavita* in the Highlands able to pay such a heavy licence duty.

The Court of Exchequer gave judgment for the plaintiff.

From this judgment, the plaintiff in error brought a writ of error, returnable in parliament, and assigned the general error; to which the defendant answered, that there was no error.

The plaintiff in error contended (H. Erskine, A. Maconochie, W. Dundas), that the judgment of the Court of Exchequer in Scotland ought to be reversed; and argued against it on the following grounds:

When the legislature has once created an exception, exemption, or provision, saving from payment of a tax in favour of any [547] particular article or description of persons to which and to whom, independent of such exception or provision, the act imposing such tax would apply, and comes afterwards to increase or diminish the amount of the duty, or to regulate the exaction thereof, there is no necessity, in order to continue the exception or provision, that it should be *verbatim* repeated in the new statute. If the former act is not repealed, the exception or provision will remain a force without any new proviso to that effect; and accordingly, though none of the various statutes altering the rate of the licence duties, did either expressly or by reference preserve the exception and provision in favour of retailers of *aquavita* in Scotland, granted by the acts of the 16th and 24th of the late king; yet it is established

by the special verdict, that such retailers had the benefit of the exception or provision in the same way as under the former acts; and though the legislature in new-modelling such duties, may find it necessary to repeal the former acts, the exceptions and provisions may be as effectually renewed, by a declaration that the exceptions, provisions, etc. in such former acts shall continue in full force, as by expressly inserting in the new act, such particular exceptions, provisions, etc.; and it is well known that a multitude of regulations, even in original acts relative to the revenue, depend not upon any particular enactment in those statutes, but merely by reference to former statutes, imposing duties upon totally different commodities.

As the act, 30th of his present Majesty, now in question, does no more than impose an additional licence duty, so the only object of the clause it contains, repealing the former acts, was to consolidate the whole duties into one. Had not this been in view, the act in question would have been conceived in the same terms with the other statutes subsequent to the act 24th of the late king, increasing the licence duty; in which case, without any clause either special or general to that effect, the retailers of *aquavitae* in Scotland would have been entitled to the benefit of the special exception or provision in the act 24th of the late king, which they have in practice enjoyed notwithstanding the different acts passed, increasing the duty without repealing the exception or provision. Independent, therefore, of the general clause in the act of the 30th of his present Majesty, on which the plaintiff in error now founds, it might be maintained, that as the former statutes were repealed only as to the amount of the duties, and "in so far as respects the form and manner of issuing licences," the whole exceptions, provisions, etc. contained in the said former acts would have remained entire, though there had been no provision in the new statute to that effect.

At any rate, the general clause in the act 30th of his present Majesty, above recited, is clearly equivalent to the express clause contained in the statutes said to be thereby repealed, declaring that nothing in these acts should extend to charge with duties any spirits made or distilled from malt, and retailed and consumed within that part of Great Britain called Scotland, which spirits are [548] commonly called and known by the name of *aquavitae* in that part of the kingdom, or to subject the makers, sellers, or retailers thereof within that part of the kingdom, to take such licences as are hereinbefore directed. It is impossible to dispute that this clause is an exception or provision, and that it relates to the retailing of distilled spirituous liquors, and to licences to retail the same, in the statute in which it was contained; it is equally clear that this exception or provision was in force before the passing of the act of the 30th of his present Majesty. It is therefore impossible that the words of the last statute, "That all the powers, authorities, rules, regulations, restrictions, *exceptions, provisions*, clauses, matters, and things, which in or by any act or acts of parliament relating to the retailing of foreign wines, or British-made wines or sweets, or distilled spirituous liquors, or strong waters, or to licences to retail the same respectively, in force immediately before the passing of this act, are contained, and shall be and continue in full force, and be duly applied, practised, and put in execution," can mean, or could have been intended to mean, any thing else but a renewal of the exception or provision contained in the former acts in favour of the retailers of *aquavitae* in Scotland; and what seems to put the matter beyond doubt is this, that it is impossible for ingenuity to point out a single exception or provision in the former acts, except this, to which it could apply, or any regulation, restriction, clause, matter, or thing in the former acts, to which it can with more justice or propriety be applied.

The consequence therefore of the judgment of the Court of Exchequer is clearly this—That the act of the 30th of his present Majesty, now in question, can have no effect whatever given to it, except as to the special provisions which it contains, there being no ground for making any distinction between one provision, restriction, exception, clause, matter, or thing in the former acts, and another provision, restriction, exception, clause, matter, or thing, when interpreting a clause in the present act which applies equally to them all. If therefore the general clause does not preserve the exception or provision in favour of the retailers of *aquavitae* in Scotland, neither does it preserve the exceptions in favour of physicians, apothecaries, surgeons, and chymists, contained in the acts of the 9th and 16th of Geo. 2. cap. 33. which has never since been renewed; neither will it preserve the provision in the act of the 16th of the late king, that no licence shall be given to any person who does

not keep a tavern, inn, coffee-house, tippling-house, or victualling-house; nor the provision in the same act, that no licence shall be granted to any person who has not been first licensed to sell ale or spirituous liquors, by two or more justices of the peace; neither will it preserve the provisions in the act of the 24th Geo. 2. that none shall be licensed to retail but such as pay to church and poor; nor the other provision in the said act, that no debt under twenty shillings, contracted for spirituous liquors, shall be recoverable in a court of law; nor the [549] farther provision in the same act, that no licence shall be granted for retailing spirituous liquors within gaols, houses of correction, or workhouses; nor this other provision in the same act, that no distiller or dealer in spirituous liquors shall act as a justice of the peace in granting licences: none of which provisions it could be the intention of the legislature to repeal, but which must be held to be repealed and not now in force, if not preserved or renewed by the present act of the 30th of his present Majesty, founded upon by the plaintiff in error.

The judgment complained of by the plaintiff in error is inconsistent with other judgments pronounced by the Court of Exchequer in Scotland, particularly in a case, his Majesty's Advocate-General against Robertson, keeper of the gaol of Edinburgh. The information was laid for selling spirits within the gaol, contrary to the statute in that case made and provided; judgment was given for the plaintiff, although, if the plea now maintained by the defendant in error be good, judgment ought to have been given for the defendant, as it could only proceed upon the provision in the act of the 24th of the late king, as reserved by the general clause in the act now in question. And in another case, his Majesty's Advocate-General against Fettes, a grocer, to recover the penalty for retailing spirits; but the Court gave their unanimous opinion in favour of the plaintiff, which could not have been, unless on the footing that the provision in the former act against a grocer's being a retailer of spirits was preserved by the general clause in the act now in question. It affords no answer to this argument, that (as pleaded by the defendant in error) an exception or provision that retailers of *aquavita* shall not be subjected to take out a licence, is repugnant to the present act, by which all persons who shall sell any spirits in any part of Great Britain are required to take out a licence, because it is not repugnant to any general clause imposing a tax to make exceptions of particular descriptions of individuals in the same act: And as the act of the 30th of his present Majesty "requires the commissioners, collectors, and supervisors to grant such licences to the persons who shall apply for the same, on the person or persons applying for the same first paying for such licences the several sums of money following," etc. it may just as well be said, that the clauses of the former acts provided that no licence shall be granted to any person who has not an ale licence, or who carries on the trade of a grocer, and cannot be held as reserved by the general clause in the act in question, because a clause denying licences to a particular set of men is repugnant to an act which directs licences to be given to all persons who shall apply and pay for the same.

The judgment complained of by the plaintiff in error establishes a most dangerous precedent, as it would be fatal to the whole provisions and regulations in the revenue statutes, created by reference to former existing acts; for the English language affords no expressions better calculated than those which occur in the clause in question, for enacting provisions by a reference to former [550] statutes, and declaring the provisions referred to, to be as effectual as if they had been expressly inferred and re-enacted in such act: so that in order to secure effect to any provision or regulation in any statute, it would be necessary to insert in it the whole powers, authorities, rules, regulations, exceptions, provisions, clauses, matters, and things contained in all former statutes, when the same are intended to make part of a new act, to the effect of multiplying the words of revenue laws beyond all reasonable bounds.

In support of the judgment, the counsel for the defendant urged (A. Macdonald, R. Dundas, J. Scott) the following reasons:

The act 30 Geo. 3. cap. 38. *repealed* all former duties on excise licences for retailing distilled spirituous liquors, and imposed a *new duty* in lieu thereof. This new duty is imposed in the most general and extensive words, by sect. 6th, which enacts, "That *all and every person or persons who shall retail distilled spirituous liquors, or strong waters,*" shall take out such licence as in the said act is mentioned; and the act points out the particular mode of issuing such licences in Scotland. The same general and comprehensive mode of expression, "*all and every person and persons,*"

also without the direction of any physician, and without taking or demanding any fee for his advice.

The defendants, apprehending this conduct to be an infringement of their privileges, brought their action against the plaintiff, to recover the penalty of £5 per month, under the above clause in their charter; and, on the trial, the jury found a special verdict, stating the charter, the confirmatory statute, and the facts of the case: and submitted to the Court, whether the defendant rose did practise physic, within the intent of the letters patent and act of parliament. And, after this verdict had been three several times argued in the Court of Queen's Bench the judges were unanimously of opinion, *that the facts found did amount to the practising physic, within the meaning of the act of parliament*; and gave judgment accordingly.

[554] Hereupon a writ of error in parliament was brought to reverse this judgment; and on behalf of the plaintiff in error, it was argued (S. Dodd), that the consequences of it would not only ruin him, but all other apothecaries; as, in case of the affirmance of this judgment, they could not exercise their profession without the licence of a physician. That the constant usage and practice, which had always been with the apothecary, was conceived to be the best expounder of this charter; and that therefore the selling a few lozenges, or a small electuary, to any person asking a remedy for a cold, or in other ordinary or common cases, where the medicines had a known and certain effect, could not be deemed unlawful; or practising as a physician, when no fee was taken or demanded for the same. That the physicians, by straining an act made so long ago, endeavoured to monopolize all manner of physic solely to themselves; and if they should succeed in this attempt, it would be attended with many mischievous consequences: For, in the first place, it would be laying a heavy tax on the nobility and gentry, who, in the slightest cases, and even for their common servants, could not have any kind of medicine without consulting and giving a fee to a member of the college: it would also be a great oppression upon poor families, who, not being able to bear the charge of a fee, would be deprived of all kind of assistance in their necessities: and it would prove extremely prejudicial to all sick persons, who, in case of sudden accidents, or new symptoms, happening in the night-time, generally send for the apothecary; but who should not dare to apply the least remedy without running the hazard of being ruined.

On the other side, it was contended (F. Brown), that by several orders of the college, its members were enjoined to give their advice to the poor *gratis*; and that not only to such as could come to them for it, but every physician, in his neighbourhood, was obliged to visit the sick poor at their own lodgings; and therefore the objection, that, if the apothecaries could not administer physic but by the prescript of a physician, the poorer sort of people would be lost for want of proper remedies, had not the least foundation. And when these orders were observed not to have their full intended effect, on account of the high prices which the apothecaries generally demanded for the remedies prescribed, whereby the poor were deterred from consulting the physician, for fear of the charge of the physic, the college, by a joint stock, erected several dispensaries in town, where, after the physicians had given their advice *gratis*, the patients might have the physic prescribed for a third, and generally less, of what the apothecaries used to exact for it; by which expedient, many hundred persons of mean condition received their cures at a very small expence, and without one farthing profit arising to the physicians. That in cases of sudden and immediate necessity, not only apothecaries, but any other person, might do his best to relieve his neighbour, without incurring the penalty of the law; but there was no reason why the apothecaries, under that pretence, should be permitted to [555] undertake at leisure all dangerous diseases; and especially where, as in this city at least, a skilful physician may be as soon had as an apothecary. That, in common or trifling indispositions, the patients themselves were generally their own physicians; and would of course send for any medicine, of which there had been common experience, for their cure, and which the apothecary might lawfully make up and sell; but for the apothecary to be permitted to judge of diseases in their beginning, whether slight or not, and to order medicines for the same, would prove both dangerous, and more chargeable. *Dangerous*, because the most malignant distempers usually begin with apparently inconsiderable symptoms, and are many days before they appear in their proper colours; and as apothecaries are not bred to have suitable skill, the management

thereof ought not to be left to their judgment. And *more chargeable*, because, be the disease ever so slight, the apothecary will be sure to prescribe largely enough; and should he chance to mistake, then that distemper, which, by the discreet advice of a physician, might, by one proper medicine, have been eradicated at the beginning, runs out into great length, to the extreme hazard and great expence of the patient.

But after hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the Queen's Bench for the President and College, or Commonalty of the Faculty of Physic, London, against the said William Rose, should be reversed. (Jour. vol. 17. p. 482.)

## PLEA.

CASE 1.—JOHN WALTER,—*Appellant*; WILLIAM GLANVILLE,—*Respondent*  
[15th March 1727].

[Mew's Dig. v. 463.]

The plea of a general release, containing the words, *decrees and orders of the Court of Chancery*, is a good bar to any demand set up under a decree of that Court, made prior to the date of the release: And if the defendant by his answer denies all the charges of fraud, etc. in obtaining the release, such answer is sufficient to corroborate the plea.

The circumstances of the case will be more fully understood by the following statement; from the report in 16 Vin. 371. ca. 1.

A. had contracted to sell land to B., and B. assigned the contract to C. Upon a bill, A. had a decree for performance against B., he being the party to the contract; but decreed, that C. should stand in his place, and indemnify him against that and all other decrees. After this, B. and C. come to an account, and mutual general releases are given, in which the words, *all orders and decrees of the Court of Chancery*, are inserted. Afterwards, upon petition, A. has an order for interest from the time of B.'s taking possession, amounting to £700, founded upon the decree made before the releases were given. B. thereupon brings his bill to compel C. to pay it, he being by the decree to stand in B.'s place. C. pleaded this *release subsequent to the [556] decree*; and it was allowed *per Cur.* though it was not taken notice of at the time of stating and settling the accounts.

ORDER of Lord Macclesfield, C. AFFIRMED.

There is a mistake in the first line of the Report in 2 Eq. Ab. 71. c. 14. where E. is put for W. and the introductory sentence is very ambiguous. Read it thus—"E. had made a contract to sell land to W., and which W. [not E.] assigned, etc."

Gilb. Rep. 184. Viner, vol. 16. p. 371. ca. 1. 2 Eq. Ca. Ab. 71. ca. 14.;  
*by the name of Waters v. Glanville.*

William Elson, esq. being seised of the manor of Selsea in Sussex, and divers lands thereto belonging; by his will devised the same to trustees; upon trust, *inter alia*, to raise £2500 for the portions of his daughters Bridget and Elizabeth, and afterwards to convey the same to his son William Elson and his heirs, at his age of 21. The testator afterwards died, leaving his estate very much incumbered; and in order to pay off those incumbrances, an act of parliament was obtained for sale of the said manor of Selsea; and some time after, a bill was exhibited in the Court of Chancery, by the creditors of William Elson the father, against William Elson the son and others, to have the manor of Selsea sold for the payment of their debts.

On the 3d of March 1708, a decree was made in that cause, whereby a sale was ordered to be made of the said manor of Selsea before the Master, and the money arising by such sale was directed to be applied in payment of the debts of William Elson the father.

This decree not being proceeded upon for a considerable time, and Bridget, one of the daughters of William Elson the father, being married to Dr. Clerke, and her portion, as also that of her sister Elizabeth, being charged upon the estate; Dr. Clerke and his wife, and Elizabeth, exhibited their bill in Chancery against the trustees in the will, and William Elson the son, for payment of their portions and interest; and upon hearing the cause, an account was directed to be taken of what was due for their portions and interest, and that the same should be raised out of the real estate of William Elson the father. The Master afterwards made his report, and thereby certified to be due for Mrs. Clerke's portion and interest £3085 5s.

On the 7th of July 1719, articles were entered into between William Elson the son and the appellant, whereby Elson covenanted before Michaelmas term then next to convey to the appellant and his heirs the said manor of Selsea; and the appellant covenanted, after the perfecting the conveyances to him, or whom he should appoint, to pay £10,000 to Elson, or such person as should be legally entitled to receive the same.

Though this estate was directed by the decree to be sold before a Master to the best bidder, yet William Elson the son and the appellant privately entered into these articles; notwithstanding which, on the 30th of December 1719, the appellant bid £10,000 for the estate before the Master, on the terms of his having the rents and profits thereof from Michaelmas 1719 to Lady-day 1720.

On the 11th of March following, and before any report was made of the appellant's being the best bidder, he entered into an [557] agreement with Thomas Stewart, esq. whereby Mr. Stewart was to pay him £1000 over and above the £10,000 agreed to be paid by the appellant to William Elson for the estate, and the appellant was to transfer the supposed benefit of his articles to Mr. Stewart; but the appellant was to have the half-year's rent of the estate due at Lady-day 1720, which, by the fall of a life during that time, came to about £500 more.

The appellant procured the Master's report of the 22d of March 1719, allowing him the best bidder for the estate; and thereupon he deposited £1000 with the Master, in part of his purchase money, and on the 23th of March 1720, he paid the £3085 5s. certified by the Master to be due to Dr. Clerke for his wife's portion, and took an assignment thereof from them; but the £1000 and £3085 5s. was Mr. Stewart's money.

The respondent having afterwards agreed with the appellant for the purchase of the premises, the respondent repaid to Mr. Stewart the £1000 deposit, and the £3085 5s. so paid by him in part of the purchase; and also paid Mr. Stewart the further sum of £1000 for his bargain with the appellant.

At this time South-Sea stock was about £900 per cent; and on the 22d of August 1720, articles were entered into between the appellant and respondent and Stewart, whereby the appellant assigned to the respondent the supposed benefit of the former articles, except the rents and profits arising from Michaelmas 1719 to Lady-day 1720, the benefit whereof was to be received by the appellant: And it was agreed, that the conveyance to be made by William Elson to the appellant should be made to the respondent; and that as touching the £11,000 consideration money, £10,000 of it should be deemed the consideration money by the first articles agreed to be paid by the appellant to William Elson, and the remaining £1000 was agreed to be the consideration money to be paid by the respondent to the appellant for the assignment of his articles, being the same sum the appellant was to have had of Mr. Stewart; and after taking notice, that the appellant had paid the £1000 deposit, and the £3085 5s. to Dr. Clerke, it was agreed, that the same were the proper monies of the respondent, and to be taken as part of the £10,000; and the respondent covenanted, after the conveyance made to him, to pay £5914 15s. residue of the £10,000 to William Elson, or such person as should be entitled thereto, as the Court of Chancery should direct; and that the respondent should also immediately pay the appellant the further sum of £1000 residue of the £11,000. And the appellant thereby assigned to the respondent the £3085 5s. with the assignment thereof, and also the Master's report of the 22d of March 1719.

The appellant having employed Mr. Moody an attorney to view the estate, and do some other business relating to the agreement; the respondent also agreed to pay him £50, and gave the appellant a note promising to pay him the same, after the conveyances should be perfected.



[558] The respondent afterwards discovered, that the estate did not come up to the value given in to him, although he was to have paid for the same after the rate of 40 years purchase; and therefore he declined to complete such purchase.

The appellant therefore, in Easter term 1721, brought this bill against the respondent and William Elson, to compel the respondent to a specific performance of the said articles; and that the appellant might be discharged from his bidding before the Master, and the respondent stand in his place. To which bill answers were put in; but before the cause was heard, the appellant's agent brought in one Page, to offer before the Master to take a lease of the estate, as a tenant for 21 years, at £400 per ann.; who was accordingly allowed; and, after a long prosecution, sealed a lease, but rather chose to abscond than perform it; and so the estate was thrown on the respondent's hands to his great loss; it being afterwards let for no more than £300 per ann.

In the cause, wherein the appellant was reported the best purchaser, an order was obtained on the 1st of August 1722, whereby he was ordered to bring in the remainder of his purchase money, being £5914 15s. which the appellant accordingly paid to the Master on the 23d of October following.

On the 15th of July 1723, the cause against the respondent came to a hearing, before the Lord Chancellor Macclesfield; when it was, *inter alia*, decreed, that the contracts between the appellant and respondent should be performed, and that the respondent should indemnify the appellant for the future, on account of the said purchase, against William Elson and his trustees; and to that end, it was referred to the Master to ascertain what the contracts were, and to see same performed, and the appellant indemnified accordingly; and that the respondent should pay the appellant the £5914 15s. with interest from the time it was brought before the Master. And at this hearing, the Master's report allowing Page to be tenant of the estate at £400 per ann. was made use of as evidence against the respondent, to raise the value of the estate.

The respondent soon afterwards repaid the appellant the £5419 15s. with interest; and on the 26th of August 1724, conveyances were executed by Mr. Elson and the appellant to the respondent.

There had formerly been great dealings between the appellant and respondent, as was particularly mentioned in the pleadings in the appellant's cause; and the respondent had great demands against the appellant, which were not then released. There were also other disputes between them in relation to the said purchase and decree, and other matters.

On the 6th of August 1724, a meeting was had between them, and all matters, differences, and demands of both parties were considered, and their securities and papers produced; and at length they agreed to settle and adjust the same, and the respondent was to pay the appellant a great sum of money, far [559] exceeding £1000; and both sides were to deliver up all their securities, writings, papers, and vouchers, and to execute to each other general and final releases. And pursuant to this agreement, the respondent paid the appellant the sum of money agreed on between them, in full of all demands against the respondent, and the securities, vouchers, and papers on both sides were delivered up to be cancelled; and on the same 6th of August, the appellant and respondent mutually executed releases to each other, whereby the appellant released to the respondent all actions, *decrees and orders of Chancery*, cause and causes of action, suits, debts, accounts, and sums of money, damages and demands whatsoever, both in law and equity, or otherwise howsoever.

On the 1st of March 1724, William Elson preferred his petition to the Lords Commissioners, praying, that the appellant might pay interest for the £10,000 purchase money, from Michaelmas 1719, till the same was fully paid; and that Elson might be discharged from Dr. Clerke's incumbrance assigned to the appellant.

And upon hearing this petition on the 15th of the same month, it was ordered, that the appellant should procure Elson's other estates to be discharged from Dr. Clerke's demand; and it was referred to the Master to compute interest for the £10,000 from Michaelmas 1719; and out of what should be due for interest, £500 was to be paid Mr. Kelsall, by the consent of Elson, towards discharging what remained due to him for Elizabeth his wife's portion; and the residue of such interest was to be paid by the appellant to Elson.

On the 8th of June 1725, the appellant preferred his petition to the Lord Chancellor King, praying, that such part of the order of the 15th of March, whereby the appellant was ordered to pay interest for the purchase money, from Michaelmas 1719, might be discharged; and that the interest might commence only from the time the appellant was confirmed purchaser; and that what should appear due for interest might be paid by the respondent.

But before this petition was heard, an order was made on the 30th of June 1725. that the appellant should, on the 30th of July then next, pay all the interest directed to be paid by the order of the 15th of March, except the half-year's interest from Michaelmas 1719 to Lady-day 1720; without prejudice to either side, touching that half-year's interest; and accordingly the appellant on the 7th of July paid to Mr. Kelsall £500, and to Elson £262 9s. 6d., in full of all interest due for the purchase money, except what accrued due from Michaelmas 1719 to Lady-day 1720.

On the 27th of July 1725, the appellant's petition came on to be heard; when it was ordered, that so much of the order of the 15th of March, whereby the appellant was ordered to pay interest for the purchase money from Michaelmas 1719 to Lady-day 1720, should be discharged; and that the appellant should pay interest from the time he was confirmed the best purchaser only. But as to the respondent's repaying the appellant what he had paid for [560] interest as aforesaid, the respondent producing and insisting upon the said release, the petition was dismissed.

Whereupon, in Michaelmas term 1725, the appellant exhibited a new bill in the Court of Chancery against the respondent; and thereby prayed, that the respondent might repay the appellant the £762 9s. 6d. with interest and costs; and also the £50 agreed to be paid to Moody; and that the release as to the same, and the respondent's obligation to indemnify the appellant against any further demands of Elson and his trustees, on account of the purchase, might be set aside; and that the respondent might discharge Elson's other estates unsold, from any demand under colour of the assignment of Dr. Clerke's incumbrance.

To this bill the respondent put in a plea and answer; and as to so much of the bill as sought to compel him to repay the appellant the £762 9s. 6d. or the £50 to Isaac Moody, and prayed an account or satisfaction concerning any matter transacted or done, or monies pretended to be due or payable at any time before, and until the 6th of August 1724, either in respect of the respondent's becoming the purchaser of the manor of Selsea, or otherwise relating to any affair in time before the said 6th of August 1724, the respondent pleaded the matters before mentioned, previous to the appellant's giving the release; and that all accounts and demands were finally settled and adjusted between them on the said 6th of August 1724, and the release given as aforesaid, which he set forth *verbatim*.—And by way of answer said, that such settling and adjusting all matters was fairly and deliberately done; and that the appellant's release to the respondent was upon mature and valuable considerations executed, and the monies truly paid to the appellant; and that it was mutually intended and understood to release and discharge all matters, demands, and disputes between the parties; and in particular, that the said decree was mentioned and intended to be released, and for that purpose the words [*decrees and orders of the Court of Chancery*] were put into the releases before the same were executed, or the respondent would not have paid such a great sum of money, nor executed a general release to the appellant; and that the respondent believed, the appellant could not be ignorant that Elson intended to demand interest for the original purchase money, in regard the appellant, or his clerk in court, did, some time before executing the release, acquaint the respondent and his agents, that Elson intended to apply to the Court for such interest; and that the appellant, at the time of executing the release, did assure the respondent, he should not have any more demands made upon him by the appellant, or Elson, or any body else, on account of the purchase.

On the 6th of May 1726, this plea was argued before the Lord Chancellor King: who held the same to be good, and ordered it to be allowed.

From this order the present appeal was brought; and on behalf of the appellant it was insisted (T. Lutwyche, W. Hamilton), that the end of his bill [561] being to set aside the release, as being obtained from him by surprise, and extending to release such matters as were in nowise under the consideration of the parties, at the time of executing it; and several matters and circumstances being charged in the bill, which.

if fully answered, would have tended to shew that the release did not, nor ought to extend to cover those demands; the respondent ought to have fully supported his plea by his answer, in giving a particular and distinct answer to all the charges in the bill, relative to the matters transacted at the meeting, when the release was obtained; and that he not having done so, the plea ought to have been over-ruled.

On the other side it was contended (P. Yorke, C. Talbot), that the plea was well grounded, and the answer sufficient to corroborate it; the respondent having thereby answered the material parts of the appellant's bill, and sworn that no fraud or circumvention, or other unfair means were made use of to gain the release from the appellant; but that the same was executed voluntarily, and upon mature and valuable consideration. That at the meeting on the 6th of August 1724, all matters and differences between the parties, and their mutual demands against each other, and particularly the demand now in question, were considered, and their securities, papers, and vouchers produced, and the money agreed upon paid by the respondent to the appellant; and the securities, writings, and vouchers on both sides, particularly the articles upon which the decree was founded, were mutually delivered up and cancelled. That the end of all releases is to settle and quiet disputes, and therefore had the releases in question been only general releases, they would have been sufficient to extinguish the appellant's present demands; but as there were contained in them the words, *decrees and orders in Chancery*, it appeared from thence, that both the decree and orders in Chancery were under the consideration of the parties, and were inserted on purpose to release the decree, and all demands which might arise under it; so that what was so fully and particularly expressed in the releases, must be taken to be thereby absolutely discharged. Besides, it was not pretended, that there were any other decree, or orders of the Court of Chancery, to which these words could possibly relate, except such as were above stated. And as the respondent, in consideration of having such a release from the appellant, had executed a release to him of very considerable demands; he was thereby become a purchaser for a valuable consideration, of the release which the appellant by his bill sought to impeach. It was therefore hoped, that the order now appealed from would be affirmed, with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed. (Jour. vol. 23. p. 216.)

[562] CASE 2.—ROBERT ROSS and others,—*Appellants*; SAMUEL CLOSE and others,—*Respondents* [2d February 1729].

Where a party pleads his title, and swears himself a purchaser for a valuable consideration, without notice of the plaintiff's title, it is contrary to the usual practice of Courts of Equity to allow an examination of witnesses *in perpetuum rei memoriam*, in order to defeat the title of such purchaser; but the plaintiff ought to proceed to recover as he can, without the aid of a Court of Equity.

This is one of the cases which arose on the laws against Papists, and therefore now of little interest. It appears, however, that the determination was rather against, than in favour of, the principle above stated by Mr. Brown, the original compiler of these cases; as the ORDER of the Irish Chancellor for overruling the plea was AFFIRMED.

Sir Robert Maxwell, bart. being seised in fee of the lands of Bally Castle, and other lands in the county of Londonderry, in Ireland, and having issue by his first lady, George Maxwell his only son, and Elizabeth his only daughter; he, in the year 1684, disposed of his said daughter in marriage to James Butler, esq. and acknowledged a statute staple for £2000 to Mr. Butler, for securing her marriage portion.

In 1692, Sir Robert intermarried with Dame Margaret his second wife; and by a settlement, dated the 10th and 11th of May 1692, made in pursuance of an agreement before the marriage, and in consideration thereof, and of a considerable marriage portion had with her, he conveyed the said lands to Henry Lesley and James Maxwell, and their heirs, to the use of himself for life; remainder to Dame Margaret

for life, for her jointure; remainder to his first and every other son by her in tail male; remainder to the heirs of his body by the said Margaret; remainder to William Godfrey and Henry Maxwell for 99 years, in trust out of the rents, issues, and profits, to pay the executors or administrators of Dame Margaret £200, and also to pay such legacies as he should leave or devise by his last will; remainder to his own right heirs.

Some time after making this settlement, Sir Robert Maxwell died, without any issue by Dame Margaret, who thereupon became entitled to the lands for her life: Elizabeth the daughter of Sir Robert, and wife of James Butler, died soon afterwards, leaving issue only one son named James; and James Butler the father, after the death of the said Elizabeth his first wife, intermarried with the said Dame Margaret in the year 1694; and had issue by her, the respondent Catherine their only child.

The said James Butler the elder died in 1713, but before his death made his will and appointed Dame Margaret executrix thereof; and thereby devised the said statute staple and the benefit thereof, from and after the death of the said Dame Margaret, in trust as to one third part thereof, for his son the said James Butler [563] junior; and as to the other two thirds, in trust for the respondent Catherine his daughter.

By the death of Sir Robert Maxwell, the reversion and inheritance of the lands, subject to the jointure and the said term of 99 years, and also to the said statute staple, descended to Sir George Maxwell his only son and heir; who, upon the revolution in 1688, became a papist, and afterwards continued in the open profession of the popish religion during all his life; and died seised of the said reversion, some time in the year 1719, without issue.

On the death of Sir George Maxwell, this reversion descended to the said James Butler junior, as his nephew and heir at law, who was a protestant; and he being seised thereof, did by deeds, dated the 21st and 22d of October 1720, in consideration of £200 really and *bonâ fide* paid to him, convey the same, and all his estate and interest therein, to Dr. Robert Maxwell and his heirs, in trust for the said Dame Margaret Butler and her heirs. Which deeds were duly registered according to the laws of Ireland, on the 24th of the said month of October 1720, and the said Dr. Maxwell by deed duly executed, declared the said trust accordingly.

Dame Margaret being so entitled to the inheritance of the lands, and a marriage being afterwards agreed upon between the respondents Samuel Close and Catherine, indentures of lease and release, dated the 9th and 10th of January 1721, were executed between Dr. Robert Maxwell of the first part, Dame Margaret and the respondent Catherine of the second part, the respondent Samuel of the third part, John Maxwell and Robert Maxwell, esqrs. of the fourth part, and Samuel Waring and James Manson of the fifth part; whereby, in consideration of the said intended marriage, and for providing for the respondent Catherine, and her issue by the respondent Samuel, Dr. Robert Maxwell, by the consent of Dame Margaret, conveyed the said lands to the said John and Robert Maxwell, and their heirs, subject to the said jointure, statute staple and term, to the use of the respondents Samuel and Catherine during their joint lives; and in case Catherine should survive Samuel, then, as to two thirds thereof, to the use of Catherine during her life; and as to the other third part, and also the two thirds after the death of Catherine, to the use of the first and every other son of the said Samuel, by Catherine in tail male; and for default of such issue, to the use of the daughters of the said Samuel and Catherine, and the heirs of their bodies; and for want of such issue, to the right heirs of Dame Margaret. These deeds were also duly registered on the 3d of July 1722.

The marriage soon afterwards took effect, and the respondents Samuel and Catherine had issue two daughters, namely, the other respondents Margaret and Mary.

Sir George Maxwell being a papist, and continuing so to his death, was disabled by an act of parliament made in Ireland, 2d Annæ, to prevent the further growth of popery, from making [564] any voluntary conveyance or disposition of his real estate; and by this act, all estates whereof any papist is seised in fee simple, or fee tail, are made descendible to his sons, or other persons inheritable thereto, notwithstanding any such voluntary disposition or conveyance.

But notwithstanding this disability, Sir George Maxwell, by lease and release

dated the 15th and 16th of October 1710, took upon him, without any consideration, to convey the said reversion in fee to Thomas Maxwell of Cuil in North Britain; who soon afterwards dying without issue, Sir Robert Maxwell of Orchard's Town, claimed as his cousin and heir; and by deeds of lease and release, dated the 3d and 4th of April 1722, conveyed all his estate and interest in the said reversion to John Nelson; who, together with the last named Sir Robert, and Isabella the widow of the said Thomas Maxwell, by lease and release dated the 10th and 11th of September following, and by a fine afterwards levied, conveyed all their estate and interest therein to Hector Graham and his heirs, in trust for the appellants.

The appellants thus claiming a right to the said reversion, on the 19th of March 1723, filed a bill in the Court of Chancery in Ireland, against the said Dame Margaret and others, setting forth their said title, and praying, *inter alia*, to have the conveyance made by the said James Butler to Dr. Robert Maxwell set aside.

The respondents Samuel and Catherine, finding that the appellants insisted on the said pretended title under the said deeds and fine, and that Dame Margaret, after she had answered the said bill on the 28th of January 1724, exhibited a bill in the said Court of Chancery in her own name against the appellants, without taking any notice of the settlement made upon the marriage of the respondents Samuel and Catherine, or of the title of them and their issue to the premises under the same; did, on the 1st of June 1727, exhibit a bill in the said court in their own names, and in the names of their said two daughters, against the appellants and others; setting forth, that Sir George Maxwell was in and before the year 1710 a professed papist, and died so; and stating the conveyance made to Dr. Robert Maxwell by the said James Butler junior, the said Dr. Robert Maxwell's deed declaring the trust for Dame Margaret Maxwell, and the said settlement made upon the marriage of the respondents Samuel and Catherine; charged, that in the deeds alleged to have been executed by Sir George Maxwell to the said Thomas Maxwell there was a proviso, or power of revocation expressly reserved to Sir George, to revoke and make void the same at his pleasure, and that he afterwards did revoke the same, and that the said deeds were found amongst the other papers of Sir George, after his decease; and therefore prayed, that the respondents might be at liberty to examine several witnesses therein named, to the proof of Sir George Maxwell's being a papist on the 15th and 16th of October 1710, and of his dying so; and that the testimonies of the said witnesses might be perpetuated.

[565] The appellants put in an answer and plea to this bill; and in their answer confessed, that by the death of Sir Robert Maxwell of Ireland, Sir George, as his only son and heir, became seised of the reversion and inheritance of the premises: That the said Sir George died without issue in 1719, and that the said James Butler was his heir at law, and always a protestant; they also confessed the execution of the deeds by the said James Butler junior, to Dr. Maxwell, but insisted on the deeds of the 15th and 16th of October 1710, made by Sir George Maxwell to Thomas Maxwell; and admitted, that there was therein contained a power of revocation; they also insisted on the several other deeds made by Sir Robert Maxwell of Orchard's Town, and the said Isabella and John Nelson, and that the appellants were entitled to the reversion under those deeds. And as to that part of the bill, by which the respondents prayed to be at liberty to examine witnesses therein named, to prove that Sir George Maxwell was a papist on the 15th and 16th of October 1710, or at any time before or after; and that the testimony of such witnesses might be perpetuated, and given in evidence against them, or any other persons deriving under them; they pleaded, that the said Sir George Maxwell was born of protestant parents, and that he was bred a protestant, and professed the protestant religion in his infancy, and after he attained his full age, to the time of his death; and that he was not convicted in his lifetime, upon any indictment or information, for being perverted from the protestant to the popish religion: That the said Thomas Maxwell, Sir Robert Maxwell of Orchard's Town, Isabella Maxwell, and John Nelson, were always protestants; and that the appellants and the said Hector Graham were protestants, and born of protestant parents; and further pleaded, that the appellants were, for the valuable consideration of £700 of money paid, purchasers of the reversion and inheritance of the premises under the said deeds, without any notice of Sir George Maxwell's being a papist on the said 15th and 16th of October 1710, or at any time after.

This plea being argued before the Lord Chancellor of Ireland, on the 20th of November 1728, his Lordship was pleased to overrule the same.

The appellants therefore appealed from this order, and on their behalf it was argued (J. Willes, W. Hamilton), that as they had sworn themselves purchasers for a valuable consideration, without notice of the respondents title, it was apprehended to be contrary to the usual practice of Courts of Equity, to allow an examination of witnesses *in perpetuum rei memoriam*, in order to defeat the title of such purchaser without notice; but that the respondents ought to proceed to recover as they could, without the interposition or aid of a Court of Equity. That this attempt ought to meet with the less encouragement in the present case, because it appeared, that Sir Robert Maxwell the father died in 1693, that Sir George the son lived till 1719, that no prosecution was commenced against him during his life, nor was any attempt made to prove him a papist, [566] till this bill was filed in the year 1727; several years after the purchases were made, and memorials of them duly registered. That whatever might be the case against the person claiming under a voluntary settlement from a papist, the difference would be very great as to those persons who were real purchasers; and especially in a case like the present, where the purchasers were protestants, and where the respondents claim was under the heir at law of that very person, under whom the appellants claimed to be purchasers. That if it is ever allowed to examine witnesses *in perpetuum rei memoriam* against a purchaser, it is only where the title of the plaintiff is clear and indisputable; but in this case the appellants by their answer denied that they believed that any such settlement was made: And it was observable, that though the respondents were defendants to the bill brought by the appellants, and put in their answer, yet they did not thereby disclose or mention the now pretended settlement. And therefore it was hoped, that the order would be reversed, and the plea allowed.

On the other side it was insisted (P. Yorke, C. Talbot), that by the act of 2d Annae, all estates whereof any papist then was, or should at any time after be seized in fee simple, or fee tail, should be of the nature of gavelkind, and should descend after the death of such papist to his sons, or to such other persons as should be inheritable thereto, share and share alike, notwithstanding any disposition or alienation to be made thereof by such papist, unless for valuable consideration of money really and *bonâ fide* paid; but that in case the heir at law of such papist should be a protestant, he should have the whole, according to the course of the common law. That the deeds of October 1710, executed by Sir George Maxwell to Thomas Maxwell, under which the appellants claimed, were merely voluntary, and not made *for a valuable consideration in money really and bonâ fide paid*, according to the directions of the said act; that there was a power of revocation contained in those deeds; and that the same being at all times after the execution thereof in the custody of Sir George, and found amongst his papers after his death, were sufficient proofs of their being voluntary, and therefore fraudulent as against the protestant heir at law. That no conviction by indictment or information was necessary to prove a person a papist, so as to make his estate descendible in gavelkind, or to make void any voluntary disposition of his estate; although such conviction would be necessary, to subject a papist to the penalties inflicted on him by the laws of Ireland, for turning from the protestant to the popish religion. That notice was not necessary of the party's being a papist, who made such voluntary disposition; nor would the want of notice make such disposition good, either as to those who immediately claimed under it, or to any other person who might claim as purchasers from them. That by virtue of the settlement made on the marriage of the respondents Samuel and Catherine, all the respondents were purchasers of the premises for a valuable consideration, under the protestant heir at law of a person who was [567] really a papist. That the respondents could not, during the life of Dame Margaret, bring any action or suit for trying their title to the premises; and if the witnesses to prove Sir George Maxwell's being a papist should all happen to die in her lifetime, the respondents would be deprived of their evidence, and might be put to great inconveniences; but the appellants could not be hurt by such examination, if, as they alleged, Sir George was and continued a protestant. The order therefore ought to be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of affirmed. (Jour. vol. 23. p. 470.)

CASE 3.—EDWARD FITZGERALD,—*Appellant*; THOMAS FITZGERALD,—*Respondent*  
[28th April 1731].

To a bill filed in the Court of Exchequer in Ireland, the defendant pleads a decree and proceedings for the same matter in the Court of Chancery of Great Britain. The plea was disallowed.

But on appeal, the ORDER was reversed.

The question seems to have been determined on the ground, that Ireland was a dependent jurisdiction; and therefore is no precedent as to the kingdom, since the stat. 23 Geo. 3. c. 28.

The appellant having at several times, from the year 1706 till 1712, paid and advanced to the respondent several considerable sums of money, amounting in the whole to £600, the respondent, for securing thereof, executed to the appellant a bond in the penalty of £1200, conditioned for payment of the said £600, and also a warrant of attorney to confess judgment for the same.

The appellant, out of compassion to the respondent's low circumstances, forbore for several years making any demand of this debt; but in 1724, the respondent coming into the possession of a very considerable fortune, the appellant did then apply to him for payment of the £600 and interest, which the respondent neglecting to comply with, the appellant found himself under a necessity of threatening to put the bond in suit; whereupon the respondent, merely for delay, and to stay the appellant's proceeding at law against him, exhibited his bill in Easter term 1724, in the Court of Chancery in Great Britain, for relief against the said bond and warrant of attorney; suggesting, among a variety of other falsehoods, that the bond was given on a marriage brokerage account, and that by agreement it was not to have affected him during his life, but was to have been a demand on his executors or administrators only after his death.

[568] To this bill the appellant put in his answer, and thereby absolutely denied the several suggestions made in the bill concerning the consideration of the said bond, and the manner of obtaining it; and swore that the same was justly perfected for the considerations before mentioned.

The cause being at issue, several witnesses were examined on both sides, and the same was heard on the 8th of June 1725, before the Lord Chancellor King; when his lordship was pleased to order, that the respondent's bill should stand absolutely dismissed with costs.

The respondent, far from attempting to controvert the justice of this decree, either by petitioning for a rehearing, or by appealing against it, suffered the same to be duly inrolled; but to elude the force thereof, and to avoid making any satisfaction to the appellant for his said debt and costs, the respondent immediately withdrew into Ireland, where the appellant, with great difficulty three years afterwards, procured him to be arrested for the debt due on the said bond.

Whereupon the respondent caused a bill to be filed against the appellant in the Court of Exchequer in Ireland, on the 26th of November 1728, merely for delay, and for the same relief, and upon the very same allegations in the bill so dismissed in the Court of Chancery in Great Britain, and no other; save only a collusion which he alleged between the appellant and his the respondent's agent, and that he was not in London when the said cause was heard.

The appellant living in London could not plead or answer within the usual time; and being forced to pray a *dedimus* to put in his answer, the respondent obtained an injunction of course.

To this bill the appellant, on the 28th of April 1730, pleaded at large, the former bill, answer, proceedings and decree of dismissal inrolled, in bar of so much of his new bill as sought to draw in question again the same matters: And by his answer,

denied the fictitious charge of collusion or combination with the respondent's agent in England, or that the respondent was not in London at the time the former cause was heard.

On the 23d of June 1730, this plea was argued; but the Court did not think proper to allow it, and dissolve the injunction; they were only pleased to order, that the benefit of the plea should be reserved until the hearing of the cause.

The appellant therefore appealed from this order, insisting (D. Ryder, E. Malone, that the Court of Exchequer in Ireland had no right to examine into the justice of the decree of the Court of Chancery in Great Britain in the former cause, and therefore ought not to have let the respondent into a fresh inquiry, touching any matter which had there received a final determination; but should have allowed the plea, as an absolute bar to so much of the new bill as sought to draw the same matter into question a second time. That as the merits of the respondent's pretended equity had already been tried in a court of competent jurisdiction, and found against him; [568] it would be a most unreasonable delay of justice to make the appellant wait till the same merits should be tried over again in the present cause. And that this was apprehended to be the first instance where any court of judicature, in a *dependent dominion*, ever claimed or pretended to a jurisdiction of this kind; so that it might become a precedent of the most dangerous consequence to all such suitors, as should be under the unhappy necessity of following the persons of their debtors out of this kingdom, in order to obtain justice. It was therefore hoped, that the plea would be allowed with costs, and the injunction dissolved.

No case appears to have been printed on the part of the respondent, nor did any counsel appear for him on the hearing of this appeal.

And therefore, after hearing the appellant's counsel, it was ORDERED and ADJUDGED, that the said order of the Court of Exchequer in Ireland should be reversed; and that the plea put in by the appellant should be allowed, and the injunction of the said Court obtained by the respondent, dissolved. (Jour. vol. 23. p. 692.)

CASE 4.—Sir LISTER HOLT and another, — *Appellants*; ROBERT LOWE, —  
*Respondent* [19th April 1736].

[Mew's Dig. v. 867.]

The plea of a fine and long possession under it is not a good bar to a bill brought for a discovery of the deeds, declaring the uses of such fine.

ORDER of the Court of Exchequer reversed.

William Lord Brereton, being seised in fee of the impropriate rectory of Middlewich, and of the advowson and vicarage of the said church, as appendant to the rectory, and being minded to sell the same, agreed with Robert Lowe, the respondent's grandfather, for the sale thereof; and in pursuance of this agreement, the said William Lord Brereton and Elizabeth his wife, and William, their son and heir apparent, in 1664 levied a fine *sur consueance de droit come ceo*, etc. in consideration of £1000 therein mentioned to be the purchase money, in the court of the county palatine of Chester, to the said Robert Lowe, and to Edward Minahall, Gabriel Hodson, and John Wilson, (who all three afterwards died in Lowe's lifetime), and to the heirs of the said Robert Lowe, and warranted the same against the said Lord Brereton and his heirs for ever. And the £1000 purchase money then paid by Lowe, was a full price for the absolute purchase of the premises.

At the time of this purchase, one Lawrence Griffith was vicar of the church, and afterwards died in possession of the same in the year 1680; and upon his death the respondent's father [570] Samuel Lowe, being then entitled to the advowson under the said purchase, would have presented to the vicarage; but Lawrence Griffith having never been instituted to the same, the crown became entitled to that turn of presenting thereto by lapse; and accordingly presented one Thomas Falkner, who was thereupon instituted and inducted.



But Falkner, refusing to take the oaths required by law, was therefore deprived of the vicarage, and the same again became void; whereupon the respondent's father would have presented thereto, but could not prevail on his clerk to accept the same, till Falkner should be actually put out of the possession thereof; Samuel Lowe therefore prosecuted him both in the Ecclesiastical Court and at law for that purpose; but before he could recover the possession of the vicarage, the then turn of presentation thereto became likewise lapsed to the crown, who presented one William Handfull, clerk; who was instituted and inducted into the same, but was afterwards removed for incontinency.

Upon his removal, Samuel Lowe presented John Cowper, clerk, who was instituted and inducted into the vicarage, and continued in possession till his death, which happened in September 1718; and during all these transactions, the appellants, or any of those under whom they claimed, never pretended any right to the rectory, advowson, or vicarage; but, on the contrary, the ancestors of the respondent, ever after the purchase in 1664, were and continued in possession and enjoyment of the rectory, glebe lands, tithes, and chance of the church, and paid the charges growing due out of the rectory, and in every respect acted as owners of it about 50 years together next after the said purchase, and until 1718; when, upon the death of Cowper, Francis Lord Brereton took upon him to present one John Cartwright to the vicarage, who was instituted and inducted.

Whereupon James Lowe, the respondent's brother, being then entitled to the premises under the said purchase, brought his *quare impedit*; but his title proving to be only an equitable one, by reason of some settlements and provisions in the family made after the purchase, he was disappointed in that suit; and therefore he filed his bill in the Court of Chancery for relief in the premises; but there happening several abatements of the proceedings by deaths, the matter was not determined before the death of John Cartwright the incumbent, which happened on the 7th of January 1730.

Upon Cartwright's death, the respondent, who was then entitled to the premises, presented John Swinton, clerk, to the vicarage, who was duly instituted and inducted. And afterwards the appellants brought their *quare impedit* to recover that turn of presentation, claiming the same under some conveyance from the family of Brereton.

To which, the respondent having pleaded his title to the rectory and vicarage, under the purchase and fine above mentioned; the appellants, in Easter term 1734, exhibited their bill in [571] the Court of Exchequer for a discovery of the deeds and writings, declaring the uses of the said fine.

In bar to this discovery, the respondent pleaded the purchase so made by Robert Lowe, his grandfather, and the fine thereupon levied to him of the said rectory, and the advowson of the said vicarage, and also the payment of the said sum of £1000, the purchase money mentioned in such fine. That proclamations were duly made upon the said fine, as appeared by the indorsements thereon, and that no claim was made to the premises within five years next after the levying thereof; that Robert Lowe the purchaser survived the other conusees; that the rectory and advowson, by several mesne conveyances and descents from the said Robert Lowe, became vested in the respondent; and that Robert Lowe, the purchaser, and those claiming under him, enjoyed the premises for 50 years and upwards, next after the time of levying the said fine, without any claim of title, or interruption from any person whatsoever: He also by his plea insisted on the statute of limitations, 21 James 1. and that Robert Lowe, the purchaser, had not any notice at the time of levying the said fine, or at the time of payment of the said purchase money, of the title set up by the appellants, or of any title under which they claimed.

And in support of his plea, the respondent, by way of answer, said he believed the said Robert Lowe, to whom the fine was levied, was an honest purchaser of the rectory, and paid the £1000 mentioned in the fine and more for the purchase thereof, and that the same was the best price which could be then gotten for the same; and also, that the said Lord Brereton intended to sell the rectory without any reservation; and denied that any advantage was taken of John Lord Brereton's lunacy, at the time William Cowper was presented, as was suggested in the bill.

On the 9th of November 1734, this plea came on to be argued before the Barons; when, after hearing counsel on both sides, they were pleased to order that the plea should be allowed.

From this order the present appeal was brought; and on behalf of the appellants it was argued (J. Willes, N. Fazakerly), that the fine insisted by the plea to have been levied to Robert Lowe, Minshall, Hodson, and Wilson, was not levied with an intention to convey the rectory to the conusees for their own use, but only to clear the title to the rectory, which was then intended to be sold in parcels; and as there did not appear to be any declaration of the uses of this fine, it would, by the rules of law, result to the conusors. That the end of the bill was to discover the intent and design of the said fine, and of a subsequent fine said to have been levied in 1667, to the said Robert Lowe, of divers parcels of the said rectory; and by the discovery of this second fine, and the uses of it, and the consideration of such conveyance, to shew that the uses of the first fine did result to the conusors, or at least as to such parts of the rectory as were not particularly conveyed by the second fine, and the deeds declaring the uses of it; and therefore the first fine ought not to have been pleaded in bar to [572] such discovery, without a denial of the particular circumstances charged by the bill as an evidence of such resulting use. That the respondent, by not answering or denying the several charges in the bill touching the second fine, and the declaration of its uses, did implicitly admit the same, and that the advowson of the vicarage was not comprised therein; and this admission was a strong evidence against him to shew that the first fine was levied only for the purposes above mentioned, and that nothing more was intended to pass to his ancestor, than what was particularly comprised in the second fine, and the declaration of the uses thereof. That it did not appear by the plea what was the real purchase money of the advowson, nor that the same was paid by Robert Lowe, the respondent's ancestor. That the appellants and the respondent derived under the same title, and the right of the appellants to the advowson appeared from the respondent's own conveyances; the pretence therefore of his ancestor's being a purchaser, without any notice of the appellants' title, was without foundation. And as to the quiet enjoyment, the fine and non-claim, and the statute of limitations set up as a bar to the discovery sought by the appellants; it was said, that as to the glebe, and such part of the tithes, parcel of the said rectory, as the respondent claimed, there might have been a long and quiet possession, nor was his title thereto at all impeached by the appellants' bill; but as to the advowson of the vicarage, the only evidence of enjoyment insisted on by the respondent was a presentation about the year 1702, which was during the lunacy of Lord John; and since that time Lord Francis, his heir, presented the last incumbent, and regained the possession of the vicarage. It was therefore hoped, that the said plea would not bar the appellants of a full discovery of the respondent's title; but that the order for allowing the same would be reversed.

On the other side it was contended (J. Strange, R. Fenwick), that Robert Lowe, the respondent's grandfather, and under whom he claimed, was a purchaser of the rectory and the advowson of the vicarage, by the fine levied in 1664, for £1000, without any notice of any other title; and therefore, by the known and established rules and practice of Courts of Equity, the respondent ought not to be obliged any further to discover or disclose his title; nor were the appellants entitled to the aid of a Court of Equity in respect to such title. That by the fine, proclamations and non-claim thereupon, and by the length of peaceable possession and enjoyment, which the respondent's grandfather, father and brother, and those claiming under them, had successively of the said advowson, under the said fine and purchase; the title under which the appellants by their bill claimed the same, was utterly and effectually barred and defeated both at law and in equity; and therefore the order for allowing the plea ought to be affirmed, and the appeal dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of should be [573] reversed; and that the plea should stand for an answer, with liberty to except so far as to oblige the respondent to discover any conveyance or conveyances made by William Lord Brereton and Elizabeth his wife, and William Brereton, esq. their son, or any or either of them, to Robert Lowe, the respondent's grandfather, alone, or jointly with any other person or persons; and to discover any deed or deeds declaring the uses of a fine in the pleadings mentioned to be levied in the 16th year of King Charles II., or declaring the uses of a fine in the pleadings also mentioned to be levied in the year 1667. (Jour. vol. 24. p. 650.)

CASE 5.—ROBERT DOBBYN,—*Appellant*; FRANCIS BARKER,—*Respondent*  
[25th April 1766].

Where a defendant by his plea, in a Court of Equity, insists, that he ought not to be obliged to discover the several matters mentioned in the introduction of it, and yet by his answer discovers those very particulars, the plea is bad in point of form, and cannot be supported.

ORDER of the Irish Chancery reversed.

On the 4th of October 1738, the respondent intermarried with Elizabeth Fell, daughter of the Reverend John Fell deceased; previous to which marriage, articles were executed between the respondent of the first part, the said John Fell and Elizabeth his only daughter of the second part, Elizabeth Barker, the respondent's mother, of the third part, and Ambrose Congreve and Samuel Barker, esq. of the fourth part; by which, after reciting that a marriage was intended between the respondent and the said Elizabeth Fell, and that the respondent was then entitled to £1700 in possession, as his own fortune, and that the said John Fell had agreed to pay the respondent £600 immediately after the solemnization of the intended marriage, as the marriage portion of the said Elizabeth Fell, and had also agreed to settle such estate, real and personal, chattels, effects, and interests *pour autre vie*, as he should be seised, possessed of or entitled unto at his death, in manner following: viz. After a suitable provision by him left, as he should think fit, for the support of Elizabeth his wife, and for the education and maintenance of his only son Hans Thomas Fell, the sum of £600 should be to and for the benefit of the said Hans Thomas Fell, together with the said John Fell's library; and all the rest and residue of his estate, real and personal, and terms *pour autre vie*, as should be in being at his death, subject to the said provisions for his wife and son, should be equally divided between the respondent and the said Hans Thomas Fell; and that the said Elizabeth Barker had agreed to advance £400 to the respondent [574] as an addition to his preferment, payable in six months after her death, without interest; all which several sums and things were thereby agreed to be settled for the benefit and advantage of the respondent and Elizabeth his intended wife, and their children: It was witnessed, that the respondent and John Fell, in consideration of the said intended marriage, did grant, assign, and make over to the said Ambrose Congreve and Samuel Barker, and the survivor of them, his heirs, executors, and administrators, the several sums of £1700, £600, and £400, amounting to £2700, together with all such money, estate real or personal, leases, terms for years, or other effects, which should come to the power, seisin, or possession of the respondent, after the death of the said John Fell and Elizabeth his wife, by virtue of the said articles, or by the last will of the said John Fell, and all the right, title, and interest of the respondent that then was, or thereafter should be, existing in law or equity, of, in, or to the same, or any part thereof; upon trust and to the intent, that the said sums of £1700 and £600, amounting to £2300, should be forthwith laid out at interest, or in the purchase of lands of inheritance in fee simple, in the names of the said trustees, and the survivor of them, his heirs, etc. by the approbation of the respondent, and the said John Fell, or the survivor of them; and that the said trustees, or the survivor of them, his heirs, etc. should permit the respondent to receive the yearly interest of the said sum of £2300, or the yearly rent of the lands to be purchased therewith, for the term of 90 years, from the solemnization of the intended marriage, if he should so long live, to his own use; and after the death of the respondent, to permit the said Elizabeth Fell his intended wife, in case she should survive him, and that there should be one or more child or children of the marriage, living at the time of the respondent's death, to receive the sum of £60 sterling per ann. out of the yearly interest of the said sum, or out of the rents of the lands to be purchased therewith, and also out of the several other sums mentioned to be in expectancy upon the death of the said John Fell, for the term of 90 years, to commence from the death of the respondent, if she should so long live, to be paid to her by equal half-yearly payments; and in case the said Elizabeth Fell should survive the respondent, and there should be no issue of the marriage living at the respondent's death, then to pay to the said Elizabeth Fell, or her assigns,

the full sum of £1000 in one entire payment, in six months after the respondent's death; which said yearly sum of £60, or the said sum of £1000, so severally to be paid, on the several contingencies aforesaid, to the said Elizabeth Fell, was to be as her jointure, and in lieu and satisfaction of dower and thirds, out of the real and personal estates of the respondent: And to the further intent, to pay the sum of £700 to such person or persons, as the respondent, by any deed to be by him duly executed during the continuance of the marriage, should direct and appoint; but in case the respondent should not, during the continuance of the marriage, make any such appoint-[575]-ment, or dispose of the said sum of £700, then to permit the respondent, in case he should survive the said Elizabeth, to dispose of £1000 to such person or persons as he should think proper; and that all the rest and residue of the said sum of £2300, or the lands to be purchased therewith, together with the several other sums so in expectancy upon the death of the said John Fell, should, after the death of the respondent, but subject to the provision for the said Elizabeth his intended wife, upon the contingencies aforesaid, be paid to and among the child or children of the respondent by the said Elizabeth, at such time, and in such proportion, as he should, by any deed, or by his said will, to be executed as aforesaid, direct and appoint; and for want of such appointment, then to be paid to them in such proportion as the said Elizabeth should by deed direct or appoint; and for want of appointment by either, to be equally between them; and in default of issue of the marriage, at the time of the respondent's death, the said residue, subject to the provision so made for the said Elizabeth, was to go to such person or persons as the respondent should by his last will nominate and appoint; or for want of such appointment, to go in a course of distribution from him; a posthumous child or children still to be considered as issue living at his death. And to the further intent, that the said sum of £400 so to be paid after the death of the said Elizabeth Barker, and all such other money, estate, or interest which should come to the seisin, power, or possession of the respondent, by virtue of the said articles, or by the last will of the said John Fell after his death, and the said Elizabeth his wife, should pursue the disposition made of the said £2300, and should be laid out at interest, or in the purchase of lands, as soon as the same, or any part thereof, should be received, in the same manner, and to the same purposes, for the benefit of the respondent and Elizabeth, and the issue of the marriage; and that the principal, interest, and profit thereof, should from time to time be paid to such persons, and in such proportions, as the said sum of £2300 was therein limited and appointed, and should be subject to the payment of the jointure provided for the said Elizabeth, and to the payment of the said sum of £700 or £1000 to be disposed of by the respondent upon the contingencies aforesaid; and to the intent, that as often as there should be occasion to alter the security thereafter to be taken for the said several sums, such securities should be liable and subject to the disposition aforesaid. And the said John Fell covenanted that he would, within 20 days next after the solemnization of the marriage, pay to the said trustees the said sum of £600. And the said Elizabeth Barker covenanted that her executors or administrators should, within six months after her death, pay to the said trustees the said sum of £400. And the respondent covenanted, that he would, within 20 days next after the marriage, pay the said sum of £1700. Which said several sums were to be laid out to the uses, intents, and purposes aforesaid; with a proviso, that nothing in the said articles con-[576]-tained should disable the said Elizabeth Fell from taking any legacy the respondent should leave her, in addition to her jointure.

In November 1739, the said Elizabeth died, leaving issue by the respondent Elizabeth their only child, afterwards the wife of the appellant.

John Fell, at the time of the marriage, and at his death, was seised and possessed of a considerable real and personal estate; and amongst other things, of the town and lands of Ballycloughy in the county of Waterford, under a lease thereof made to him and his heirs by William Disney, esq. for three lives, at the yearly rent of £86 11s. 3d., and six couple and a half of fat hens every Easter; with a covenant of renewal for ever, upon payment of £9 4s. as a fine upon each renewal.

Elizabeth, the wife of John Fell, died in his lifetime. Mrs. Barker, the respondent's mother, died many years ago, and appointed Samuel Barker her executor.

John Fell died in the year 1754, leaving Hans Thomas Fell, LL.D. his only son

and heir, but before his death he made his will, and thereby bequeathed a legacy of £10 to Elizabeth the respondent's daughter, and appointed the said Dr. Fell his sole executor.

Samuel Barker, being the surviving trustee in the marriage articles, received the £1700 from the respondent, the £600 from John Fell, and the £400 out of the assets of Elizabeth Barker, the respondent's mother; and he also received from Dr. Hans Fell several considerable sums, part of the personal estate and effects of the said John Fell. All which sums, it was presumed, he invested in mortgages, or other securities, agreeable to the trust reposed in him, for he laid out no part thereof in the purchase of lands of inheritance.

After the death of John Fell, Dr. Fell and the respondent entered into an agreement, whereby the one was to purchase of, or sell to the other, his moiety of the interest in the lands of Ballycloughy, at a fixed valuation. It was to be determined by casting of lots who was to set the valuation, and the lot having fallen on Dr. Fell, he valued his interest in the said lands at the sum of £600. The respondent agreed to this valuation, and in order to convey all the right and title of Dr. Fell to one moiety of the said lands, for the consideration aforesaid, and all his legal right to the other moiety thereof, (but that the title which Elizabeth, the respondent's daughter, had to such moiety, should not be altered or varied,) Dr. Fell, together with the respondent and Samuel Barker, by lease and release, dated the 3d and 4th of November 1757, did convey the said lands of Ballycloughy to Robert Dobbyn the elder, esq. the appellant's father, his heirs and assigns, in trust with regard to £1200 (being the valuation of the lands as set by Dr. Fell) for the said Samuel Barker, his executors, etc. and after payment thereof, in trust for the respondent and his heirs.

[577] On the said 4th of November 1757, an account was stated and settled between the said Samuel Barker, Dr. Fell, and the respondent, touching the real, and such part of the personal estate of John Fell, as had then come to the hands of Dr. Fell; by which it appeared, that several considerable sums had been paid by the Doctor to Samuel Barker, as surviving trustee in the marriage articles, in order to be laid out at interest for the uses therein mentioned. And it also appeared, that some other sums of the trust money had come to the hands of the respondent, which he alleged he had paid over to Samuel Barker, for the uses aforesaid. And after the settling such account, several other sums were paid to Barker, as part of the personal estate of John Fell, for the same uses.

It having been frequently and publicly declared, as well by the respondent as Samuel Barker and others, that Miss Elizabeth Barker, the respondent's daughter, was under the marriage articles, or in right of John Fell, or otherwise, entitled to a considerable fortune, to take effect in possession immediately after the death of the respondent, the appellant, who was nephew of the respondent, and eldest son and heir apparent of Robert Dobbyn, esq. Recorder of the city of Waterford, paid his addresses to Miss Barker; and on the 3rd of November 1760, a marriage was solemnized between them, by the consent of the respondent, and Samuel Barker, and others of her friends and relations.

Some time after this marriage, Samuel Barker and Robert Dobbyn the elder, on behalf of the appellant and his wife, met in order to adjust and settle the fortune which the said Elizabeth was then entitled to, and that the same should be immediately conveyed to the appellant and his wife, and thereupon an estimate or calculation was made thereof; and after deducting £1000 which the respondent alleged he had a power of charging, and also the value of his interest for life in the several sums mentioned in the articles, Elizabeth's fortune was by such deductions reduced to £1755: For the only particulars comprehended in this estimate, were the several sums of £1700, £600, and £400 mentioned in the articles, and a moiety of the lands of Ballycloughy; and no credit or allowance was given or proposed, for any of the sums which had been paid by Dr. Fell to the respondent and Samuel Barker, since the death of John Fell; and the manner in which the respondent proposed to pay the appellant the said £1755, was by an assignment of the entire lands of Ballycloughy, which, as he alleged, he had set at a profit rent of £100, and valued at £2000, at which valuation he proposed to convey the said lands, provided the appellant's father would pay him £245, being the alleged difference between the value of the lands, and what the appellant's wife was entitled to: But the lands being so

much over-rated in value, and the terms proposed by the respondent being so unreasonable, the appellant's father could not, in justice to the appellant and his wife, submit thereto. However he proposed, if the respondent would make some abatement in the sum he [578] demanded for his interest for life, to contribute proportionably on his part, and that the whole should be settled upon the appellant and the said Elizabeth and their issue, which proposal was not agreed to by the respondent.

Soon after the above meeting, the appellant and his wife, in order to settle the fortune to which she was entitled under the marriage articles, upon her and her issue, by an instrument in writing, dated the 1st of September 1761, assigned and conveyed all the said fortune to their uncle Cornelius Bolton, esq. in trust for them and their issue; and in default of issue, for the survivor of them.

The appellant had issue by Elizabeth one son, named Robert William, who died an infant of tender years; Elizabeth attained her age of 21, and afterwards died leaving the said Samuel Barker, her uncle and heir at law on the part of the father, and Dr. Fell, her uncle and heir at law on the part of the mother.

The appellant having taken out administration to his wife, and being unable to bring the respondent to any reasonable terms of accommodation, filed his bill in the Court of Chancery in Ireland, on the 17th of November 1763, against the respondent, and the said Samuel Barker, Dr. Fell, Cornelius Bolton, and Robert Dobbyn the elder; whereby, after stating the marriage articles, and the several other matters before mentioned, the bill charged, that the respondent, during the continuance of his marriage with Elizabeth Fell, executed the power in the articles, with respect to the sum of £700, or part thereof, or did some act with an intent to execute such power, or raised money, or entered into some agreement upon the credit of the said £700, or the power he had of charging the same. And the appellant insisted, that the respondent having survived Elizabeth Fell, and Elizabeth Dobbyn, the appellant's late wife, having been the only child of that marriage, and having attained her full age of 21, and the appellant having married upon the credit of her said fortune, and having had issue as aforesaid, all the residue of the several sums and other effects in the articles mentioned, (exclusive of the sum of £700 or £1000 in case the respondent had executed his power, with respect to either of those sums,) duly vested in the said Elizabeth Dobbyn, and that the appellant, as her representative, was entitled thereto after the death of the respondent, and that the respondent had no any power of appointment, nor any dominion over the several sums or substances mentioned in the articles, in case he survived the said Elizabeth Fell, save only to dispose of £1000. The bill further charged, that the respondent, or any other person, did not, at any time before the appellant's marriage, suggest to him, or any person on his behalf, that the fortune of the said Elizabeth Dobbyn was precarious or doubtful; but the appellant was given to understand, that in right of the said Elizabeth his wife, he should be entitled thereto in possession, immediately after the death of the respondent, whether the said Elizabeth was living, or left issue or not. That the respondent was married to a second wife, and had [579] children by her of tender years: And that in case the said several sums should not be laid out upon proper securities before the respondent's death, the appellant would be in danger of losing his just demand. And therefore the bill prayed, that the said several sums, as well as the other parts of the trust fund, might be laid out at interest upon securities, to be approved of by the court; and that such of the defendants as should admit that the marriage articles, or any deeds, accounts, or writings, relating to the premises, were in their custody, or power, might deposit the same with the proper officer, and for general relief.

To this bill the respondent put in a plea and answer, and as to so much of the bill as sought a discovery from him, as to the several sums mentioned in his marriage articles, or in whose power the same were, or whether Samuel Barker received the same, or when, or by whom, or at what interest, or upon what securities, or in what manner the same had been laid out, or whether the respondent executed the power in the said articles with respect to the sum of £700 therein mentioned, or any part thereof, or raised or borrowed money upon the credit of the said sum, or power, or otherwise, or did any act, purporting that he executed, or with an intent to execute the said power, or entered into any engagement upon the credit of the said power, or the said sum of £700, or declared that he had, or intended to execute the said power,

or that any money which he had raised, borrowed, or contracted for, was or would be secured, or repaid by virtue of the said power, or that the same would be a fund or security for the payment of any money: Or whether the respondent executed the power in the said articles, with respect to the said sum of £1000 therein mentioned, or disposed of that sum pursuant thereto, or so gave out: And as to so much of the bill as sought a discovery, whether Hans Thomas Fell paid to the respondent and Samuel Barker, or either of them, any money on account of, or as part of the assets or substance of John Fell, pursuant to the articles, and in what manner the same had been laid out or applied, or in whose hands the same then remained, or as sought a discovery from the respondent, whether an account was stated and settled between the said Samuel Barker, Hans Thomas Fell, and the respondent, touching the real, or any part of the personal estate of the said John Fell, or what appeared thereby, or whether any money was paid to the said Samuel Barker, as part of the personal estate of the said John Fell, for the uses in the said articles: And as to the relief prayed by the bill, the respondent pleaded; and for plea said, that on the 4th of October 1738, a marriage was had between him and the said Elizabeth, daughter of the said John Fell, and that previous thereto indentured articles were executed by the said parties, and he set forth the articles *verbatim*. That there were no other articles executed previous to or in consideration of the said marriage, and that Elizabeth his late wife died on the 17th of November 1739, leaving issue by him Elizabeth Parker their only child, who died [580] on the 1st of April 1762, without leaving any issue; so that there was not any issue, or possibility of issue of the said marriage, nor had the appellant, as the respondent was advised and believed, any right or title to any sum of money, or to any lands, or other interest, under or by virtue of the said articles, or to any part of the real or personal estate of the said John Fell, or to any sum payable thereout. And therefore the respondent did plead the several matters aforesaid, in bar to the discovery sought by the bill, with respect to the parts before mentioned, and also in bar to the relief prayed by the bill.

And as to so much of the bill as was not pleaded to, the respondent, not waiving the benefit of his pleas, for answer said, he admitted, that John Fell, at the time of the respondent's marriage with Elizabeth his daughter, and at his death, was seised and possessed of a considerable real and personal estate, and (amongst other things) of the town and lands of Ballycloughy, by virtue of the aforesaid lease from William Disney; and believed the appellant was not entitled to any part of the sums of £1700, £600, or £400; and admitted, that after his death, an agreement of the import before stated was entered into between his son Hans Thomas Fell and the respondent; and that by deeds of lease and release of such date, and between such parties as before mentioned, the freehold interest in the said lands was conveyed to Robert Dobbyn the elder, and his heirs, upon the trusts before stated. He also admitted, that the release recited the marriage articles, but he said there was not any saving in the said conveyance, for any right or title of his daughter Elizabeth, or that the same, if any she had, should not be altered. He likewise admitted it had been frequently and publicly declared, as well by himself as Samuel Barker, and many others, that Elizabeth his daughter, in case she survived him, would, under the said marriage articles, be entitled to a considerable fortune, to take effect in possession immediately after his death; but that it was not declared by him or others, that she would in right of the said John Fell, or otherwise than as aforesaid, be entitled to a considerable fortune, to take effect in possession immediately after the respondent's death, or that he had no more than an interest for life in such fortune: And he said it was well known by the appellant, and in his family, long before he intermarried with the said Elizabeth, that she was not entitled to one penny under the said articles, but on the contingency of her outliving the respondent, and that the said articles had been perused by the appellant's father, who was a lawyer, several times before the marriage. He believed the appellant did pay his addresses to his daughter, who was a minor, and said he expressed his disapprobation thereof to Robert Dobbyn the elder, who confessed that he had taken notice of their behaviour, which made him believe that there was a liking between them, but that he would put a stop to any further courtship. That in some short time after, viz. on the 9th of October 1760, the said Elizabeth, without the privity or consent of the respondent, or of her uncle [581] Samuel Barker, in

whose hands she then was, and for some time before had lived, eloped in the night-time, and went off with the appellant, and believed they were married by a popish priest, (though they were protestants) and that he so much disapproved of the behaviour of the appellant and his daughter, that he never had any interview with them, from the time of her elopement to her death; but he admitted, that he did, on the 1st of November 1760, give a consent in writing, that a marriage should be publicly solemnized between them, and that on the 3d of the same November, the appellant and the respondent's daughter were married, according to the ceremonies of the established church, with the consent of the said Samuel Barker, and others her relations and friends. He admitted, that some time after the marriage, Samuel Barker, the respondent, and the said Robert Dobbyn the elder, on behalf of the appellant and his wife, met at the house of Barker; but said, that such meeting was to consider what fortune the said Elizabeth would have been entitled to if she survived the respondent, and to calculate the value thereof upon that supposition. That a calculation was accordingly made, and there was deducted out of such calculation the sum of £1000, which the respondent, in case of her surviving him, had a right by the articles to dispose of, out of the sums and effects mentioned in the articles, and also the value of the respondent's life estate in the same: Said he could not set forth as to his knowledge, remembrance, or belief, whether the fortune which the said Elizabeth would be entitled to, if she survived him, had been reduced by such deductions to £1755, nor whether the sums of £1700, £600, and £400 in the articles mentioned, and a moiety of the lands of Ballycloughy, were the only particulars comprehended in the estimate; nor whether no credit or allowance had been given, or proposed, for any money paid by Hans Fell to the respondent, or Samuel Barker, since the death of John Fell, nor what had been particularly comprehended in the said estimate; but said, he did not propose to pay the appellant the sum of £1755, or any sum by any assignment of the lands of Ballycloughy, or to convey the said lands at a valuation of £2000, provided Robert Dobbyn the elder would pay him £245, nor did he believe that sum was the difference, or alleged difference, between the value of the lands, and what the said Elizabeth would be entitled to at the respondent's death; but that having valued his interest in the said lands at £2000, which was upwards of £500 more than his daughter, or the appellant in her right, upon the supposition of her surviving him, would be entitled to, after the deductions aforesaid, he did, in order that his daughter might have some present maintenance, propose to the said Robert Dobbyn the elder, if he would then pay him £200 to assign the said lands to the appellant and his wife, in lieu of what they might be entitled to under the articles; but that the said Robert the elder, and the appellant, refused to agree to such proposal. He believed that soon afterwards the appellant and his wife did execute some instrument, by which they assigned the fortune, which they claimed to be entitled to under the articles, to their uncle Cornelius Bolton, esq. as a trustee for some purposes, but what he did not know. He said he was advised, that, according to the true meaning of the articles, he was entitled to the whole of the sums therein mentioned to his own sole use; and insisted, that the appellant's wife having died in his lifetime, no part of the said sums vested in her, and that the appellant was not entitled to the same, to take effect after the respondent's death, but that the respondent had a right to dispose thereof as he should think proper.

On the 24th of May 1764, this plea came on to be argued before the Lord Chancellor of Ireland; and on the 2d of June following, his Lordship was pleased to order, that the plea should be allowed with costs.

The appellant, apprehending himself to be greatly prejudiced by this order, appealed from it; and on his behalf it was contended (C. Yorke, W. de Grey), that the plea could not be supported in point of form, because it submitted to the Court, that the defendant ought not to be obliged to discover the several matters mentioned in the introduction to it; though at the same time the answer discovered those very particulars in contradiction to the plea. But if the plea had been proper and regular in point of form, it is not usual, nor according to the established practice of Courts of Equity, to determine upon a plea, questions of difficult or doubtful construction upon deeds, against a plaintiff, (though the appellant conceived that in this case the true construction of the deed was clearly in his favour,) but leave the matter for a more full discussion and debate at the hearing of the cause.



If however, the merits of the question were to be brought under consideration upon his plea, it was apprehended, that the fortune claimed by the appellant, as administrator of his late wife, vested in her upon the death of her mother, and was transmissible to her representative; and that this question depended upon the true construction of the marriage articles of the 2d of October 1738, by which the fortunes of the respondent and Elizabeth Fell were to be laid out at interest, or in the purchase of lands, and settled for the benefit of them *and their issue*. That these articles, though very inaccurately worded, plainly intended to make different provisions for two different events; the one, the death of the respondent before Elizabeth; the other, the death of Elizabeth before the respondent; with a difference in the provision for the husband and wife, in case of there being issue or no issue of the marriage. If the respondent died before Elizabeth, leaving issue, £700 of the settled fund was subject to his power; Elizabeth was to have £60 a-year for her life, and subject to that provision, the residue was to be paid to or among the child or children of the marriage, as the respondent should by deed or will appoint; and for want of such appointment, then as Elizabeth after his death should by deed appoint; and for want of an appointment by either, was to be equally divided between them. [583] Upon this event the articles were clear, and there could not be a doubt, but if it had happened, the residue of the fortune would have vested in Mrs. Dobbyn, as the only child of the marriage. If the respondent died before Elizabeth without issue, the articles were equally clear; for in that case, Elizabeth was to have a gross sum of £1000, and the clause "in default of issue living at the death of Francis," applied to this event, and was to have effect in the words of it; viz. the residue was to go to such persons as Francis should by will appoint; and for want of such appointment, in a course of distribution. In the contrary events, of Elizabeth's dying before the respondent without issue, and of her dying before him leaving issue, different provisions and consequences were to follow; in either case, the respondent's power of disposition was enlarged from £700 to £1000, and with good reason; for the settled fund being discharged of Elizabeth's jointure, could better bear this enlargement of his power. If Elizabeth left no issue, then, as the wife and children who were the objects of the articles would have failed, the residue was left to the disposition of law. But if, on the other hand, Elizabeth died in the lifetime of the respondent, leaving issue, then, as there would be proper objects of the articles capable of taking the provision intended for them, the interest in the residue of the settled fund, after deducting the £1000 which the respondent had a power over, was to vest in such issue upon Elizabeth's death, and to take effect in possession after the death of the respondent. In this event, no power was given to the respondent over the residue; he was only to have the usufruct for his life. And if this was the true meaning of the articles, it would follow, in the event which had happened, that upon the death of Elizabeth, an interest in all the residue of the settled property, after deducting the £1000 subjected to the power of the respondent, vested immediately in her only child; and as she afterwards married the appellant, with the consent of the respondent, and of Samuel Barker her uncle and surviving trustee, and attained 21, had issue and died, such interest was transmissible to, and was now become vested in the appellant as her representative, to take effect in possession after the death of the respondent.

It was also contended, that the power given to the respondent to appoint the times when, and the proportions in which the residue of the settled property was to vest in the issue of the marriage, must be considered as a power to be executed by him during the life of Elizabeth, and consequently to cease at her death. And this appeared from the words which gave the power: For, 1st, the residue was to be subject to the provision made for Elizabeth, upon the contingencies in the articles. And, 2dly, in default of the respondent's making an appointment by deed or will, a power was given to Elizabeth to appoint by deed: But she could neither enjoy the provision made for her by the articles, nor execute her power of appointment, unless she survived the respondent. Nor could it be reasonably presumed, that when Mr. [584] Fell was purchasing a provision for his grandchildren, he would leave a power in his son-in-law to defeat them of that provision after his daughter's death; which he might do, if the execution of the power of appointment was not confined to the continuance of the marriage: For, after the death of Elizabeth, he might, to enlarge his own

chances, postpone the execution of that power indefinitely, whatever the ages, or however pressing the occasions of the children might be; and thus the issue, or representative of a child married in the respondent's lifetime, might be defeated of the whole provision, in favour of him or his children by a second wife. That the clause which gave the respondent the power of disposing of the residue, in default of issue living at his death, was improperly applied to the event of his surviving Elizabeth, and the issue which she should leave at her death; for the contrary event, viz the death of the respondent before Elizabeth, without issue living, or *in ventre sa mer*, was the only object of this clause, as appeared from every part of it. 1st, It supposed the respondent dead before it could operate. 2dly, His disposition was to be prevented from taking effect by the birth of a posthumous child; an event which necessarily supposed the father dead, and the mother living. And, 3dly, it was declared to be subject to the provision made for Elizabeth; but this provision could not take effect till after the death of the respondent. So that every part of the clause supposed Elizabeth to be the survivor; and this construction flowed from the plain meaning of the words as they stood in the clause, without adding or rejecting a single letter. It was also confirmed by the words of the empowering clause before mentioned; for each of these clauses threw a light upon the other, and showed that the sole event to which both of them related, was the death of the respondent in the lifetime of Elizabeth; whereas the construction which the respondent contended for was inconsistent with the words, and could not be maintained without rejecting one-half of the clauses to support the other.

But further: The fund settled by the articles was personal estate, which was assigned to trustees upon trust, either to be laid out at interest, or invested in the purchase of lands, as should be found most profitable to the parties interested. There was no direction to lay it out in one or other of these ways, but an election was given to lay it out in either; and the parties who had the greatest interest in the fund chose that it should be laid out at interest, as yielding greater profit; and as no part thereof had ever been invested in the purchase of lands, it must now be considered as personal estate; and in which light it was chiefly treated and disposed of by the articles themselves. But it was conceived, that if the trust monies had been invested in the purchase of lands, and settled to the uses, and agreeable to the intention of the parties to the articles, the respondent, in the event which had happened, could only have been entitled to an estate for his life, with a power of charging the inheritance with £700 or £1000, and that, expectant on [585] that estate, Mrs. Dobbyn would have had the remainder in fee; of which, as she lived to attain 21, she could have levied a fine, and given the inheritance to the appellant her husband, after the respondent's death. Lastly, that in all cases of portions provided for children, Courts of Equity wish to make such a construction of deeds and wills, as vests their portions, by which they may be enabled to marry, or advance themselves in the world; rather than, by making them subject to contingencies and conditions, hold them in a state of poverty and dependence as long as they live, and render their fortunes of no use to them.

On the part of the respondent it was said (F. Norton, A. Forrester), that the appellant's claim was wholly founded on a supposition, that his wife, as being the only child of the respondent and Elizabeth Fell, was under their marriage articles entitled to the several sums and effects thereby settled, subject only to the respondent's life interest therein, and his power of disposing of £1000, part of the principal. But the provision of the articles was express, that, in default of issue of the marriage at the time of the death of the respondent, the sums and effects alluded to should, subject to Elizabeth's provision, be disposed of by the respondent by his will, and for want of such disposition, go in a course of distribution from him; which cut off every pretence of right in the appellant. That the articles were wisely framed for securing the obedience of the child or children to their father, by empowering him, if he left issue at his death, to divide the whole amongst them as he should think proper; to diminish that whole by £700 or £1000, according as he or his wife should survive each other, and he might think the children deserved it; and if but one child, to keep it in proper subjection by the precariousness of its provision, which the father might upon the dutiful behaviour of the child assure to him or her, by bestowing in his own lifetime what he thought fit. That the circumstances of the appellant's marriage were such, as, even in a more doubtful case, would set his pretensions in a

very unfavourable light; but there was no necessity for recurring to collateral arguments. He had not even a shadow of right under the articles; and those articles, being set out *verbatim* in the respondent's plea, were as fully before the Court, as they would have been upon a more distant examination. The Lord Chancellor therefore was clearly right in stopping at the first outset the litigation of a matter, which, either by over-ruling the plea, or reserving the benefit of it to the hearing, would only have created further expence, without the least variation in the judgment.

On the day appointed for hearing this appeal, the counsel for the respondent admitted at the bar, *that they were unable to support the plea*; and therefore it was ORDERED and ADJUDGED, that the order complained of should be reversed; and that the plea should stand for an answer, with liberty to except, and save the benefit to the hearing. (Jour. vol. 31. p. 358.)

[586] CASE 6.—RICHARD CHALKE and another,—*Plaintiffs*; HENRY TOWNLEY WARD,—*Defendant* (in Error) [21st May 1773].

A plea of privilege is a plea in abatement, and should be offered, in the first instance, to the Court in which the suit is commenced, and cannot afterwards be introduced by writ of error.

JUDGMENT of K. B. and Exchequer-chamber AFFIRMED.

At the General Quarter Sessions for the county of Middlesex, held at Hick's Hall on December 1770, the plaintiffs preferred an indictment against the defendant and two other persons, charging them with wickedly devising to ruin the plaintiff Chalke, and conspiring to withhold a debt, alleged to be due to him from one of the parties; by which means they had wholly ruined Chalke.

Having procured this indictment to be found upon their own evidence, they obtained a judge's warrant for apprehending the defendant, which they caused to be executed, and the defendant being taken into custody, was obliged to give bail for his appearance to answer the charge.

The indictment being removed into the Court of King's Bench, was brought on for trial there by the defendant, on the 13th of February 1771; when no person appearing in support of the prosecution, the defendants were acquitted.

The defendant, in order to do justice to his reputation, and to recover satisfaction for the injury he had thus received, on the 23d of April 1771, commenced an action in the Court of King's Bench against the plaintiffs, by attachment of privilege, as an attorney of that court, with which process the plaintiffs being served, and not choosing to appear, common bail was put in for them, according to the statute, and a declaration was filed against them, for having maliciously, and without any probable cause, commenced and prosecuted the above-mentioned indictment against the defendant.

The plaintiffs, conscious of their being unable to make any defence to this action, and proof of any *probable* cause for the prosecution would have been a good defence.) did not think proper to plead, and therefore interlocutory judgment was signed against them by default, and a writ of inquiry of damages issued; upon the execution of which, before the sheriffs of Middlesex, the jury, upon full proof of the circumstances of the case, assessed the damages at £500.

Several applications were afterwards made to the Court of King's Bench, on behalf of the plaintiffs in error, to set aside this judgment and inquisition, for pretended irregularities, and upon other suggestions, which attempts proved ineffectual; and in Michaelmas term 1771, final judgment was entered for £500 damages, and 27 10s. costs.

[587] A writ of error was thereupon brought in the Exchequer-chamber, where the plaintiffs thought fit to assign only the general errors, and in Trinity term 1772, that Court affirmed the judgment.

And now to reverse this judgment of affirmance, a writ of error was brought in

parliament, and the errors assigned were, 1. That there was no original writ of attachment of privilege filed to warrant the declaration. 2. That there were only ten days, and not fifteen, between the teste and return of one of the original writs. 3. That the original writs and declarations were not sufficient in law to maintain the action. 4. That the cause of action appeared to be jointly against Chalke and Chilton, and that Ward had proceeded by an attachment of privilege against them jointly; whereas by the laws and customs of this realm, no attachment of privilege can issue in a joint action, or for a joint offence. 5. That Chilton, at the time of exhibiting the bill, was one of the attornies of the Court of Common Bench at Westminster, and that by the laws and customs of the realm, and of the said court, and the liberties and privileges of its attornies, Chilton ought to have been impleaded in the Common Bench only, and not in the Court of King's Bench. And 6. That Ward was an attorney of the Court of Common Bench, and having exhibited his bill against Chilton in the Court of King's Bench separately and not jointly, Chilton was not bound to appear, or answer the same; wherefore the said bill, and all the subsequent proceedings thereon, were totally void.

No case was printed, nor any reasons offered on behalf of the plaintiffs, in support of these assigned errors. But on behalf of the defendant it was said (J. Wallace, & Thompson), that supposing no writ of attachment of privilege was filed in this cause, yet the want of it would not be matter of error; since the bill which was exhibited against the plaintiffs, as being in the custody of the Marshal, was the foundation of the suit, and not the attachment; however, the attachment of privilege was in fact filed, and returned upon a *certiorari*. That it was not necessary in this cause to determine, whether the fifteen days between the teste and return of an original writ could be assigned as a matter of error, because this suit was by bill; and an attachment of privilege was merely in the nature of a writ of *latitat*. It was not an original writ; for it is essential to an original writ, that it should issue out of the Court of Chancery; but the attachment of privilege issues out of the Court of King's Bench, and is signed by the proper officer there, whose business it is to make out and sign the writs of *latitat*: and like them is made returnable before the king at Westminster on a certain day; whereas original writs are returnable on a general return, before the king himself, wheresoever his Majesty shall then be in England. Upon this objection, the plaintiffs in error have given judgment against themselves; for if the present suit had been by original, they could not have brought their writ of error in the Exchequer-chamber, but must have resorted to Parliament immediately. That it might as well be contended, that, for an [588] injury jointly committed, no action can be maintained, as that an attachment of privilege will not lie in such case; for in all personal actions, an attorney has as much right to his writ, as an unprivileged person has to the ordinary process. With regard to the objection founded on the supposed privilege of the plaintiff Chilton, as an attorney of the Court of Common Bench, to be sued in that court only; it was submitted, that the objection came too late. The plea of privilege is a plea in *abatement*, and should be offered in the first instance to the court in which the suit is commenced, and cannot be introduced by writ of error. Besides, it was apprehended, that in this case such plea of privilege could not have been supported even if it had been tendered in due time to the court below; because it is an established rule, that an attorney sued *jointly* with another person is not entitled to any privilege, neither is he when sued separately, provided the plaintiff in such action be an attorney of another court; nor was it material that the plaintiff Chilton happened likewise to belong to the court of which the defendant was an attorney, since, being besides an attorney of another court, he might sue in either of the courts at his election. It was not, however, necessary in this stage of the cause to decide what would have been the effect of a plea of privilege, if it had been duly put in, the plaintiffs in error not having relied upon it in the proper place.

On the day appointed for arguing this writ of error, counsel appeared for the defendant, but none for the plaintiffs; and therefore it was ORDERED and ADJUDGED, that the judgment should be affirmed, and the record remitted, and that the plaintiffs should pay the defendant £50 for his costs sustained by reason of bringing the said writ of error. (MS. Jour. *sub anno* 1772-3. p. 731.)

CASE 7.—JOHN CRANG and Wife,—*Appellants*; JOHN ADAMS,—*Respondent*  
[29th February 1776].

A. by lease grants B. a liberty of searching and digging for coals in certain lands for a term of 100 years, rendering an eighth part of the coal by way of rent. The colliery is worked for some years, and then discontinued. The person claiming the land under A. begins to work the mine, whereupon those claiming under B. file a bill to restrain the working, and for a discovery of their title, in order to maintain an action of trespass. To this bill the defendants plead in bar, both to the discovery and relief, that B., and those claiming under him, had ceased working the colliery for a space of 55 years, and had therefore waived and relinquished the benefit of the lease. But the plea was over-ruled, the matter of it being properly determinable at law.

ORDER of the Court of Exchequer AFFIRMED.

In Easter term 1775, the respondent exhibited his bill in the Court of Exchequer against the appellants and others, setting forth, that William Purnell, deceased, was in 1703, and for [589] several years before, seised in fee (amongst other freehold lands and hereditaments) of the several closes of ground, called the Grove, Crabtree Close, and the Tynings, otherwise Purnell Tynings, lying in Timsbury in the county of Somerset; and it being in that year apprehended, that there was a considerable quantity of coal under these lands, Purnell agreed with one Henry Bull (since deceased) for working the veins of coal under such lands; and thereupon, by indenture dated the 2d of December 1703, Purnell, in consideration of the covenants, conditions, reservations, and agreements, thereafter mentioned and reserved, did demise and grant, unto the said Henry Bull, his executors, administrators, and assigns, free liberty, licence, and authority to search, dig, and open any pit or pits of coal, in or upon any part or parcel of his the said William Purnell's ground, lying in Timsbury foresaid; together with free liberty of ingress, egress, and regress, for any person or persons, to take or carry away all such coal as should be digged, or landed, in or upon any of the said premises, or any part thereof; to hold the said coal work, mine, and veins of coal whatsoever, to him the said Henry Bull, his executors, administrators, and assigns, from the date above mentioned, for 100 years (except as to the close called the Grove, which was to be only for 12 years); yielding and paying unto the said William Purnell, his heirs and assigns, the eighth part, free wrought, of all such coal as should be digged, landed, and sold upon the said premises, or any part thereof; and payable once in a month, or oftener if required. And Bull thereby covenanted to allow to Purnell, his heirs and assigns, for trespass, as should become due and payable, during the term; the same to be paid half-yearly, and the *quantum* thereof to be settled in manner therein mentioned; and also to fill up all pits as should be by him, or his representatives, opened on the said premises, when and as they should become useless, and to rid and carry into some convenient place in the said ground, as Purnell, his heirs and assigns, should direct or appoint, all such rubbish, wark, and cavage, as should be landed on the premises, and level all such places as should be made thereon; and also at the end of the term to leave the bounds in good and sufficient repair, as the same should be at the entry thereunto. And Purnell thereby covenanted, that Bull, his executors, administrators, and assigns, should, and lawfully might peaceably and quietly have, hold, and enjoy the said premises, and every part thereof, to search, dig, and mine for coal, during the term thereby granted, under the covenants, reservations, and agreements, thereby expressed and mentioned, without any molestation, interruption, or denial of him, his heirs or assigns, or any person lawfully claiming under him or them. That by virtue of this lease, Bull very soon after entered into a copartnership with one Britton and Hodges, for working the said coal mines, and Bull alone, or with them, or one of them, did search, dig, and open a pit for coal, upon the said close called the Grove, and worked the same about four or five years, and took and carried away all the coal dug therein, [590] and from time to time paid to Thomas Kent clerk, his heirs or assigns, the eighth part free wrought of all such coal. That in 1708 or 1709, they opened a pit for coal in the close called Crabtree Close, and continued to work the

same until the death of Bull, and paid from time to time to Kent, who was owner of the said close, the eighth part free wrought of all such coal as was dug, landed, or found thereon. That in, or soon after 1709, Bull died, having by his will given all the residue of his personal estate to Ann Bull his then wife, and appointed her sole executrix, who duly proved the same; and she after his death, alone, or with Britton and Hodges, or one of them, continued to work the said colliery on Crabtree Close till about 1718, when they began to dig for coal on the close called the Tynings, and intended to have proceeded in properly working the same; but the veins or drifts unexpectedly diverting their course from the Tynings into an adjoining ground called Dudmead, and the level of the Tynings being much lower than that of the close called the Grove and Crabtree Close, they were prevented from so doing, and desisted from working the Tynings, on account of the great body of water that lay against them. That Ann Bull, by her will, dated the 2d of March 1718, gave to her three daughters Mary, Ann, and Eleanor, all her right and title to the coal works at Timbury aforesaid, and elsewhere, and made them executrices; and she afterwards dying in 1719, her said three daughters duly proved her will. That the said Eleanor Bull, by her will, dated the 20th of February 1721, gave to her sisters, Mary and Ann, all her real and personal estates whatever, and appointed them executrices; and she afterwards dying in the said year 1721, Mary and Ann Bull duly proved her will. That in September 1722, Thomas Bush intermarried with Mary Bull; and by indenture, dated the 20th of August 1728, the said Ann Bull the other daughter, in consideration of £100, assigned to Bush all her right in the said coal lease, for the residue of the said term. That by indenture, dated the 21st of March 1766, made between the said Thomas Bush and Mary his wife of the one part, and the respondent of the other part, Bush and his wife, for a good and valuable consideration, assigned to the respondent, his executors, administrators, and assigns, the said mines and coal works, for the residue of the said term. That William Purnell the lessor, died, on the 30th of January 1703, intestate, leaving John Purnell his eldest son and heir, who became thereupon seised of the said closes, subject to the said lease; and he soon afterwards disposed of the close called the Grove to Benjamin Bowditch in fee, and Bowditch and Purnell soon afterwards sold and conveyed the two closes called the Grove and Crabtree Close to Thomas Kent, clerk, and his heirs, who afterwards died, leaving Ann (afterwards Ann Roach widow) his only child and heir at law. That by lease and release, dated the 17th and 18th of March 1731, Ann Roach conveyed the closes called the Grove, Crabtree Close, and the Tynings, to Thomas Short and William Purnell, and their heirs; and by other indentures of [591] lease and release, dated the 26th and 27th of March 1744, Short conveyed one moiety of the said three closes to Matthias Purnell and his heirs. That the last named William Purnell died in August 1759, leaving Mary Purnell, spinster, his only child and heir, who by lease and release, dated the 30th and 31st of the said month of August 1759, conveyed her moiety of the said three closes called the Grove, Crabtree Close, and the Tynings, to the said Matthias Purnell and his heirs. That Matthias Purnell afterwards died, leaving the appellant Mary Crang, his only child and heir, and having by his will devised all his real estates to both the appellants, their heirs and assigns for ever; and that the appellant John Crang, for some time before the filing of the bill, had been, and then was, in possession of all the said closes. That from the year 1718, until very lately before filing the bill, the mines or veins of coal, under the said three closes, could not be worked, by reason of the great body of water, which during all such time lay therein, and therefore the said Thomas Bush, and Mary his wife, Ann Bull, and Eleanor Bull, after the death of Ann Bull the mother, were obliged to forbear working the said colliery, and they did not receive any benefit of the lease during such time. But as the working of the colliery was come about again, the manner of getting coal deeper in that country being since discovered and improved, Bush, in October 1762, gave notice to the appellant John Crang, and to other persons who claimed a right to the said closes called Crabtree Close and the Tynings, that he the said Thomas Bush intended to work the mines under the said lands, in pursuance of the aforesaid lease. That the respondent, after he became entitled to the benefit of the said lease, did, in July 1773, sink pits on the close called the Tynings for working the coal under it; but that the appellants, and the other defendants, insisted, that the respondent had no right to the said colliery, and therefore they very shortly after-

wards, in a forcible manner, interrupted and prevented the respondent and his workmen from proceeding in the said coal work; and that the appellants had lately erected a coal work, and sunk pits on the land, wherein such authority was by the said lease granted, and had dug and opened many pits in the said lands for coal, and hereby got great quantities of coal to a considerable value, and continued working the same; insisting, that the said lease, or the right under it, had been surrendered up, and that it was barred and extinguished by reason of its not having been exercised for many years. In answer to which, the respondent by his bill charged, that at such time as aforesaid, on account of the great body of water which lay in the colliery, it became impracticable to prosecute working it, and therefore, and on account of the nature of the said grant, the respondent insisted, that he ought not to be prejudiced or affected in his right to dig the said mines, on account of any length of time inured without having worked the mines. The bill also charged, that if the appellants, or either of the other defendants, were purchasers of the said lands, or derived title thereto under [592] purchasers for a valuable consideration, such purchasers had previous notice of the said lease, or of the right and claim to the said colliery; and particularly, that such lease, right, or claim, was excepted or mentioned in all or most of the deeds and writings under which the defendants claimed the lands. That Thomas Kent always acquiesced under the lease, and received his free wrought part or share of the coal raised from the lands, called the Grove and Crabtree Close, agreeable to the reservation in the lease. That the respondent, in Hilary term 1774, brought an action of trespass in the Common Pleas against the appellant John Crang, on account of the obstruction by him given to the respondent's working the coals in the said lands called the Tynings; and that the respondent had given notice of trial of such action at the Summer Assizes in 1774, for the county of Somerset, at which time and place the respondent attended with his attorney and witnesses, in order that he cause might have been tried; but that the appellant John Crang, knowing that he respondent could not try his said action without the production of the deeds and writings under which he derived his title to the said lands called the Tynings, refused to produce the same, although the respondent had caused notice in writing to be given to him for that purpose; and that the said appellant John Crang then refused to admit, that the first-named William Purnell deceased was seised of or entitled to the said lands, on the said 2d day of December 1703; and that the respondent being on that account unable to proceed to trial of the said action at law, the appellant threatened to enter up judgment against the plaintiff as in case of a nonsuit, pursuant to the act of parliament in that case made and provided. And the bill also charged, that the appellant John Crang threatened to continue to work the collieries in the said lands and grounds, or part thereof, and that he would never account with the plaintiff or the produce thereof. And therefore the bill prayed, that the respondent might have a full disclosure and discovery of all the matters aforesaid, and that the appellants, and the other defendants, might in particular set forth, whether the said lease or liberty was not excepted or mentioned in all or some, and which of the deeds which had been executed concerning the said closes, since 1703, and in what words, or whether any and what persons or person had, and when or by what deeds or deed, writings or writing, surrendered, released, or extinguished the said right or liberty; and that the appellants, and the other defendants, might set forth a full and true particular of all deeds and writings in their respective custody or power, in any ways relating to the said parcels of land called the Crabtree Close, and the Tynings, otherwise Purnell's Tynings, or to either of them, and that they might leave all deeds and writings in the hands of their clerk in court, for the inspection of the respondent, or with liberty for him to take copies or extracts thereof, at his own expence; and that he appellants might be restrained from proceeding to judgment against the respondent, and also from working the said mines.

[593] To this bill the appellants put in a plea and answer, as to so much of the bill as sought a discovery from the appellants, whether the said first-named William Purnell was in 1703, or at any other time, seised or entitled in fee-simple of or to the said three closes, or any of them; and, as required, the appellants to set forth a particular of all deeds and writings in their power, relating to the said parcels of land, and to leave the same in the hands of their clerk in court; or, as sought, any discovery from the appellants touching such deeds and writings. The appellants

pleaded, and for plea said that, from the year 1718 to the time of filing the bill, any person or persons, having lawful authority, might, without their own wilful default, at any time or times, and during all the said space of time, have searched for and dug, or opened any pit or pits for coal, in or upon all or any of the said closes, and dug or landed coal therein found, and with horses, carts, and carriages, have taken and carried away the same, without any impediment arising from any water, or body of water, or any other cause whatsoever, such person or persons using the same, or the like means to carry off the water, which were in use and practice in the year 1718. That according to the true construction of the said lease of the 2d of December 1703, it appeared to have been the true intent and meaning of the parties thereto, that the said Henry Bull, the lessee therein, and his representatives, should at all times diligently and duly use and prosecute the licence thereby granted, of digging for and landing coal in the lands and closes comprised in the said lease, to the end that the said William Purnell the lessor, his heirs and assigns, might continually have and receive the eighth part of such coals so landed upon the said premises, and sold, according to the reservation in the said lease. And the appellants for further plea said, that as it appeared by the respondent's bill, that no person, by virtue of the said lease, had dug or opened any pit for coal in the said closes, by reason whereof no profit whatsoever did or could accrue to the lessor, his heirs or assigns, between the year 1718 and the year 1773 (being a period of 55 years), they insisted that the respondent ought not to be assisted by a Court of Equity, to obtain a discovery of such matters pleaded to against the appellants.

This plea was argued on the 18th of November 1775, before the Lord Chief Baron, Mr. Baron Eyre, and Mr. Baron Hotham (Mr. Baron Burland being absent), when the Lord Chief Baron declared his opinion that the plea ought to be allowed; but the two other Barons dissenting, the Court was pleased to order that it should be overruled.

To reverse this order the present appeal was brought; and in support of the appeal it was said (J. Dunning, J. Madocks) to appear by the bill, that the respondent could not proceed in his action of trespass against the appellants, without proving at the trial that William Purnell was seised of the closes in question in 1703; and therefore the principal relief prayed by the bill was, that the appellants might [594] answer to that fact; if it should be admitted, their answer might be given in evidence at law, and if not admitted, the bill prayed a production of the appellants' title-deeds, and that the respondent might be permitted to take copies, to be given in evidence at law. This part of the relief was prayed merely in aid of the legal jurisdiction; and therefore there was no prayer of a *quantum damnicatus*, or any other relief respecting the trespass for which the action was brought. But the bill also added another relief, upon which the Court could not decree until the title was established at law; namely, an injunction to restrain the appellants from working for coals in the places in question. The point of the plea was to oppose that part of the relief which was sought to aid the legal jurisdiction; and the ground of the plea was, that there not having been any enjoyment under the licence stated in the bill for a period of 55 years, a Court of Equity ought not to assist the respondent; and the more especially as the ceasing to work for coals for 55 years together was contrary to the intention of the parties in the original agreement, and to the manifest injury of the appellants and those under whom they claimed.

But the respondent, conscious that the objection of his neglect and breach of covenant had weight, alleged by his bill that those under whom he claimed were compelled by inevitable necessity to desist from working, by reason of the great body of water which lay upon the coal, and which late improvements in mining now enabled him to carry off. The plea therefore averred the contrary, viz. that from the year 1718 to the time of filing the bill, the coals under the premises might have been got, without impediment from the water, by the like means to carry off the water as were in use and practice in the year 1718. If this fact was not true, the respondent might reply to the plea and dispute it. The question therefore now was, Whether, taking it for true that coals had during the 55 years been capable of being worked, the not working them during that period was a sufficient reason why a Court of Equity ought not to interfere to assist the respondent? If the deed stated in the bill, instead of being a mere licence, had been a conveyance of the land, either at law or in equity, the statute



of limitations of King James I. would at law have barred the right of entry; and in equity would have been a bar to any relief. So equity follows the statute of limitations, in refusing relief to the mortgagor after twenty years possession in the mortgage; for as it is the policy of the law, so is it the policy of Courts of Equity, not to assist old dormant claims to affect men's estates. In the present case, there had not only been a non-user of 55 years, but a non-user contrary to the intention of the parties, and in direct breach of their contract, to the actual detriment of those who during the 55 years had been the owners of the land.

From the nature of mining leases, where part of the produce of the mine is reserved to the lessors, it cannot be disputed, but [595] that it is the intention of the parties, that the lessee shall work the mine; otherwise the lessor is wholly without any profit arising from his lease. In the agreement in question, it was expressly stipulated that the share of coal reserved should be paid once in a month, or oftener, and the satisfaction for the trespass to the herbage of the land in working should be paid half-yearly: so that it was plainly in the intention of the parties, that the coals should be continually worked, to produce a profit upon the lease monthly, and as that would occasion an injury to the land, that such injury should be compensated half-yearly. A total cessation therefore from working for 55 years together, was an abandonment of the agreement by a conduct in direct breach of the intention of the parties, and a manifest loss and damage to the owners of the mine during that period; and the person who has been guilty of a breach of his agreement wilfully for a number of years together, to the damage of the other contracting party, is not to be relieved upon the contract in a Court of Equity; for he that seeks relief in a Court of Conscience must himself have acted conscientiously in the matter touching which he seeks to be relieved. For these reasons it was hoped that the order would be reversed, and the plea allowed.

On the other side it was said (E. Thurlow, A. Wedderburn, G. L. Newnham, W. Ainge), that, laying aside any objection to the claim of the respondent, arising from the length of time for which no act was done on any of the lands under the lease or licence in question, he would be clearly and indisputably entitled to all the discovery which was attempted to be avoided or covered by this plea: 1st, Whether William Purnell, the lessor, was not, at the time of making the lease, seised or entitled, in fee or otherwise, of or to the closes in question? 2dly, The particulars of the deeds and writings relating to those closes, in the custody of the appellants, and a production of them for the inspection of the respondent. The first particular was necessary to shew the respondent's right in those lands, the lease being in general terms of all the *ground* of the lessor in Timsbury, without mentioning any particulars, except that in the *habendum* there was mention made of the close called the Grove, as to which the lease was long since determined, it being as to that only for twelve years. And the second particular was necessary for the same purpose, and also to shew that the appellants derived their title to these closes, called the Crabtree and the Tynings, under the lessor William Purnell; and further to shew that if they were, or claimed under purchasers for valuable considerations, they had notice of this lease, or of the right claimed by the respondent.

On arguing this plea in the Court of Exchequer, it was admitted, and it could not be disputed, that this case did not fall within the statute of limitations. Nor could the want of exercise of the liberty granted, for a long number of years, prejudice the licence at law, which was not by the terms of the grant to be exercised continually, or at any stated times, but generally; [596] which must mean at the discretion of the lessee, or his representatives, and when, and as they should think fit, during the term. And it was a sufficient answer to the objection in the plea, that by the lessee's not working the coals, the lessor lost the profit which he would have had by the eighth part of the coals gotten; that the lessee, during the same time, lost seven times as much, and his term was wearing out. But supposing this want of exercise of the liberty to be any objection to the respondent's now setting it up, the validity of it was proper to be determined at law, by way of defence on the trial of the respondent's action, but ought not to be set up in bar to the discovery of the matters here pleaded to; which discovery, and particularly the fact of the lessor's being the owner of the two closes in question, was absolutely necessary to enable the respondent to support that action, and bring the circumstance of the length of time in question; so that over-ruling the

plea left the appellants at full liberty to have the benefit of the length of time on the trial of the action; whereas allowing the plea would, in a summary way, totally deprive the respondent of an opportunity of trying his right at law. And it was conceived to be the doctrine of Courts of Equity, that the ground of a plea in bar to the discovery was not so extensive as a plea to the relief sought by a bill.

But the plea, though bearing that name, was little or nothing more than a demurrer, being wholly argumentative, except as to one fact; which was in general, that the mines might have been worked at any time from 1718 to 1773, as well as now: and that fact was averred in the plea, by way of denial of a charge inserted in the respondent's bill, as a reason for the long forbearance in working the mines; viz. that on account of the water therein, it was impossible to work them, until new methods were lately invented in that country for draining the water. And though on arguing the plea, it was insisted by the appellants' counsel, that the equity of the bill depended on this charge, which was so denied by the plea: yet that was a groundless argument, it being confessed by the respondent that he had no other equity to entitle him to the discovery in dispute, than every person setting up a legal demand has to come into equity against the defendant for the discovery of a fact necessary to support his case on a trial at law.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the order therein complained of affirmed. (MS. Jour. *ms.* anno 1775-6. p. 385.)

CASE 8.—FRANCIS GORMAN, and others,—*Appellants*; WILLIAM M'CULLOCH, and others,—*Respondents* [23d February 1779].

[Mew's Dig. xi. 628.]

A defendant to a bill of review pleads length of time, after the decree, which had been duly inrolled, and under which part of the estate had been sold to a bona fide purchaser, who had been in possession thereof for 27 years. Upon arguing this plea, the Court of Exchequer in Ireland ordered, that the defendant should be at liberty to withdraw the same, and to plead *and demur*, or demur only, without introducing any new matter. This order, upon an appeal, was AFFIRMED, with a *variation*, that the defendant should also be at liberty to *answer*.

The constant defence to a bill of review, for error apparent upon a decree, has been said to be, by plea of the decree, and demurrer against opening the inrolment. 2 Atk. 534.; and see 3 Atk. 627: 1 Vern. 392. There seems, however, no necessity for pleading the decree, because it must be stated in the bill: the books of practice contain the forms of a demurrer only to such a bill, and there are cases accordingly. 1 Cha. Ca. 122: 1 P. Wms. 139. And see *Jones v. Kenrick*, *ante*, tit. Mortgage, Ca. 14; where it appears that the defendant pleaded the decree inrolled in bar of the first bill, which did not state the decree; but demurred alone to the bill of review. And in *Helburt v. Philpot*, Dom. Proc. Mar. 11, 1725, the defendant demurred alone to a bill of review; and the demurrer was allowed, and the order affirmed by the Lords. But see 1 C. R. 233. See Mitford's Treatise on Chancery Pleadings, p. 166.

Where any matter beyond the decree, as length of time, a purchase for valuable consideration, or any other matter, is to be offered against opening of the inrolment, that matter must be pleaded. 2 Ves. 109. And if a demurrer to a bill of review has been allowed, and the order allowing it is inrolled, it is an effectual bar to a new bill of review on the same grounds, and may be pleaded accordingly. 2 Ch. Ca. 133: 1 Vern. 135, 417, 441: 2 Vern. 130. See Mitf. p. 231.

Hugh M'Gill, of Kirkstown in the county of Down, esq. being, under the last will and testament of his father James M'Gill, bearing date the 1st of November 1679, seised of divers lands, tenements, and hereditaments in Kirkstown, Ratalia, Ballycranmore, Ballyministragh, Tullynagee, and other places, made his will, bearing date

the 30th of June 1690, and thereby gave, devised, and ordained, (*inter alia*), "That if the child (wherewith his wife was then enseint) should happen to be a son, he, and the heirs of his body lawfully begotten, for ever should have, hold, and enjoy his the said testator's whole estate of inheritance, in such manner, and subject to such charges in favour of his the said testator's daughters, as therein is expressed. But if the said testator's wife should not then be with child of a son, but of a daughter, and the said testator should not have a son who should live to be 21 years of age, then the testator did thereby will and ordain, leave and bequeath his whole estate of inheritance, lease, and mortgage, (except as therein is mentioned,) unto his daughter Lucy and the heirs male of her body for ever, under condition of paying his debts, and portions for younger daughters, in such manner as therein is expressed." And the testator did hereby bequeath [598] unto his daughter Letitia £800 sterling; and if his wife should be delivered of another daughter, to such other daughter £400 sterling; and the testator appointed Lucy his wife sole executrix, and departed this life in 1690, leaving issue the said Lucy and Letitia his two daughters named in his will; and the child whereof the testator's wife was enseint, at the time of making the above will, proved to be a daughter, was born after her father's death, and called Jane; but Letitia his second daughter died soon after her father, very early in her infancy.

The said James and Hugh M'Gill having in their respective lifetimes become indebted to William Shaw, deceased, (who was son-in-law to the said James M'Gill, and brother-in-law to the said Hugh M'Gill,) in various sums of money; and the said William Shaw having also joined with them in securities for several considerable sums of money, to the payment of which he then stood liable, and for some of which he had their bonds and counter-bonds; the said William Shaw, in Hilary term 1692, exhibited his bill in the Court of Exchequer against the said Lucy M'Gill, Letitia and Jane M'Gill, and the other defendants herein named, praying that the said Jane M'Gill, and the said Townley and his wife, might apply the personal and real estate of the said James and Hugh M'Gill in payment of the debts for which he had become and then stood bound, and to indemnify the said William Shaw from the same.

The defendants having answered, the cause was at issue, witnesses examined, and came on to be heard on the pleadings and proofs the 14th day of February 1694, whereupon it was decreed, that the said William Shaw should recover out of the said James M'Gill's assets, the several debts for which he had become bound for the said James, and the debts which he had become bound for the said Hugh, out of the assets of Hugh; and if there were not sufficient assets, then out of said Hugh's real estate: and it was referred to the Chief Remembrancer to ascertain how much the debts which he said William Shaw had become bound for the said James M'Gill and Hugh M'Gill respectively amounted to, and in whose hands the personal estate then was; and to take an account of the real and personal estate of the said Hugh.

The Chief Remembrancer having made his report, dated the 13th of June 1696, the cause came on to be heard on the report and merits the 20th June 1696, when it was decreed, that the said William Shaw should recover against the defendants the sum reported due, being £2957 13s. 6d. debt, with interest from the 1st of June then instant, with £32 15s. 6d. costs; and that the debt, interest, and costs should be paid out of the real and personal estates of the said James and Hugh M'Gill; and that the lands of inheritance and leasehold lands of the said James and Hugh should be liable to the payment thereof; and that an injunction should issue to put the said William Shaw into possession of the lands of Ballymacarett, Clogher, Tullynagee, Ballyministragh, and the mill thereof, part of the real estate of the said James and [599] Hugh M'Gill, in the county of Down, subject to an annuity of £60 a-year; and that upon the death of either Jane the widow of James M'Gill, or of Lucy the wife of Townley, an injunction should issue to put the said William Shaw in possession of such lands as either of them had in right of dower, till the debt, interest, and costs should be paid.

Lucy, the eldest daughter and heiress of Hugh M'Gill, in July 1708, intermarried with Robert Johnson, esq. by whom she had issue the appellant Robert Johnson, her eldest son, and several other children.

William Shaw died in 1710, and before his death made his will, and appointed Patrick Shaw and John Shaw, both since deceased, his executors; which said Patrick

Shaw survived the said John, and died in 1716, but before his death made his will, and appointed William M'Culloch and William Shaw, esqrs. and Patrick Agnew, executors; but William Shaw the executor soon after died.

Robert Johnson, the husband of Lucy the heiress of Hugh M'Gill, died in September 1720, leaving the said Lucy his widow, and appellants Robert Johnson and Elizabeth Gorman, and several other children.

Lucy, then the widow of Robert Johnson the father, on the 21st June 1722, exhibited her bill in the Court of Exchequer against William M'Culloch and Patrick Agnew, the surviving executors of Patrick Shaw, deceased, who was the surviving executor of William Shaw, and several others, to have an account of the rents and profits of the said Lucy M'Gill's estate, which had been received by the said William Shaw in his lifetime, or by his representatives; and to be relieved against certain errors alleged to be in the decree which had been made on the 20th June 1696, with prayer of general relief. Which bill the defendants answered; but before any further proceedings were had, the said Lucy intermarried with William Savage, esq. and the said Patrick Agnew died.

The said William Savage and Lucy his wife, on the 20th of October 1724, filed their bill of revivor; which bill the then defendant William M'Culloch and the other defendants answered. And the cause being at issue, came on to be heard upon the pleadings and proofs on the 20th of February 1727, when it was decreed, that the said former decree, obtained by William Shaw in 1696, should be set aside; and that it should be referred to the officer to report what bonds and other securities William Shaw was bound in for James and Hugh M'Gill, and for what sums, and what he had paid for principal and interest on account thereof; and that William M'Culloch, as representative of William Shaw, should account for what he had received out of the real, and personal estate of James and Hugh M'Gill, and that the officer should carry on the account on both sides.

The respondent William M'Culloch, after this decree, used all diligence to have the account settled before the officer, and to ob-[600]-tain a report; and for that purpose his agent and attorney constantly attended the officer, who, in the month of May 1735, signed a draught of his report, whereby he certified that £7582 8s. 8½d. was due to M'Culloch as surviving executor of Patrick Shaw, on the 1st of November 1734, which being served on the parties, the plaintiffs excepted thereto; and by the many affected delays on the part of William Savage and Lucy his wife, and of Lucy Savage after the death of her husband, the exceptions were not all disposed of, but the account actually depended before the officer from the time of the decree in 1727 until the year 1738.

William M'Culloch, being wearied out by the delays of Savage in his lifetime, and of Lucy after his death, agreed with Lucy, the then only plaintiff in the suit, to refer the stating and finishing of the account to two gentlemen, to be indifferently chosen; whereupon they, on the 9th of January 1738, entered into a submission, whereby all matters in difference between them were referred to Arthur Hill, esq. and William Hartson, clerk, provided they made their award on or before the 9th day of May then next; which submission was, on the 23d of January 1738, made a rule of Court.

The arbitrators accordingly made their award on the 5th of May 1739, whereby, after reciting that they had examined all the matters and things in the pleadings mentioned by each of the parties, as well plaintiffs as defendants, and having duly considered the same and the proofs offered by each of the parties, they did award that Lucy the plaintiff should pay unto the said William M'Culloch £7000 sterling, to carry interest from the 1st May then instant at £5 per cent.; and that the said principal sum and interest should be paid him on the 1st of May 1740, and upon payment of that sum and interest, he should execute to Lucy Savage a general release of all matters in dispute between them, and should reconvey to her all his right and title to the lands of Ballyministragh and Tullynagee in the pleadings mentioned, or execute warrants of attorney to acknowledge satisfaction on the judgments.

The award was confirmed the 7th of November 1739; and the £7000 not having been paid agreeable to the award, William M'Culloch, being the surviving executor of Patrick Shaw, on the 16th of February 1741, filed his bill against Lucy Savage, Robert Johnson, and others, praying that the defendants Savage and Johnson might discover the value of the personal estates of James and Hugh M'Gill, and how disposed of; and

the value of the assets and personal estate which Lucy Townley (formerly the wife of Hugh M'Gill) died possessed of, and how disposed of; and that the award might be carried into execution by the decree of the Court; and that the £7000 and interest might stand a charge on the real estates and leasehold lands; or that the award, if Lucy Savage could not be obliged to perform the same, might not stand in William M'Culloch's way, but that he might be at liberty to proceed in the account directed by the decree in 1727; and that [601] the premises, subject to the debts, might be sold by the decree of the Court, for payment of the balance due on such account for principal, interest, and costs; and the bill, after particularly enumerating the freehold and leasehold estates in the several counties of Down and Wicklow, and in the city of Dublin, whereof James and Hugh M'Gill died seised and possessed, charged, that notwithstanding the assurances of Lucy Savage that she would, in a short time, raise the principal and interest awarded, due to William M'Culloch, by sale of part of her estate, yet the said Lucy, on the 5th of May 1739, (the very day the arbitrators made their award,) executed some deed or conveyance to Robert Johnson, his heirs and assigns for ever, of all those estates in the several counties of Down and Wicklow, and in the city of Dublin.

Lucy Savage, on the 24th of June 1742, answered the bill; and thereby, amongst other things, admitted having entered into the above-mentioned submission, that the same was made an order of Court, and that the referees made such award thereon, and published the same under their hands and seals in writing, to the purpose before set forth, and that she acquiesced under the said award, and was willing to acquiesce under the terms of the same, as far as it lay in her power so to do; but apprehended that the lands of Ballyministragh and Tullynagee, and the mill thereof, were then only subject to the plaintiff's demand; and admitted that James and Hugh M'Gill were possessed of such lands and leases as in the bill were set forth, and that the same came to, and were afterwards possessed by her; and admitted that she had, about the time in bill mentioned, and in consideration of a yearly maintenance to be given to her, and some other inducements and considerations, and also in consideration of the natural love and affection which she bore to Robert Johnson her son, assigned over to him all her estate, and that he was then in the actual possession and enjoyment thereof; the said several lands having descended and come to the defendant Lucy, as heiress of Hugh M'Gill, who was heir of James M'Gill; and as to the full value of such, she referred to the answer of Robert Johnson, who was then in possession thereof, and had also all the deeds, evidences, and writings relative thereto in his possession.

Robert Johnson answered the bill on the 22d of April 1743; wherein, amongst other things, he admitted the award, and believed that Lucy, or her agent or attorney, by her consent, promised that she would raise money to pay the £7000 by sale or mortgage of her estate, which came to her as heiress at law of her said father and grandfather, and would pay that sum and interest to the plaintiff, pursuant to the award.

The cause being at issue, came on to be heard on the 27th of November 1744, when it was ordered, that the defendants should examine their witnesses, if any they had, the then next [602] vacation, or, in default thereof, the said last-mentioned cause should be set down to be heard on the pleadings; and on the 30th January 1744-5, on reading the order of 27th November 1744, and an affidavit of the service thereof, the defendant not having examined, it was ordered, that the cause should be set down to be heard on the pleadings the fourth of the eight days after the then Hilary term; and the same having been accordingly set down, came on to be heard the 19th of February 1745, when, upon reading the order for hearing and opening the plaintiffs' bill, (none appearing for the defendants Lucy Savage, Robert Johnson, Samuel Madden, and Jane his wife, who were served with subpoena to hear judgment, as by affidavit of the service thereof appeared,) the other defendants having appeared by their respective attorneys, and upon opening the defendants' answers, it was ordered and decreed, that the award should be carried into execution; and that the sum of £7000 so awarded to be due to William M'Culloch the plaintiffs' testator, with interest thereof, from the 1st of May 1739, should be and stand a charge upon the real estate of James and Hugh M'Gill; and that the said real estate and leasehold lands which James and Hugh respectively died seised and possessed of, or so much thereof as should be sufficient for that purpose, should be sold by the proper officer, to pay the

said £7000 and interest: and it was referred to the officer to audit and state the account between plaintiffs and defendants Savage and Johnson, Madden and wife, and the cause to stand over as to the other defendants.

On the 1st May 1746, it was ordered, that the last-mentioned cause should be set down to be heard on conditional decrees the first of the four days after the then Easter term: and the same having accordingly come on, it was, on Saturday the 23<sup>rd</sup> of June 1746, ordered, adjudged, and decreed, that the said decrees of the 19<sup>th</sup> of February 1745 should be made absolute against the defendants Lucy Savage, Robert Johnson, Samuel Madden, and Jane his wife, and that the award should be carried into execution, and that the sum of £7000 so awarded due to William M'Culloch the plaintiff's testator, with the interest thereof, from the 1st of May 1739, should stand a charge upon the real estate and leasehold lands of which James and Hugh M'Gill respectively died seised and possessed, and that the same, or a competent part, should be sold to satisfy the plaintiffs' said demands, with interest: and it was thereby referred to the Chief Remembrancer, or his deputy, to audit and state an account between the plaintiffs and the defendants Lucy Savage, Robert Johnson, Samuel Madden, and Jane his wife, for the said sum of £7000 and the interest thereof, from the 1st of May 1739, at five and a half per cent.

The officer, after witnesses had been examined by the defendants in aid of the account depending, accordingly made up his report on the 20<sup>th</sup> of February 1747: and thereby reported [603] the defendants, after all just allowances, to be indebted to the plaintiffs in £8912 18s. 10d.; which report was confirmed on the 26<sup>th</sup> day of February following; and on the same day it was further ordered, that the cause should be set down to be heard on the officer's general report and the merits for the second hearing-day in the then next Easter term. Accordingly, the cause came on to be heard on the 11<sup>th</sup> of May 1748; when, on reading the order for hearing, and an affidavit of the service thereof, the Chief Remembrancer's report, and the order for confirming the same, it was ordered, adjudged, and decreed, by the Chancellor, Treasurer, Lord Chief Baron, and the rest of the Barons of the Court of Exchequer in Ireland, (which decree was afterwards, on the 11<sup>th</sup> May 1748, inrolled,) that the plaintiffs should be, and they were thereby decreed to be paid the said sum of £8912 18s. 10d. so reported due to them, with interest and costs: And it was further ordered and decreed, that unless the said sum of £8912 18s. 10d. should be paid to the plaintiffs, within six months from the said 26<sup>th</sup> day of February 1747, being the time of confirming the report, the Chief Remembrancer, or his deputy, should sell the lands in the pleadings mentioned, or a competent part of them, by public cant, to the best bidder, for payment thereof, with interest and costs; and that all necessary parties should join with the said Chief Remembrancer, or his deputy, in proper conveyances for that purpose.

After several intermediate proceedings a bill of review and reversal was filed on the 29<sup>th</sup> of April 1774, in the names of Francis Gorman, and Elizabeth Gorman otherwise Johnson, his wife, and of Robert Johnson; and which said Elizabeth is by the bill described as daughter and administratrix of Lucy Savage, otherwise Johnson, otherwise M'Gill, who died intestate, the grand-daughter and administratrix, with the will annexed, of Hugh M'Gill, against James M'Culloch, and others, praying that the decree of the 11<sup>th</sup> of May 1748 might be reviewed and reversed, for the several errors thereby assigned, and others appearing upon the face of the decree; and that the cause might be heard over again, so as such decree might be pronounced therein as should be agreeable to the rules of justice and equity.

James M'Culloch, one of the defendants named in the bill of review, died, after filing the bill, by reason whereof the respondent William M'Culloch became the surviving executor; who, on the 12<sup>th</sup> December 1775, swore and filed a plea to the said bill of review, wherein he insisted (amongst other things) upon the length of time which had run since the pronouncing of the decree of the 11<sup>th</sup> day of May 1748; and that, although 26 years had elapsed since the inrolment of that decree, no party interested had, previous to the bill of review, impeached, or attempted to draw in question, either the said decree to account of the 28<sup>th</sup> June 1746, or the said final decree of the 11<sup>th</sup> May 1748, as a bar to the relief sought by the said bill of review.

[604] This plea came on to be argued and stood over for the opinion of the

Court; and the respondent M'Culloch having been advised, that his plea, from its informality only, (not for want of sufficient matter,) might ultimately be over-ruled; he, by his counsel, on the 11th of November 1777, moved the Court for liberty to withdraw the same, upon such terms as the Court should think proper; which being opposed by the appellants, and a cross notice having been given by them, for leave to amend their bill of review, and the business of both notices having come on together, it was ordered by the Court, that the said motion should stand over until the 15th day of the same November.

Accordingly on the 15th of November 1777, upon hearing counsel on both sides, and upon reading the decree of the 11th May 1748, it was ordered, that the respondent M'Culloch should be at liberty to withdraw his plea, and to plead and demur, or demur only, to the said bill of review and reversal, without introducing any new matter in such plea, not contained in the former plea, upon payment of the costs of arguing his said plea: And it was further ordered, that the appellants (the plaintiffs in the bill of review) should be at liberty to amend their said bill of review and reversal, without introducing any new matter, and that the plaintiffs in the bill of review should be at liberty to bring on the cause upon the said bill of review and reversal.

From this order the appellants appealed, and on their behalf it was argued (A. Wedderburn, J. Madocks, W. Selwyn), that the respondents' plea being multifarious, and having been argued, ought not to be withdrawn, but over-ruled. That if the respondent could at all by law be permitted to withdraw his plea after arguing, and to plead *de novo*, this order, as it now stood, did not put the appellants and respondents upon equal ground; for, as the respondent M'Culloch did by his plea insist upon length of time, acquiescence, and several subsequent facts, thereby introducing every matter since the decree, which could tend to a defence, he was left at liberty to re-insert in his new plea all such new matters; whereas the appellants were restrained from shewing the report of 1761, or introducing any new matter by amendment to contradict, account for, or explain the several matters insisted upon by such plea: And therefore the appellants ought to be at liberty to amend their bill, by adding all such charges as are mentioned in the affidavits referred to in the notice; which tend to shew that the report of 1761 must be considered as the final date of the decree of 1748, and that such decree was not acquiesced under, but very strongly impeached, ever since 1761, by which decree the estates were charged by M'Culloch with large sums which never were paid by Shaw, but still stood against the estate.

On the other side it was contended (J. Adair, J. Dunning, E. Hilliard), that the order which permitted the respondent to amend his plea to the appellants' bill of review, without adding new matter, was absolutely necessary to attain justice in this case; as otherwise, if that plea should be over-ruled for any defect in matter of form, the respondent would be precluded from making any defence upon the merits against an attempt so unjust and extraordinary, as that made by the appellant, to review and reverse a decree made so long ago as the year 1748, founded on an award made, on the most diligent examination and mature deliberation, by men of the most unquestionable character, chosen by the parties then interested, who were of full age, and after long litigation and discussion of the matters in dispute; and which decree was duly inrolled, and had since been regularly proceeded upon, and an actual sale made of part of the estates to a *bona fide* purchaser, who had been in possession thereof for twenty-seven years. That bills of review and reversal, by the invariable practice of Courts of Equity, can be admitted but on two grounds; either upon errors apparent on the face of the decree, or upon matter subsequent and relevant discovered after the decree. The latter ground must always be by leave of the Court, and the matter alleged as a foundation for it must be verified by affidavit, and must be such as by no possibility, or at least by no efforts of reasonable diligence, could have been discovered by the parties, or have come to their knowledge before the hearing in the original cause. And even in cases where the matter appeared proper in its nature, the Courts have held length of time and acquiescence to be a very forcible objection. Whereas in the present case, (exclusive of the objection of time and acquiescence,) the matters themselves, as set forth in the affidavit adduced in support of the appellants' application for leave to add new matter in their bill of review, were so far from coming within the description of new discoveries, within the rules in-

variably observed in like cases, that all, or the greatest part of them, were expressly stated by those affidavits to appear from records, reports, and proceedings, not only prior to the decree of 1748, but which were actually before the Court at the time of making that decree, and therefore could give no ground in equity for the application of the appellants, to which that part of the order appealed from, which restrained them from adding new matter in the amendments of their bill, referred: And that, if there were any matters contained in the affidavits, on which the appellants' application was founded, that did not appear from the records, reports, and proceedings already mentioned, but were all stated to have come to the knowledge of the parties by the report in 1761, the subject-matters of which report were all of them prior to the decree of 1748: And the sources from whence the officer making that report drew his information, were such as were equally accessible to the parties, as well before as after the decree in question, and were or ought to have been known to them; the contrary of which ought to be clearly stated and verified, to entitle the appellants to that indulgence from which they were justly restrained by the order appealed from.

[606] But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, That the decree complained of be affirmed, with the following variations, viz. after the words "liberty to plead" insert the word "answer," and leave out the following words—"and demur;" and after the words "or demur" leave out the word "only," and after the words "without their introducing any matter," insert the following words—"not warranted by the order of the 14th of December 1773." (MS. Jour. *sub anno* 1779. p. 296.)



REPORTS of CASES upon Appeals and Writs  
of Error determined in the High Court of  
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Vol. VI.

PLEADINGS.

CASE 1.—Earl of PETERBOROUGH, and others,—*Appellants*; Sir JOHN GERMAINE, et Ux,—*Respondents* [24th February 1709].

[Mew's Dig. vi. 363. Explained in *Moss v. Anglo-Egyptian Navigation Co.* 1865, L.R. 1 Ch. 116; see *Tredegar v. Windus*, 1875, L.R. 19 Eq. 613.]

It is against the known and established rules of all Courts of Equity, that after issue joined, publication passed, and the cause heard, the same matters, or the same title, should be drawn into question again, by another original bill; for, if this was once admitted, it would introduce perjury, and make suits endless..

Orders of the Court of Chancery AFFIRMED.

Notwithstanding the determination of the former suit, between the present appellant the Earl, and the respondent Sir John (see *ante*, title Evidence, ca. 1. vol. 3. p. 539); the Earl, in 1706, after the death of Lady Mary, Sir John's first wife, exhibited another bill in Chancery against him, to be relieved touching the Northamptonshire estate, which the plaintiff claimed under the settlement of 16 Charles I. and also as heir at law of the said Lady Mary; and obtained an injunction against the defendant for staying waste. To which bill the defendant pleaded his title under several conveyances from Lady Mary, his late wife; he also pleaded the dismissal of the plaintiff's former bill, and the affirmance of that dismissal upon the appeal to the House of Peers. And, upon arguing this plea, on the 26th of July 1707, it was allowed, and the injunction dissolved.

It was stated as one of the facts in the former case, that certain leases which had been granted by the late Countess Elizabeth to one Newport were ordered to be sealed up, and deposited with the Usher of the Court of Chancery, there to remain; but this being omitted, and the Earl having by some means obtained the custody of these leases, to the number of fifteen, Sir John made an application to the Court in the old cause, that the Earl might deliver them up; and by an order of the 21st of April 1708, the Earl was accordingly ordered to bring back the said fifteen leases, so as the same might be brought before Sir William Lacon Child, one of the Masters of the said Court, to be by him delivered over to the Usher of the Court, who was to keep them till further order.

The Earl being still dissatisfied, in Hilary term 1708, filed another bill in the Court of Chancery, against the present respondents, to call again in question the title of the Northamptonshire estate, [2] and to be relieved touching these fifteen leases, and that he might be at liberty to make use of them upon any trial at law.

To this bill the defendants pleaded the several fines, feoffments, recoveries, and settlement of Earl Henry, the articles between him and Countess Elizabeth, and the decree in confirmation thereof, the dismissal of the former bill and appeal, and a settlement made of the premises by the defendant Sir John, upon his marriage with

the defendant Lady Elizabeth, his wife; and, upon arguing this plea before the Lord Chancellor Cowper, on the 18th of November 1709, it was allowed.

From this order, and also from the former order of the 21st of April 1708, the plaintiffs appealed; and, on their behalf, it was insisted (T. Parker, S. Harcourt), that none of the leases having been suffered to be read in the former causes, it had not yet come before the Court judicially to determine whether those leases, or any of them, were made in breach of the articles or decree; which only restrained the Countess from making leases to lessen the rent of the estate, but did not hinder her from making leases to preserve the estate in the name and family. That the end of the Earl's bill, which was formerly dismissed, was to have the deed of the 14th Charles I. set aside as a voluntary settlement, and the deed of the 16th Charles I. established; which was a matter quite different from the relief prayed by the present bill, and therefore ought not to be set up as a bar to such relief; more especially as in the former suit the Earl had not proper parties to be relieved touching the leases: And that the order of the 21st of April 1708 was not regular; inasmuch as the cause wherein that order was made had been long before abated by the death of parties, and was not then revived.

On the other side it was contended (T. Powys, J. Montague), that these leases having, by a decree made so long since as the 28th of October 1671, been set aside; and, by virtue of a subsequent order, been brought into court to remain there till further order. The Court, on being informed that the Earl had got them into his possession, could not do less than order them to be brought back again, although there was no suit then depending between the parties interested therein: And a practice of this kind might have been justly censured, and punished as a contempt of the Court's authority. That the articles which restrained the Countess Elizabeth from making leases, were plain and express as to all leasing whatsoever after the £2000 was raised, during the life of Earl Henry, without his consent, except for such terms only as should end at her death; and it was thereby also provided, that if the Countess should outlive Earl Henry, the articles were to be void, and in that case, her power of leasing would have arisen again; so that it was manifestly the intention of these articles, that the estate was to be kept free from leases for the particular benefit of Earl Henry, in order that he might have the more absolute power and command over it, without any such regard had to the remainder-men, as the appellant apprehended. That the [3] decree of the 28th of October 1671, not only confirmed the articles, but expressly set aside all leases made contrary thereto; and the Court most clearly took the leases in question to be so made when they were ordered to be brought into Court; at which time it was not so much as pretended, that they were not made in breach of the articles. That the Earl sought to have the benefit of these leases, and to be admitted to use them, not only by his bill of Hilary 1697, in which cause they were fully put in issue; but he also made it part of his complaint, in his former appeal to the House; and yet both his said bill and petition of appeal were dismissed. That no objection was made in that cause for want of proper parties; but both in the Court of Chancery and in the House of Peers it was defended and determined upon the mere right; nor in truth were there any parties wanting to determine the question, whether the appellant should be permitted to make use of these leases as against the then respondents, or not. That there was very good reason for allowing the respondent's plea to the *third* bill brought by the appellant, upon the same title, and for the same estate, it being against the known and established rules of all Courts of Equity, that after issue joined, publication passed, and the cause heard, the same matters, or the same title should be drawn into question again by another original bill; for if this was once admitted, it would introduce perjury, and make suits endless: And much less ought such an attempt to be suffered after an appeal to the House of Peers, and judgment given by the supreme and last resort; and in a case where the respondents came in as purchasers under fines, recoveries, marriage-settlements, and even an act of Parliament at so great a distance of time after the leases had been set aside; for if, after such transactions, purchasers could not be safe in their title, nothing could ever be reduced to a certainty or be at peace.

After hearing counsel for two days on this appeal the House ordered, that on the next day one counsel on either side should be heard to this point only, viz. "Whether the matter of the respondent's plea, allowed by the Court of Chancery,

and against which order of allowance the present appeal was brought, be, as touching the fifteen leases in question, in whole or in part, the same matter which was in judgment before the House, upon the Earl of Peterborough's former appeal, heard and judged in 1702;" and counsel having been heard thereon accordingly, and the House being of opinion it was the same matter, it was therefore ORDERED and ADJUDGED, that the orders complained of in the appeal, as well that for bringing back the leases into court, as that for the allowance of the respondent's plea should be affirmed. (Jour. vol. 19. p. 75, 77, 78.)

CASE 2.—EARL OF CLANRICKARD, and another,—*Appellants*; THOMAS BOURKE, et Ux,—*Respondents* [20th January 1717].

Where a defendant answers to the same thing to which he insists by his plea, that he ought not to answer; the answer over-rules the plea.

The above abstract is copied from 4 Vin and 2 Eq. Ab. The point of the case is thus stated in the report of it by Comyns.

"A person restored, after an attainder for high treason, shall have the same equitable interest in every part of his estate, as he had before the attainder."

The *last* order of the Irish Chancery REVERSED.

Viner, vol. 4. p. 442. ca. 1. 2 Eq. Ca. Ab. 79. ca. 2. 1 Comyn's Rep. 237.

King Charles II. by his letters patent, dated the 8th of April 1662, granted several manors, lands, tenements, and hereditaments (charged with the payment of £20,000 to Charles Viscount Muskry) unto Rickard, then Earl of Clanrickard, in tail male; remainder to his heirs male of the body of Ulick, first Earl of Clanrickard, remainder over to his right heirs. And which letters patent were afterwards confirmed by the acts of *settlement* and *explanation*.

Colonel William Bourke, in the lifetime of his brother the said Earl Rickard, married the Lady Lettice Shirley, and by her had issue two sons, Rickard, late Earl, and the appellant John; and, after her decease he married the respondent Hellen, by whom he had issue three sons, who all died without issue, and two daughters, Margaret Viscountess Iveagh, and Honora, since also dead.

In 1667, Earl Rickard died without issue, whereupon the honour and estate (charged as aforesaid) descended to the said Colonel William Bourke, as heir male of the body of Earl Ulick; and about nine years afterwards the Colonel, by deeds of lease and release, and common recovery, limited the barony of Dunkellin (*inter alia*) to the respondent Countess Hellen for life, for her jointure, with remainders over, and declared, that in case the £20,000 should be demanded or recovered, the estate thereby settled should only bear its proportion thereof. In 1678, Earl William made an additional jointure to Countess Hellen of other lands and tenements, in recompence of such part of her former jointure as had been or might be evicted by reason of incumbrances, but subject to a power of revocation; and, in 1679, he made a settlement of other part of the said estate upon his sons by the first marriage; and also made a provision of £4100 for his daughter Margaret, payable at the age of sixteen, or marriage, but subject likewise to a power of revocation.

In October 1687, Earl William died, and Rickard, his eldest son by the first marriage, took possession of the estate, subject to the £20,000, with a great arrear of interest and several other incumbrances, and Countess Hellen was kept out of her jointure, [5] whereupon great differences arose in the family; to compose which, all parties concerned submitted to a reference, and entered into bonds to perform such award as the referees or umpire should make.

In 1688, an award was made, ascertaining what proportion of the estate should be applied for payment of the debts and incumbrances, and what part thereof the sons of Earl William and Countess Hellen should respectively enjoy; and all parties having agreed to such award, an act was passed in Ireland, by mutual consent, con-

firming the same; but this act being made after the abdication of King James II. it was void, and could not have the force of a law.

After the Revolution, the respondent Colonel Burke (who married the other respondent Countess Hellen) and the sons of Earl William, by his first marriage, became forfeiting persons; but the Colonel and Earl Rickard, the eldest son of Earl William by his first wife, were comprised in the articles of Limerick and Galway, and by that means saved their estates; whereupon the respondent Colonel Bourke, in right of the other respondent Countess Hellen, entered upon all the lands limited to her in jointure by the settlements of 1676 and 1678, contrary to the award, whereby she was to have a less proportion of the lands, until the debts, portions, and incumbrances were paid off; and on that account the proportion allotted her by the award was to be freed by those incumbrances to which her jointure was before subject.

By an act, 11th and 12th William 3. c. 2. it was enacted, "That all honours, manors, and lands, of what nature or kind soever, within the realm of Ireland, whereof any persons convicted or attainted of high treason, or who should be so before the last day of Trinity term 1701, were seised, possessed or entitled to, on or since the 13th of February 1688, should be vested in certain trustees therein named, and their heirs, in order to be sold for the purposes in that act mentioned. Provided always, that nothing therein contained should be construed to take away, impeach, or prejudice any estate, right, title, interest, etc. which any person, who had been adjudged to be entitled to the benefit of the articles of Limerick or Galway, might claim in or out of the said forfeited estates."

And in the same act provision is made, "That all persons (except his Majesty, and those claiming by, from, or under the crown, or the forfeiting persons, and those claiming by, from, or under them) having any estate, right, title, interest, charge, or incumbrance whatsoever in law or equity, in, to, or out of any of the premises so vested in the said trustees, should, on or before the 10th of August 1700, enter their claims before the said trustees, or in default thereof every such estate, right, title, etc. should be, and was thereby declared void, and the estate liable thereto, or charged therewith, should from thenceforth be freed and discharged of and from the same. And if such claim should not be allowed, such claimant should be for ever de-[6]-barred, and without remedy; but if allowed, the same should never afterwards be impeached, avoided, or called in question by the King, his heirs, or successors, or by the said trustees, or any persons deriving under them."

In pursuance of this power to make claims, Colonel Bourke, in right of Countess Hellen his wife, exhibited his claim before the trustees, for all the lands limited for her jointure, by the said settlements in 1676 and 1678; and obtained from the trustees an allowance of his claim; but no notice was therein taken of the award.

By an act 1 Ann. (st. 2. c. 21.) intitled, *An act for making provision for the Protestant children of the Earl of Clanrickard and the Lord Bophin*, it was enacted, "That the appellant (then called Lord Bophin) and his heirs, should be, and were thereby restored in blood and lineage, and should be restored to hold, have, and enjoy all their honours, titles, dignities, and privileges whatsoever; and all the lands, tenements, hereditaments, etc. of what nature or kind soever, which he or they would have been entitled unto, in case he had not been attainted, and the act of 11th and 12th William 3. had never been made."—But provision was made in this act, that the appellant should, by the methods therein prescribed, pay £25,000 to the use of the public, and £5000 for the portion of the wife of Alexander Pendarvis. And in the same act is a clause, "That all adjudications and decrees made by the trustees before the 25th of March 1702, for any part of the lands, tenements, or hereditaments of the said Lord Bophin, should be as good and effectual as if the said act had not been made; and all pretences, claims, and demands, to or for any part of the said estate, or any charge or incumbrance thereon, not claimed or allowed by the trustees (unless the same was allowed by this act), should be void, and the estate freed and discharged therefrom, as if sold by the said trustees."

In March 1707, the respondent Colonel Bourke exhibited a bill in the Court of Chancery in Ireland, against the appellants and others, to enforce the payment of the portion provided for Margaret, afterwards Viscountess Iveagh, by the settlement in 1679; whereupon the appellants exhibited a cross bill against the respondents, praying, that the lands and tenements limited to them might be exonerated from the

debts and incumbrances affecting the same, pursuant to the award, and that the defendants might account for the rents and profits of the jointure lands, over and above what Countess Hellen was to receive pursuant to the award, and to perform the said award.

To this cross bill the respondents pleaded the said several settlements, fines, and recoveries, by Earl William; the said several statutes of 11th and 12th William 3. and 1st Ann. and the allowance of their claim by the trustees [in bar to the demand by the award (1 Com. Rep. 237.)]: And, on arguing this plea on the 25th of June 1714, the then Lord Chancellor of Ireland ordered the same to stand for [7] an answer, with liberty to except; but on a rehearing the 22d of February 1714—15, the plea was allowed with costs.

From this last order the present appeal was brought, and it was urged (J. Comyns, R. Raymond) in support of it, that the statute 1 Ann. was an act of restitution (not a new grant) whereby the appellants were restored to their honour and estate in the same manner as if there had been no attainder, and the statute of 11th and 12th William 3. had never been made, and this for a sum of £25,000 paid by them for the use of the public; that therefore they ought to have the same rights and advantages, and consequently the same benefit from the award, and the respondents' agreement to it, as if no forfeiture had been committed; but which, if this plea stood, they would be entirely deprived of. That the jointure settled on the respondent Countess Hellen, in 1676 and 1678, was subject to the debt of £20,000 and other incumbrances, in proportion to the rest of the appellants' estate, and was no way discharged, unless by virtue of the award: If then the respondents would take advantage of the award, to excuse themselves from the proportion which the jointure-estate ought to pay towards such debt and incumbrances; they ought to be bound by the same award with respect to the proportion of the jointure-estate, which they ought to enjoy, and to account for the profits of any other part, more than what they were allowed by the award to receive. That by the proviso in the statute of 1 Ann. the decrees of the trustees were set upon the same foot, on which they stood by the statute of 11th and 12th William 3.; whereby those decrees were final, and not to be impeached by the Crown, the trustees or any purchasers under them; and all claimants, if they made not their claim by a limited time, should be for ever barred—And, therefore, if the £20,000 or other incumbrances which affected the jointure, or the appellants' estate, had not been claimed before the trustees, they had for ever barred; but such claim being made and allowed, the question now, was not whether any estate or charge upon it, not claimed, should be allowed, but whether any charge or incumbrance, claimed and allowed, should not be satisfied, and apportioned out of or upon the lands liable thereto, in such manner as equity should direct, or as the parties themselves, by any private agreement had assented to? And that it was a rule in Courts of Equity, that when the defendant answers to the same thing, which he insists on by his plea he ought not to answer; the answer over-ruled the plea; which, it was insisted, the respondents had done in this case. And therefore it was prayed, that the order, allowing the plea, might be reversed; and that the respondents might answer in such manner, as that the merits of the cause might be heard.

On the other side it was argued (S. Cowper, S. Mead), that the allowing the respondents' title to be good, which was all that was done by the order appealed against, was no more than what had been already done by the act of Parliament, made in favour of the appellants, and by which they were restored to their blood and estates. That [8] even the present appellants opposed the allowance of the pretended award by the trustees for forfeited estates in Ireland, when the late Earl Rickard, who lived till about the year 1708, made some claim before the said trustees under colour of that award, and which claim was disallowed by the trustees. That if the plea should be over-ruled, it would tend to give a great handle to people to controvert and question the decrees of the said trustees, which were made final by acts of Parliament, and be the occasion of endless suits, to the almost ruin of the respondents, as well as others who had purchased under such decrees. That if any such pretended award was made in 1688, it was not the part of a Court of Equity, *ex debito justitiæ*, to establish an award; and, in the present case, it would be of the most dangerous consequence; since this pretended award had been so long neglected, and not regarded in the family; and since there had been such decrees and proceedings, which

were now all attempted, after so long an acquiescence, to be overturned by setting up this pretended award.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order complained of should be reversed; and that the said plea should stand for an answer, with liberty to except, according to the order of the said Court of Chancery of the 25th of June 1714. (Jour. vol. 20. p. 577.)

CASE 3.—ROBERT KENNEDY and others,—*Appellants*; JOHN PIGOTT and another,—*Respondents* [22d January 1717].

A. pleaded an inquisition *post mortem* M. F.; whereby it appeared that E. F. under whom the defendant claimed, was tenant in tail: the plaintiff objected that the defendant ought to have pleaded the *settlement*, whereby E. F. was tenant in tail, and not have pleaded that he was tenant in tail, as appeared by the inquisition *post mortem*, finding the settlement; for that inquisition could at most be only *evidence* of the settlement, and a matter of evidence is not pleadable either by the rules of law or equity. But this objection was over-ruled, and the plea allowed.

ORDER of the Irish Chancery AFFIRMED.

Viner, vol. 16. p. 378. ca. 9.

By an inquisition *post mortem* of Miler Fay, taken the 4th of September 1622, it appeared that Garrett Fay was seised in fee of several lands in the county of Westmeath, in the kingdom of Ireland; and that he and Simon Petit, in the month of April 1591, conveyed the said lands to Peter Weldon and others, and their heirs to the use of the said Garrett Fay during his life, and then to the use of the heirs male of his body; remainder to Miler Fay, brother of the said Garrett, in tail male; with fifteen several remainders to fifteen other persons particularly named of the sur- [9]-name of Fay, successively in tail male; with remainder to the right heirs of George Fay, the father of the said Garrett Fay.—That Miler Fay was, at the death of the said Garrett Fay, his brother and next heir: that Miler Fay entered on the said lands, and was seised thereof in tail male; and that, on the 7th of November 1627, Miler Fay died, leaving Edward Fay his son and heir.

This Edward Fay, being tenant in tail of the said lands, did, on the 20th of January 1638, demise the same to George Aylmer and Richard Nugent for 99 years upon certain trusts long since determined; and afterwards, in trust for his eldest son Garrett Fay, and the heirs male of his body; with divers remainders over in tail male to the same persons as were named in the settlement of 1591.

Edward Fay being indicted and outlawed for high treason, on account of the Irish rebellion in 1641, the lands were seized and sequestered; but on the 5th of November 1662, Nugent the surviving lessee, together with Garrett Fay the common *que trust* of the term, exhibited their claim for the said lease before the commissioners appointed to execute an act, intitled, *An act for the better execution of his Majesty's gracious declaration for the settlement of the kingdom of Ireland, and satisfaction of the several interests of adventurers, soldiers, and others, his subjects there.*

This claim came on to be heard before the said commissioners on the 15th of March 1663; when they declared, that it appeared to them that the said Edward Fay by his deed dated the 20th of January 1638, did demise unto the said Aylmer and Nugent the said lands for a term of 99 years, at the yearly rent of a grain of wheat upon the said trusts; and that it likewise appeared to the said Court that Edward Fay, at the time of making the said lease, was tenant in tail male of the said lands, so that the said lease, after the death of the said Edward Fay, who was then living and a *nocent* person, appeared to the said Court not to be good as to the said entailed lands: and thereupon the said commissioners decreed the said Edward Fay to be a *nocent* person, and the claimants *innocent*; and that they were entitled to the

benefit of the said lease, subject to the said trusts, but determinable nevertheless on the death of the said Edward Fay.

In pursuance of the said act of *Settlement*, the reversion of these lands was, on the 21st of February 1667, granted by certificate and letters patent to Thomas Pigott and Matthew Lock and their heirs, with a saving to the said decree of *innocency* of the trustee and the *cestui que trust* of the said term. And by a clause in the act of *Explanation* it was enacted, "that all letters patent granted by virtue of that act, should be and were thereby confirmed to the several persons in such patents named, according to their several estates therein granted, against the King and all other persons, discharged of all estates, remainders, titles, and interests whatsoever, not decreed by the said commissioners."

In 1673, Thomas Pigott, one of the patentees, died; whereupon his moiety of the said lands descended to the respondent John [10] Pigott as his son and heir; and Matthew Lock, the other patentee, conveyed his moiety for a valuable consideration to Henry Monck, the father of the other respondent George Monck.

In 1686, Edward Fay died, leaving Garrett Fay his son, who soon afterwards got into possession of the said lands; and upon his death, George Fay his son, the father of the appellants Mary and Alson, entered upon the same.

Upon the death of Edward Fay, the respondent Pigott and the said Henry Monck were advised that they had a right to enter; but as the titles of Protestants under the acts of *Settlement* and *Explanation* were not much countenanced in the reign of King James II., they desisted until after the Revolution; and in 1691 made an entry, and soon afterwards divided the lands between them; and proper deeds of partition being executed on that occasion, they, in Trinity term 1695, respectively levied a fine of each divided moiety.

By indentures of lease and release, dated the 8th and 9th of March 1698, the said Henry Monck, in consideration of the marriage of his son George (the respondent), and of a marriage portion of £2000, settled his divided moiety of the said lands on his said son George for life, with remainder to his first and other sons in tail male.

In September 1711, the appellants Mary and Alson, as the daughters and coheirs and also administratrixes of the said George Fay, together with the other appellants their husbands, exhibited their bill in the Court of Chancery in Ireland against the respondents; charging them with having got into possession of the premises by force, fraud, and violence; and therefore praying that they (the plaintiffs) might be decreed to the possession thereof for the remainder of the said trust term of 99 years, and have an account of the rents and profits.

To this bill the defendants pleaded the inquisition and the several other matters above stated, and also the length of possession, in bar to the relief thereby prayed; and by their answer they severally denied all the fraud, force, and violence charged by the bill.

On the 24th of November 1712, these pleas were argued; when the Lord Chancellor declared that the statute of limitations was not well pleaded, as the twenty years were not expired at the time of filing the bill; and that as to the fine pleaded, it was not good, because it should have been a fine and nonclaim; but being of opinion that the lease for 99 years was determined by the death of Edward Fay the tenant in tail, he was pleased to allow both the pleas; and that the plaintiffs might reply thereto, if they would, without costs.

From these orders the plaintiffs appealed; insisting (E. Northey, R. Raymond), that the respondents ought to have pleaded the *settlement*, whereby Edward Fay was tenant in tail, and not have pleaded that he was tenant in tail as appeared by the inquisition *post mortem* finding the settlement; for that inquisition could at best be only evidence of [11] the settlement, and a matter of evidence is not pleadable, either by the rules of law or equity. That the statute of limitations was no bar in this case, the appellants having filed their bill, before the expiration of 20 years after they were forced out of possession. That as to the respondent Monck's pleading himself to be a purchaser for a valuable consideration, viz. marriage and portion; it was apprehended to be no bar to the appellant's demands, since he had not made himself a purchaser *without notice* of the lease, and the trust thereof; and even if he had so pleaded, yet it could not have availed him; because in the very settlement, under which he claimed, there was a saving of the appellant's right: besides,

eldest son, Nicholas Osborne of Cappagh, Roger Osborne, and Sir John Osborne of London, knight; and thereupon Sir Richard the son, as heir of his said father, came into possession of the premises, and had issue John, afterwards Sir John Osborne, bart. his first son, and Richard, who became a lunatic, and three daughters, the mothers of the respondents Beverley Usher, John Pomeroy, and John Odell.

In 1663, John Osborne, the eldest son of Sir Richard Osborne the son, married Elizabeth Walsingham, a lady of little or no fortune, but of an ancient and honourable family; and in 1669, Nicholas Osborne, his uncle, in consideration of £570 paid by the said Sir Richard Osborne, his brother, by a fine and feoffment, conveyed and settled the lands of Ballyne Courty, worth about £40 per ann. to the use of the said John Osborne and his wife, and the heirs male of his body.

In consideration of which settlement, and of the love and friendship subsisting between these two brothers, Sir Richard, on the 28th of September 1678, entered into articles with his said brother Nicholas; whereby it was agreed, that in case Sir Richard and his son John should die without issue male, Sir Richard's estate should be so settled, as to go to Nicholas and his issue male. And accordingly, by a feoffment dated the 6th of October 1680, Sir Richard, in pursuance of these articles, settled divers manors and lands in the county of Waterford to the use of himself for life; remainder to Dame Elizabeth his wife, for her life, to the intent that she might thereout receive a jointure of £140 per ann.; [21] remainder to the said John for life; remainder to his first and other sons in tail male; remainder to Nicholas for life; remainder to Thomas his eldest son for life; remainder to Nicholas, jun. the eldest son of Thomas, in tail male; with other remainders over: And by this settlement a provision was made for John, during the lifetime of his father Sir Richard, and a jointure of £200 per ann. settled on John's wife; with portions for his daughters and younger children, and a maintenance of £50 per ann. for Richard, the lunatic.

But, afterwards, Sir Richard Osborne made a voluntary settlement of his estate by indenture of feoffment, whereof there were two parts, both bearing date at the top, on the 17th of April 1680, and one of them dated at the bottom, the 17th of April 1682; whereby he conveyed all his lands in the county of Waterford to Francis Gough and Hugh Webb, in fee; to the use of himself for life, and then to his son John Osborne, and the heirs male of his body begotten; and for want of such issue, to the use of Nicholas, Sir Richard's brother, in tail male; remainder in tail male to Sir John Osborne of London, his other brother: And certain lands were thereby limited to the use of Sir Richard's lady, as her jointure, and a rent-charge of £140 per ann. was appointed for John Osborne's wife, if she happened to outlive her husband: another rent-charge of £400 per ann. was limited in fee to the three daughters of Sir Richard; and he reserved to himself a general power of revocation, and kept both parts of this settlement in his own hands.

After the making of this last settlement, Nicholas, the son of Thomas, called Nicholas Osborne of Carrick, thought fit to reconcile himself to the church of Rome; which gave such offence to Sir Richard, his great uncle, that he cancelled both parts of the settlement, and by his will, dated the 20th of November 1684, charged his estate with the payment of £140 per ann. to his wife Dame Elizabeth, during her life, and the like sum to the wife of his said son John, during her life; and on the 2d of March following Sir Richard died; whereupon Sir John Osborne, bart. his eldest son and heir, became seised of the premises.

This Sir John Osborne, in order to prevent any disputes which might happen by reason of the intail created by the cancelled deed of 1680, and all intails which might happen to have been made by Sir Richard, his grandfather, did, in Easter term 1686, suffer a common recovery of all the lands in the county of Waterford; and declared the use thereof to himself in fee: He also, by his will, dated the 16th of February 1699, devised the said lands, by particular denominations, to his three nephews and heirs at law; namely, the respondents Beverley Usher, Pomeroy, and Odell, in tail male, with remainders in tail male to their younger brothers, with remainder of each respective part to Nicholas Osborne of Carrick, in tail male; and charged the same with the payment of £300 per ann. to Dame Elizabeth his wife during her life; £30 per ann. to his brother Richard, the lunatic; [22] and with the payment of his debts and funeral charges, and portions for his younger nephews and nieces, and also with several legacies.



In April 1713, the said Sir John Osborne died without issue; after whose death the respondents Beverley Usher, Pomeroy, and Odell entered, and became seised of the premises so devised to them respectively by his will; and paid the Lady Osborne her annuity of £300 a-year, discharged the testator's debts and funeral expences, amounting to £500, and the portions left to their younger brothers and sisters, amounting to £1660.—And in October following, Richard, the lunatic and brother of Sir John, died without issue, having received the £50 per ann. provided for him by the settlement of October 1680, until his death.

After the death of Sir John and his brother Richard, Thomas, the son of Nicholas their uncle, succeeded to the title; and on the 27th of January 1713 exhibited his bill in the Court of Chancery in Ireland against the respondents, claiming title under the articles of September 1678; but the respondents having put in their answers to this bill, and denied that they ever heard of any such articles, Sir Thomas desisted from any further proceedings in that suit, during his life, though he lived until the 20th of February following.

However, after the death of Sir Thomas, his grandson Sir Nicholas, on the 9th of July 1715, filed a bill in the said Court of Chancery against the respondents, in order to have the benefit of the said articles of September 1678, and of the settlement of October 1680, made in pursuance thereof: To which bill the respondents put in their answer, setting forth their title under the will of Sir John Osborne, and denying that they knew, or ever heard of any settlement whatsoever, other than the voluntary settlement of April 1680, which was cancelled, as before mentioned.

On the 1st of June 1717, the cause was heard before the Lord Chancellor of Ireland, who declared that the plaintiff's remedy was properly at law, and therefore ordered an ejectment to be brought by him for trying the title, if he thought fit; on which trial he was to be at liberty to read and make use of the depositions of Lionel Webb, one of his witnesses, who had died since he had been examined; and it was ordered, that the two cancelled deeds, dated at top, April 17, 1680, and one of them dated at the bottom, April 17, 1682, and the other without date at bottom, should be produced at the trial by the respondents: And it was further ordered, by consent, that the pocket-book of one Boyton, another of the plaintiff's witnesses, should be also read at the trial; and that the bill as to the respondents Hubbert, Keane, and James Usher should be dismissed with costs; but the consideration of costs as to the respondents Beverley Usher, Pomeroy, and Odell was reserved until the trial should be had.

On the 20th of July following the cause was reheard upon the petition of the respondents Beverley Usher, Pomeroy, and Odell, before the Lord Chancellor, assisted by the Lord Chief Justice [23] Forster, and Mr. Justice Dolben; and it was then ordered, that the said Sir Nicholas Osborne, the plaintiff, should go to trial in the Court of Common Pleas, in the then next Michaelmas term, by a jury of the county of Waterford, upon the following issue, viz. Whether the said Sir Richard Osborne entered into the articles of 1678, in the pleadings mentioned, and both parties were at liberty to make use of the depositions of such witnesses as were dead, or for any other lawful cause could not be present at the said trial: And, on the 29th of November following, it was ordered, that the said trial should be at the bar of the Court of Common Pleas, in the then next Hilary term, by a jury of the county of Cork.

But the plaintiff, not thinking fit to take any proper steps towards this trial, and fearing that the said issue should be taken *pro confesso* against him, petitioned for another rehearing, which was accordingly granted; and the cause coming to be again reheard before the said Lord Chancellor on the 23d of May 1718, it was ordered, that the said Sir Nicholas Osborne should, in the then next Trinity term, bring on the said trial, in respect to the articles of 1678, in such manner as was directed by the said former order, made on the first rehearing; or, that the issue should be taken as found against him.

Sir Nicholas Osborne, neglecting to comply with this last order, and the cause standing in the paper of causes to be heard, the Court, on the 4th of July 1718, was pleased to order, that the said issue should be taken as found against him; and that his bill, as to the respondents Beverley Usher, Pomeroy, and Odell should be dismissed with costs.

On the 13th of January following, Sir Nicholas died without issue male, leaving

the appellant his only brother; who, claiming title to the premises in question, as heir male of the body of Sir Nicholas, his father, thought fit to appeal from the said orders of the 23d of May and 4th of July 1718.

And in support of this appeal it was argued (R. Raymond, T. Lutwyche), that the settlement of October 1680 appearing in the cause to have been fairly made and perfected by Sir Richard Osborne, and by fraud and practice of Sir John Osborne, who was but tenant for life, to have been burnt and destroyed, the Court ought to have decreed the same to be established; and the rather, because the respondents Beverley Usher, Pomeroy, and Odell claimed only under the will of Sir John, who was guilty of the fraud in suppressing the settlement, and the occasion of depriving the plaintiff of his remedy at law. That the several recitals in that settlement ought in all courts, as well of law as equity, to be taken as true (especially after such a length of time) against Sir John Osborne, to whom only an estate for life was thereby limited: and against the respondents also, who only claimed as volunteers under his will; and therefore the Court ought not to have directed the articles of 1678 to be tried: But if the Court had any reason to conceive a doubt, so as to think it necessary to have an issue tried, [24] before a decree could be pronounced, it was submitted, that such issue ought to have been, whether the settlement of the 6th of October 1680 was made! Should it be objected, that Sir Richard made the settlement of the 17th of April 1680 antecedent to the settlement of October 1680, and that though that first settlement was cancelled, the uses and estates thereby limited were not destroyed; it was answered, that the settlement of April 1680 was cancelled, because it was not in the limitation of its uses agreeable to the intention of the articles of 1678, and therefore Sir Richard made the settlement of October 1680; but the respondents proved, that though that first settlement was dated the 17th of April 1680, yet it was not executed by Sir Richard till the 17th of April 1682, which was subsequent to the settlement in question, of October 1680; and this proof, together with the fact of Sir Richard's cancelling the deed of April, and preserving that of October, which was not destroyed till after his death, sufficiently shewed the objection to be of no force. But if it should be further objected, that the appellant's brother Sir Nicholas, and also his father, in their lifetime, frequently applied to Sir John to make a settlement, or some provision for them out of his estate; it was answered, that, until after Sir John's death, they did not come to the knowledge of the settlement of October 1680, or of its being destroyed; and though it was the general opinion of the country, that in case Sir John died without issue male, the estate would come to Sir Thomas, and his issue male; yet the appellant's father and mother, not knowing in what manner the remainders were limited, might reasonably enough have applied to Sir John on that subject. Upon the whole, it was submitted, how fatal it might prove to family settlements, if the persons who claimed under them, being heirs at law, might by any notorious breach of trust, or other indirect means, get the same into their possession: and afterwards, by burning, or otherwise cancelling those settlements, invest themselves with a disposing power over the estates as they pleased; and by means thereof deprive the persons in remainder of any remedy, either in law or equity.

On the other side it was contended (C. Phipps, S. Mead), that the appellant was neither a party to the suit, or heir, or representative of Sir Nicholas Osborne, the plaintiff therein, or derived his pretended title by, from, or under him, but claimed by a title paramount, *per formam doni*; and therefore was not a proper person to complain of, or appeal against the orders; but, if he thought he had any just foundation, he ought either to bring an original bill, or commence an action at law, for asserting his pretended title, the suit being abated by the plaintiff's death. That Nicholas, the brother of Sir Richard, known by the name of Nicholas Osborne of Cappagh, who was bred to the law, and had for many years executed the office of Clerk of the Crown; had immediate notice of the common recovery suffered by Sir John Osborne, and lived till the year [25] 1696, but never insisted upon any articles or settlement whatsoever; whereas, if the pretended settlement of October 1680 had been really executed, Sir John, being thereby made tenant for life only, would have forfeited his estate by suffering that recovery; and the said Nicholas Osborne of Cappagh, to whom the next remainder was limited, might have entered for the forfeiture; and might easily have compelled Gough and Webb, the trustees, to have produced this pretended settlement, if any such there was, and which so knowing

and careful a man would not have failed to do. That it was not pretended, that at the time of executing the said settlement of October 1680, Nicholas Osborne of Cappagh did any act in performance of the pretended agreement of 1678, on his part; nor was it alleged, that he had any part of those articles or that settlement delivered to him, though he was one of the parties principally concerned and interested therein; and would, in all probability, have insisted on having one part, had there been any such transaction: But the pretence of this settlement of October 1680 seemed still the more improbable, Sir Richard having, at that time, one younger son and three daughters; and yet no sort of provision was thereby made for these daughters, nor any remainder limited to such younger son, in case he should become *compos mentis*, which was not then despaired of; and though the owner of the estate was thereby made strictly tenant for life, yet no power was reserved to him for making leases, or for limiting a jointure to any wife whom he might afterwards marry. That it might introduce great mischief, and be of fatal consequence to most families, if, after so great a length of time, their titles were to be impeached and defeated by such stale and inconsistent pretensions, and supported by such evidence as was offered on the part of the plaintiff in this cause; which was not only improbable in itself, but not agreeable to the pretensions first set up by Sir Thomas Osborne in his bill; and it would be very extraordinary in a Court of Equity to establish a supposed settlement upon the credit of Boyton's pocket-book; which, when produced, appeared to have several marks, rendering its credit liable to suspicion. That when a fair opportunity was offered to Sir Nicholas Osborne to try the reality of the articles set up by him, it was all that could reasonably be expected from a Court of Equity, where a real estate of inheritance was concerned; and upon a trial at law, where witnesses are examined *vivâ voce*, the truth was most likely to be discovered; but since Sir Nicholas did not think fit to proceed to such trial, his bill was very properly dismissed: And the rather, as his remedy, if he had any, was properly at law; and as the evidence offered by him in the Court of Chancery, touching this pretended settlement, might have served as well, and would have had as much weight on any trial at law, as it could or ought to have had in a Court of Equity; and therefore it was apprehended, that after Sir Nicholas Osborne had had all the discovery which he could from [26] the respondents, there was no sufficient reason for a Court of Equity to give him any farther assistance.

After this appeal was brought, and before it came on to be heard, the appellant presented a petition to the House, praying, that he might be at liberty to prove, by one or more persons *vivâ voce*, or in such manner as might be thought proper, that he was heir male of the body of Nicholas Osborne, his father. And counsel being heard on the matter of this petition (Jour. vol. 21. p. 532), on the 26th May 1721, it was admitted, that Sir Nicholas Osborne died without issue male, leaving two daughters; and that the appellant was the only brother of Sir Nicholas, and heir male of the body of Nicholas, the father of Sir Nicholas and the appellant.

On the same day it was ORDERED, that the Judges should attend the House on Saturday, the 10th of June next, prepared to give their opinions upon the following question, viz. "In case a tenant in tail die, leaving two sons, and the elder of them bring a *formedon in descendre*, and judgment be given against him; whether, after his decease without issue, his brother, being issue in the same intail, may bring a writ of error to reverse that judgment; and whether such brother may bring a new *formedon* upon the same gift in tail, without reversing that judgment?"

This matter being afterwards adjourned to the 12th of June, the Judges on that day attended; and the Lord Chief Baron of the Exchequer delivered their unanimous opinion (Ibid. p. 541): "That the second brother might bring in a writ of error; but whether he could bring in a new *formedon*, without reversing the judgment given against his brother, depended upon the nature of such judgment given in the former *formedon*, which, in some cases, may be a bar, but in others not." The House being hereupon of opinion, that the appellant Sir John Osborne was well entitled to his appeal: it was ORDERED, that the same should be heard on the next Wednesday, at eleven o'clock.

And after hearing counsel accordingly, it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the orders therein complained of affirmed: And it was further ORDERED, that the appellant should pay to the respondents the sum of £100 for their costs, in respect of the said appeal. (Ibid. p. 544.)

[27] CASE 6.—KATHERINE YALE, Widow,—*Plaintiff*; THE KING,—*Defendant*  
(in Error) [4th December 1721].

[Mew's Dig. v. 29, 342, 502.]

Declaration upon a bond, conditioned for the payment of all monies which J. S. should receive on account of the Revenue. The defendant pleads general performance. The Attorney-General replies that J. S. or some other person or persons by his order, received, etc. Held, that the averment of the receipt was only the introduction to the breach, the real assignment of the breach being the non-payment of the money: But, however this would have been on a demurrer, it was cured by the defendant's rejoining that he had paid the money, which was an admission of his having received it.

The above is only one, and by no means the principal, point in the case.

The statute 33 Hen. 8. c. 39. says that all obligations and specialties made to the King or his heirs, shall be made payable by these words, *Solvend. eidem domino Regi, haered. vel executoribus suis*. But a bond taken to the King, his heirs and successors, was held to be good; these words in the statute being only directory. See 19 Vin. Ab. 516. c. 58.

Where the condition of a bond is entire, and the whole unlawful, it is in most cases void; but where it consists of different parts, some of which are lawful, and others not, it is good for so much as is lawful, and void for the rest. See 5 Vin. Ab. 99. c. 9.

Judgment of the EXCHEQUER and EXCHEQUER-CHAMBER affirmed.

Bunb. 58: Viner, vol. 16. p. 531. c. 8: vol. 19. p. 39. (I), ca. 2.

Edward Pancefort, esq. Receiver-General, and acting Cashier to the Commissioners of Excise, in April 1716, employed Sir Matthew Kirwood, knight, a goldsmith in London, to receive considerable sums of money, relating to his Majesty's revenue of excise; and thereupon Sir Matthew Kirwood, together with Elihu Yale as his surety, entered into a bond to his Majesty, in the penalty of £40,000, with a condition thereunder written, as follows; viz. "Whereas Edward Pancefort, esq. Receiver General, and acting Cashier to the Commissioners of Excise, hath agreed to employ the above bound Sir Matthew Kirwood, for receiving from him the said Edward Pancefort, his clerk, or agents, all such sum and sums of money, bill and bills of exchange, notes, bonds, and other papers, as the said Edward Pancefort shall from time to time think fit to pay or deliver to him the said Sir Matthew Kirwood, or his order, for or on account of his Majesty's revenue of excise on beer and ale, and other liquors; and also, the duties of malt, hops, soap, paper, silk, and callicoes, etc. or any of them, or relating to any other revenues or payments belonging to his Majesty, or to the said Edward Pancefort on his own private account: If, therefore, he the said Sir Matthew Kirwood do and shall from time to time, and at all times hereafter, when he shall be thereupon required, due and true account make with the said Edward Pancefort, his agent, executors, or assigns, of or concerning all such sum and sums of money, bill and bills of exchange, notes, bonds, and other papers as he the said Sir Matthew Kirwood, or any other person or persons by his order, privity, or consent, shall receive, or that shall come to his or their, or any of their hands, by virtue of the said trust reposed in him: And shall from time to time, and at all times hereafter, when he shall be thereunto required, but more particularly in every Tuesday in every week (except the same be holiday) if required, well and truly satisfy, pay, and deliver, or cause to be paid, satisfied, and delivered, in bank silver, or gold, unto the said Edward Pancefort, his agent, executors, or assigns, all such [28] sum and sums of money as he the said Sir Matthew Kirwood, or any other person or persons by his order, privity, or consent, at any time shall have received or collected, or shall have in his or their hands or custody, by virtue of any bill or bills of exchange, notes, bonds, or other papers, in anywise relating to the said revenues for the time being, or any account belonging to his Majesty, or unto the said Edward Pancefort on his own particular account: And if the said Sir Matthew Kirwood shall from time to time, when he shall be thereunto required by the said Edward Pancefort, his executors, administrators, or assigns, deliver unto the said Edward Pance-

port, his agents, executors, administrators, and assigns, all and singular bill and bills of exchange, notes, bonds, book and books, papers, and all other things whatsoever relating to the said revenues or any of them, or to the said Edward Pancefort, according to the true intent and meaning of the said condition, then the same to be void," etc.

Sir Matthew continued in this employment from the 25th of April 1718, when the bond was executed, till the 1st of September following, when he failed, and absconded; being at that time indebted unto Mr. Pancefort in a balance of £13,000 and upwards. Whereupon Mr. Pancefort sued out an extent in aid against Kirwood, and by virtue thereof, all his real and personal estates were seised into the King's hands.

In Trinity term 1718, a *scire facias ad satisfaciendum* issued out of the Court of Exchequer against Mr. Yale upon this bond; to which he appeared, and having prayed *oyer* of the bond and condition and *scire facias*, he pleaded a special performance of this condition by Sir Matthew Kirwood, in every part thereof. To this plea the Attorney-General replied, that after the making the said bond and during the continuance of the said Sir Matthew Kirwood in the said employment, viz. 30 *die Augusti anno 5 Regis*, and by virtue of the trust in the said condition mentioned, the said Sir Matthew Kirwood, or some other person or persons by his order, privity, or consent, had and received, or had in their hands and custody, of the said Edward Pancefort (he being for all that time Receiver-General and acting Cashier to the Commissioners of Excise), or of the clerks or agents of the said Edward Pancefort, monies, and several bills of exchange, notes, and other papers, touching the said revenues in the condition mentioned, belonging to his Majesty; and that by virtue hereof, the said Sir Matthew Kirwood then received and had several sums of money, amounting in the whole to £13,790 8s. 3½d.; which monies the said Sir Matthew Kirwood did not well and truly satisfy, pay, and deliver, or cause to be paid, satisfied, and delivered, to the said Edward Pancefort, his agents or assignees, according to the tenor of the said condition; but that the same was then unpaid, although the said Sir Matthew Kirwood was thereunto required by the said Edward Pancefort, and that Sir Matthew Kirwood al[29]-together refused so to do, contrary to the condition of the said bond.

Hereupon the defendant Yale rejoined, that Sir Matthew Kirwood paid the said £13,790 8s. 3½d. to one Conrade de Golls, by order and for the use of the said Edward Pancefort, according to the said condition.—To this the Attorney-General sur-rejoined, and took issue; but Mr. Yale, in order to bring the validity of the bond into question, demurred generally; and this demurrer having been several times argued, the Court, in Michaelmas term 1720, gave judgment in favour of the bond.

Whereupon Yale brought a writ of error in the Exchequer-Chamber; and the cause being twice argued there, the judgment was, in Trinity term 1721, affirmed.

Soon afterwards Mr. Yale died, and thereupon his widow and administratrix brought a writ of error in Parliament, to reverse both these judgments; and on her behalf it was contended (C. Phipps, T. Bootle), that the said Mr. Pancefort, not being such an officer as by law is enabled to take a bond in the name of the King; his taking the bond in question, in his Majesty's name, for securing what Sir Matthew Kirwood should receive, as well on Pancefort's private account, as on account of the public, was void. That the proceedings upon this bond, to affect body, lands, and goods, all at the same time, and to have all the privileges and benefits given and allowed to the Crown, by the stat. 33 Hen. 8. c. 39, were not warranted by that statute, or any other law, consequently were void. That as the King was no ways concerned in the event of the suit, the debt due to the Crown being secure in all events, there was the less reason to extend the power and privilege of the prerogative in this particular case. That if this bond, and the proceedings thereupon, were allowed and established, the consequence would be, the establishing a method, whereby the ancient and settled rules\* of the Court of Exche[30]-quer, in issuing prerogative process, would

\* These rules are contained in the following order:

*Scaccarium: Termino Sancti Hilar. anno 15 Regis Caroli, Mercurii, 12 die Februarii.*

"Whereas, upon complaint made of abuses formerly, touching assigning of debts to his Majesty, and in causing of debts to be found by inquisition, upon

be eluded: And that, as all such bonds, if allowed to be good, would bind and affect the lands from the date thereof, and the process thereon would be attended with all the powers and privileges of the prerogative, purchasers of lands could never be secure against such sort of incumbrances, there being no certain means of coming at the knowledge or discovery of these *pocket securities*: And hence, all common creditors would be postponed in the recovery of their debts; landlords would likewise be deprived of that security and precedence which the law has provided for the obtaining their rents; and even the rights and privileges of the Lords of Parliament might thereby be evaded.

On the other side it was said (R. Raymond, P. Yorke), that the points principally insisted upon in the several arguments of this case, on the behalf of the defendant, did not regard the justice of the demand, but were only matters of form: As, I. That this was not such a bond to the King as that a *scire facias* could lie thereon, it not being taken pursuant to the statute 33 Hen. 8. c. 39. which requires, that the penalty in the obligation should be made payable to the King, his heirs, or *executors*, whereas, in this case, the penalty was made payable to the King, his heirs, or *necessors*, and the word [*executors*] being omitted, the act was not pursued; and without the aid of that act, this particular method of proceeding by *scire facias* could

bonds taken in his Majesty's name, for the payment of monies to some of the King's Farmers, Receivers, or other Accountants, the Lord Treasurer, Lord Cottingham, and Lord Chief Baron, and the rest of the Barons of this court, and Sir John Banks, knight, his Majesty's Attorney-General, having conferred together, and taken mature consideration for reforming the said abuses in the future; have thought fit, and do order, that no debts be assigned to the King, or found by inquisition for the King's debtors, or accountants in aid, save such as are originally due unto them *bonâ fide*, without any matter of trust, according to the directions and instructions hereafter following: viz. He who assigneth any debts to the King shall take the oath, viz. *The within-named A. B. maketh oath, the day of the date within written, that the debts hereby assigned are just and due debts, and have not formerly been put in suit in any other court; and that the same are his own proper debts, originally due unto him bonâ fide, without any trust; and that he hath not received the same, nor any part thereof, except, etc.*—He who desireth any debt or debts to be found by inquisition in his aid, shall take this oath: *The said B. maketh oath, the day and year above written, that he is justly indebted unto A. one of the Farmers of his Majesty's Customs, etc. and that the same debt is a just and due debt, originally due to the said A. bonâ fide, without any manner of trust, and that the said debt hath not been put in suit in any other court, and that he hath not received the same, nor any part thereof, except so much, etc.* And that C. is justly indebted unto him the said B. originally and *bonâ fide*, without trust, and that C. is much decayed in his estate; so that unless a speedy course be taken against the said C. the said debt by him owing is in great danger to be lost.—That no farther inquisitions shall be taken for debts in aid, than to inquire, and seize the lands, debts, and personal estate of him that is debtor to the King's debtor, or accountant, unless it be by special order made in open court.—No debts, without specialty, shall be assigned to the King, in case of debts in aid. No debts, without specialty, shall be found by inquisition for debts in aid, unless it be by order upon motion in open court, and except it be for debts due to the King's Farmers. That no immediate process of extent be awarded for debts in aid, but in cases of extremity, and upon oath to be taken as aforesaid. That every *scire facias* for such debts shall be awarded into the proper county where such debtor is mentioned in the specialty to reside, unless upon a *scire facias* returned in London or Middlesex. That where bonds are taken in the King's name, payable to the King's Farmers, Receivers, etc. they shall, before any extents go forth, make oath, or testify it under their hands to the Court, that such bonds are, and, at the time of taking such bonds, were for just and true debts, originally owing to themselves *bonâ fide*, and that they are not in trust, or for the benefit of any other. That receivers, collectors and bailiffs, have no more deputies than are necessary for the King's service, and that such deputies be neither *tradesmen* nor *scriveners*."

Dom. Thesaur. Dom. Cottingham. Capital. Baron. Baron Treavor. Baron Weston. Baron Hendon. Johan. Banks. Mil.

not be maintained upon a bond executed to the King. II. That this bond was not within that statute, because it was not taken by a proper authority; Mr. Pancefort, whom, by the condition, the payments were to be from time to time made, not appearing to be an officer of the Crown, but of the Commissioners of the Excise, and consequently having no power to take a bond in the King's name. III. That the condition of the bond required Sir Matthew Kirwood, not only to account for and pay all sums of money [31] and bills that should be deposited in his hands, on account of his Majesty's revenue, but also such as belonged to Mr. Pancefort himself; whereas a bond could not be taken in the King's name for Mr. Pancefort's own money, within the above-mentioned statute. And, IV. That the breach of the condition assigned in the replication was too general and uncertain; being uncertain both as to the persons of whom the money was received, and by whom the receipt was; and involving together several facts of different natures.

To the first of these objections it was answered, and so resolved by the Judges in both Courts, that those words in the statute 33 Hen. 8. were only directory; and it was not necessary to insert in the bond all the words mentioned in the act. That the principal intention of the Legislature was, that bonds taken to the King, which were to have so great a privilege beyond other bonds, should be for some matter concerning the King's interest, and should be made to him in his regal name, and not in the name of common persons to his use; which was the mischief designed to be prevented by the statute, and that this had been formerly so adjudged.—In answer to the second objection, it was insisted, and so held by the Court, that it neither did nor was necessary to appear, by what authority the bond was taken; the only requisites which the statute had made necessary, being, that the bond should be made to the King, by his regal name, *and for a cause or causes touching or concerning the King's majesty*. That these requisites sufficiently appeared in the present case, the monies secured by this bond, being mentioned in the condition, to arise from the revenues of excise. It was likewise insisted, that Mr. Pancefort appeared, upon this bond, to be an officer of the Crown sufficient for this purpose, being described in the condition to be *Receiver-General and acting Cashier to the Commissioners of Excise*; that the Commissioners of Excise were known officers of the Crown, and that a subordinate officer under them, being appointed by an authority derived from the Crown, might properly enough be said to be an officer of the King; besides, if this objection prevailed, it would avoid most of the bonds taken on account of the revenue.—To the third objection it was said, that though where the condition of a bond is entire, and the whole unlawful, it is in most cases void; yet it is a known and allowed distinction, that where the condition consists of several different parts, and some of them are lawful, or such for which the bond might be taken, and the others not; it is good for so much as is lawful, and void for the rest: That, therefore, this bond was good for so much as concerned the King's revenue, and the only breach assigned in the cause was for the non-payment of money received by Sir Matthew Kirwood, on account of that revenue. And in answer to the last objection, it was urged that the replication was sufficiently certain, because it was alleged in the conclusion of it, that by means of the several particulars before mentioned, Sir Matthew Kirwood received several sums of money [32] amounting to £13,790 8s. 3½d. And in cases of bonds of this kind it had often been held, that it was not necessary to shew of what persons in particular the several sums were received: But however that be, the contentment of the receipt was only the introduction to the breach, the real assignment of the breach being the non-payment. That whatever force there might have been to this objection, had the case stood upon a general demurrer to the replication; but it was now supplied by the defendant's rejoinder, who, by passing over the receipt, and taking issue upon the other fact, viz. that he had paid the said sum of 13,790 8s. 3½d., had admitted the receipt of the money; and of this opinion was the whole Court. It was therefore prayed, that both the judgment and affirmance might be affirmed, with costs.

Accordingly, after hearing counsel on this writ of error, it was ORDERED and JUDGED, that the said judgment given in the Court of Exchequer, and the judgment given in the Exchequer-Chamber, affirming the same, should be affirmed; and that the record should be remitted, to the end execution might be had thereupon, if no such writ of error had been brought into the House. (Jour. vol. 21. p. 619.)

CASE 7.—CHARLES MORDAUNT, and others,—*Appellants*; PETER MINSHULL, and others,—*Respondents* [26th March 1724].

Upon a bill in the nature of a bill of revivor against a devisee, the defendant cannot dispute the justice or validity of the former decree, for if he could, a devisee would be in a better condition than an heir.

But the rule is that *haeres natus* is rather to be favoured than *haeres factus*.

DECREES of the English Chancery AFFIRMED.

2 Vern. 672: 1 Eq. Ab. 3. c. 3: Viner, vol. 4. p. 437. note to (O. a) ca. 1.: vol. 14. p. 279. ca. 20. (by the name of *Minshull v. Mohun* Ltd.)

Sir Edward Fitton, bart. being seised of the manor of Aldford, held *in capite*, and of other manors and lands in the county of Chester, by deed dated the 3d of April 1634, in consideration of his marriage, and of £3000 portion, settled part of the premises to the use of himself for life, remainder to trustees for 99 years; with remainder, as to all other the premises, to Dame Jane his wife, for life; remainder to himself for life, remainder to the same trustees for 99 years; remainder, as to all the premises, to the first and other sons of the marriage in tail male successively; and for want of such issue, to the use of such person and persons, and for such estate and estates, as Sir Edward, by deed or will, should limit or declare; and for want thereof, to the use of Sir Edward and his heirs; with a power of revocation.

By another deed, dated the 13th of June following, it was declared, that the uses, estates, and terms, by the first deed limited to the trustees, were so limited to the intent, that if Dame Jane [33] died in Sir Edward's life-time, without issue, the said trustees should, after her death, dispose of the said manors and premises, and the 99 years terms, to such uses and purposes, and in such manner, as Sir Edward by will or writing, in the presence of two witnesses, should appoint.

Dame Jane afterwards died, in the life-time of Sir Edward, without issue; and on the 16th of August 1643, Sir Edward made his will in the presence of four witnesses, and after taking notice, that he was deprived of all necessary assistance and conveniences of the law and lawyers; he thereby revoked all former settlements by him made, of his lands and estates in Cheshire, and appointed and declared his nephew Charles Gerard, afterwards Earl of Macclesfield, to be full and sole heir of all his lands and estates whatsoever.

On the 30th of the same month, Sir Edward Fitton died, without issue, and the will being void, by reason of the tenure *in capite*, as to a third part of the lands devised; such third part descended to his seven sisters and coheirs; viz. Dame Ann Gerard, alias Brereton, grandmother of Lord Brereton; Frances, the wife of Henry Manwaring, esq.; Lettice, the wife of John Cole; Jane, the wife of Thomas Minshull, esq. the respondent's grandmother; Penelope, the wife of Sir Charles Gerard, mother of Charles Gerard the devisee; Mary, the wife of Jeffry Minshull, esq. and Alice, the wife of Sir John Mericke, knight.

The Earl of Macclesfield having obtained administration with the will annexed, and got possession of the whole estate, and of the deeds and writings relating to it: purchased in the shares of Manwaring, Mericke, Jeffry Minshull and his wife, and Cole.

But in the year 1661, one William Fitton, and others, set up some title to the estate, which occasioned the earl to file a bill in Chancery for a discovery; and on the 27th of November, 14 Car. 2, that cause was heard before the Lord Chancellor Clarendon, who decreed an assignment of the 99 years terms to the Lord Hawly and others, in trust for the Earl, who was also decreed to hold possession of the estate against the Fittons.—The assignment of the terms was accordingly executed, and this decree was afterwards confirmed by another decree after a verdict at law. Notwithstanding which, the Fittons brought a bill of review, to reverse and set aside both the decrees, and also the verdict; but upon a plea and demurrer to this bill, it was dismissed.

Sir Edward Fitton having, in his life-time, mortgaged part of the premises to



one Mary King, for a term of 500 years, for securing £1500 and interest; the Earl filed a bill for a redemption, and by a decree dated the 19th of May, 32 Car. II. this mortgage was ordered to be assigned to trustees for his benefit; which was accordingly done.

In 1670, Thomas Minshull, the respondent's father, brought an ejectment, for recovery of his seventh part, of a third part of the estate; the trial of which was delayed by the Earl's privilege, [34] and otherwise, until the ejectment lease expired: He therefore, in 1679, brought another ejectment in the name of John Smallwood, his lessee, for recovery of his share of the said premises; which being ready for trial, the Earl, in Hilary term 1681, brought his bill in Chancery, against the said Thomas Minshull, for an injunction; to which he put in his answer, and denied the whole equity thereof: But on the Earl's alledging, that he had records in the Tower to search for, to defend his title, he obtained an injunction to stay the said Thomas Minshull from proceeding at law; but it was ordered, that the trial should only be put off till the then next Summer assizes: The Earl afterwards, on similar pretences, prayed farther time; but on the 16th of July 1682, it was ordered, that the respondent, said father and the Earl, should proceed to a trial at the Exchequer bar, in the then next Michaelmas term, on this issue, viz. "Whether the said manor of Aldford was held by tenure *in capite* or not." And after proper directions were given for such trial, the Court declared, that if a verdict passed for the defendant Minshull, that on his motion, a commission should issue to indifferent persons, to set out his proportion and share of the estate, whereof Sir Edward Fitton died seised, and that the mesne profits thereof should be decreed him.

This issue was made up, and the respondents father having, at great charge, brought his witnesses out of Cheshire to the trial; the Earl, on the 16th of November following, moved the Court of Chancery that he might waive the trial of the issue, for that he admitted the said manor to be held *in capite*, which he did not discover till lately; and that there was a lease made by Sir Edward Fitton, for 99 years, that would protect his estate against the said Minshull's claim, and therefore prayed liberty to amend his bill: And, upon hearing counsel on both sides, it was ordered, that the Earl should be at liberty to amend his bill, on payment of twenty shillings costs; but he was to do it before the end of the term, and the injunction from thenceforth was to stand absolutely dissolved.

The Earl went on no farther with his suit; but the respondents father discovering, that the Earl pretended, there were some terms of years created by Sir Edward Fitton, which might prevent his remedy at law; he and the said John Smallwood, his lessee in the ejectment, brought their bill in Chancery in Hilary term 1682, against the Earl and the other coheirs of Sir Edward Fitton, and against the Lord Wharton, and Richard and Thomas Leigh, in whom the terms were pretended to be vested; setting forth the former proceedings, and the delays and expence he had been put to by the Earl, and that in regard the Earl had confessed the issue to be against him, he ought to have a commission to set out his share and proportion of the said estates, and that the Earl ought to produce the deeds and writings relating thereto, and to account for the mesne profits; and also charging, that, to delay the plaintiff's recovery of his just right, the defendants pretended that two terms of 99 years were created by the marriage-settlement of [35] Sir Edward Fitton, upon his estate, which the plaintiffs charged (if such there were) were intended for performance of some trust agreed on between Sir Edward and his lady's relations, and after, to remain and be to and for the benefit of the heirs of Sir Edward Fitton; and that Sir Edward and his lady being dead, without issue, and the marriage-agreement in equity performed, the same terms, in case any legal estate thereof did remain, ought to attend the inheritance, and to go and be for the use and benefit of such persons, to whom the inheritance belonged; but that the Earl had procured the said terms by some means, to be assigned to the said defendants the Leighs, in trust for him; and therefore the bill prayed a discovery of the defendants title, and of the deeds and will, and to have the benefit of the terms, if yet in being, and a commission to set out the plaintiff Minshull's share; and to have the terms, as far as they related thereto, assigned to attend the inheritance, and for an account of his share of the profits.

To this bill, the Earl put in his answer, setting forth the will of Sir Edward Fitton,

and the settlement of the 3d of April 1634, and insisting, that the terms for years, thereby limited, were so limited, to prevent the descent of any part of the lands upon the *capite* tenure, to any person or persons, otherwise than as Sir Edward by will, or otherwise, should dispose of them; and that those terms being still subsisting, he ought to have the sole advantage of them: He admitted, that he was administrator with the will annexed of Sir Edward Fitton, and that the 99 years terms, were assigned in trust for him.

The other defendants also put in their answers, and all the coheirs, except Lord Brereton, admitted their conveying their interests to the Earl; and the Leighs admitted the terms of 99 years to be assigned to them in trust for the Earl.

Witnesses being examined on both sides, the cause was heard on the 30th of June 1687, when the Earl making default, a decree was made unless cause. And the Earl coming to shew cause, on the 14th of November following, the Lord Chancellor Jefferies declared, he was fully satisfied that the terms ought to attend and wait upon the inheritance of the premises; and it being admitted, that part of the lands were held in *capite*, he conceived, that the will, as to a third part, was without all controversy void; and that the plaintiff Minshull, as son and heir of one of the seven sisters and coheirs of Sir Edward Fitton, was well entitled to a seventh part of a third part of the said manors and premises; and therefore decreed the terms to be assigned to protect the inheritance, and a commission to set out the said plaintiff's part of the estate, to be enjoyed in severalty, by him and his heirs, subject nevertheless, and chargeable in proportion to the debts of Sir Edward Fitton; but the profits received, and the personal estate possessed by the Earl, were to be accounted for, and applied for that purpose; and if there should be any surplus profits, the Earl was to pay the plaintiff Minshull his proportion thereof, from filing [36] the bill; and to bring all deeds and writings into Court, but costs were reserved.

Pursuant to this decree, a commission was executed, and a seventh part, of a third part of the estate, being about £169 per ann. was set out and allotted to the respondents father.

But the Earl having taken exceptions to this allotment, the same came on to be argued, on the 25th of July 1688; when the Lord Brandon (son of the then defendant the Earl, and who afterwards succeeded him) appearing in Court, and declaring his father's willingness to purchase the respondents father's interest, at such price as indifferent persons should set; it was, by consent of the parties and the Lord Brandon, referred to three gentlemen, named in the order, or any two of them, to set a value on the respondents father's share of the estate, and to set down and appoint what the Earl, or the Lord Brandon, should pay him, as well for the absolute purchase of his share of the estate, as the mesne profits decreed, and to end all other matters; and their award was, by consent, to be final; and on payment, the respondents father was to convey all his interest to the Earl; but if the Lord Brandon should not sign his consent to that order in three days, the Commissioners certificate of the allotment was to stand absolutely confirmed.

The Lord Brandon and Mr. Minshull did sign their consent accordingly; but Lord Brandon avoided attending the referees, so that no award was made.

Several of the parties dying before any thing farther was done, the respondent Peter, as heir to his father and to Thomas Minshull his brother, and the respondents Alice and Jane, as their administratrices, in April 1706, brought their bill against Charles Lord Mohun, devisee of the real estate, and Executor of Earl Charles the son, and the trustees of the 99 years terms, and others; praying that the former decrees might be carried into execution, and that they might have the benefit of those proceedings, and a satisfaction for the mesne profits out of the assets of Earl Charles the father, and Earl Charles the son.

To this bill the defendant Lord Mohun put in his answer, insisting, that the former decrees and proceedings ought not to be binding or conclusive to him; and that the terms of 99 years were subsisting, of which he ought to have the benefit, as executor and residuary legatee of Earl Charles the son.

Afterwards Lord Mohun exhibited a cross bill against the respondents, to unravel all the matters that had been settled by the former decrees, and to quiet his possession: to which bill the respondents put in their plea, insisting on the former decrees and proceedings, and that after a decree so long since made, signed, and inrolled. and

so far executed and submitted to; after Earl Charles, the father, had so long since bought in the shares of the other coheirs; and after 40 years suit, wherein they and their father had spent the full value of the lands allotted them, Lord [37] Mohun, who claimed by a voluntary devise under Earl Charles, the son's will, the person who submitted to the decree and signed the register-book for himself and his father, ought not to be permitted, by an original bill, to ravel into the former proceedings, or impeach the decree.

But Lord Mohun, not thinking fit to proceed farther in that suit; the cause, wherein the respondents were plaintiffs, came on to be heard, *ex parte*, on the 18th of June 1711, when Lord Mohun making default, a decree was made unless cause; and Lord Mohun coming to shew cause against that decree, on the 19th of November following, the Lord Keeper Harcourt declared, that considering the distance of time since the former decree, and the nature of the proceedings had thereupon, he did not conceive it proper, at that distance of time, to draw into examination the justice of the former decree; and the rather, for that, as was then admitted, if the heir of Earl Charles the father, was before the Court, it ought not to be done, and much less in the case of a devisee; and therefore decreed, that the former decree and proceedings should be carried on and executed, and that the plaintiff Peter and his heirs, should hold and enjoy the lands so allotted to him and his heirs, and that possession thereof should be delivered, and an account of the profits taken; and directed costs to be paid out of the assets of the respective testator's estates. But it being insisted, that there were exceptions taken by Earl Charles the father, to the Commissioners allotment, which remained undetermined; it was ordered, that the Lord Mohun should procure those exceptions to be heard, within a month then next, or, in default, that the certificate should stand absolutely confirmed.

Lord Mohun never applied to have the exceptions argued, pursuant to this last decree, and thereby the certificate became absolute; but he lodged an appeal against the said decrees, which he neglected to prosecute; and on the respondents endeavours to proceed below, the proceedings on that appeal were renewed by the appellant the Lady Mohun, and continued till the 29th of March 1720, when the same was dismissed for want of prosecution\*.

In Trinity term 1723, the respondents brought their bill, to carry the former decrees and proceedings into execution against the appellant Lady Mohun, as the devisee and personal representative of Lord Mohun, and also against the other appellant her husband. To which bill, the appellants put in their answer; and, without insisting on the terms for years, or on any hardship in the said decrees, submitted to be examined on interrogatories, for the discovery of Lord Mohun's personal estate; and touching the account of the rents and profits of the lands claimed by the respondents.

On the 11th of December 1723, this cause was heard at the Rolls, on bill and answer; when the appellants making default, a [38] decree was made, unless cause, for carrying the former decrees and proceedings into execution, and for the appellants delivery of the possession, and conveying to the respondent Peter and his heirs, the allotted lands; and for an account of profits.—And no cause being shewn to the contrary, this last decree was, on the 25th of January following, made absolute, without any complaint against the justice thereof; and was accordingly afterwards signed and inrolled.

But the appellants afterwards thought proper to appeal from all these decrees and proceedings; and on their behalf it was argued (C. Wearg, C. Talbot), that Earl Charles the father did not take the estate under the will of Sir Edward Fitton, any otherwise, than as the same operated by way of appointment, or declaration of a new use, pursuant to the power reserved to Sir Edward, by the settlement of the 3d of April 1634; so that Earl Charles the father was in by the settlement, and not by the will, consequently had a good title to the whole estate; and therefore, the statutes of 32 and 34 Hen. VIII. touching devisees of lands, did not operate on this estate, nor could the same, under such disposition thereof, be void as to one third part, for the benefit of the coheirs of Sir Edward Fitton. That the two several terms of 99

\* Vide Jour. vol. 21. p. 284. And at the same time, no less than *thirty-four* other appeals were dismissed, for the same reason.

years, were terms in gross, and not attendant upon the inheritance of the premises; consequently the trust, or benefit thereof, did effectually pass to, and vest in Earl Charles the father, by virtue of Sir Edward Fitton's will; and therefore, during the continuance of those terms, the coheirs of Sir Edward could have no title to a third part of the premises, even supposing Earl Charles the father to have taken the inheritance thereof by the will: For Sir Edward had indisputably a good right to dispose of the equitable interest in the said terms, and having so done by his will, they ought not, in a Court of Equity, to be set aside, as to one third part of the premises, for the benefit of the coheirs, in violation of the plain intent of Sir Edward Fitton's will; and the rather, in regard both these terms had been long since assigned, in pursuance of a former decree of the Court of Chancery, 14 Car. II. for the benefit of Earl Charles the father, and who had really paid a great sum of money for redemption of the mortgage created by Sir Edward Fitton. Should it be objected, that Earl Charles the father, by his answer in the original cause, insisted that he claimed by the will, and did not make his defence, that he was in by the settlement, and that therefore the appellants could not now make that objection to the decrees of 1687; it was answered, that the settlement of April 1634, and Sir Edward Fitton's will, were fully set forth in the pleadings in the original cause, and properly put in issue; and that the title of Earl Charles, depending upon the proper construction of both, which was proper for the judgment of the Court; that judgment ought to have been given according to the rules of law, arising upon the whole matter disclosed by the pleadings, and not upon any single instrument, independent of the rest: Besides, though Earl Charles the father insisted by his answer, that he claimed [39] under the will, that did not exclude his being in by the settlement; for the will operated as an appointment, or declaration of a new use, according to the power in the settlement; so that he really took the estate by virtue of the will, not operating as a will, but as an execution of the power; and since his answer might bear that construction, a Court of Equity ought to take it in that sense, as being agreeable to the truth and justice of the case. Should it be also objected, that the two terms for 99 years, created by the settlement of April 1634, were attendant upon the inheritance, and consequently that the respondent Peter Minshull was entitled to a seventh part of one third of the premises therein comprised; it was answered, that there was no express declaration of trust, either in the said settlement, or any other deed executed by Sir Edward Fitton, which rendered these terms attendant on the inheritance; and consequently, that they ought to be deemed in equity, as terms in gross, and created by Sir Edward on purpose to prevent his heirs from taking any advantage of any share of his estate, against the declaration and direction of his will, by the tenure *in capite*; and were kept on foot in trust for him, and such person and his heirs, to whom he should limit his estate by his will. That Sir Edward Fitton had undoubtedly an absolute power to dispose thereof as he thought fit, and by his will had made such disposition to Earl Charles the father; and the terms were intended, and ought to wait upon the inheritance, so limited or disposed of by Sir Edward, or else belonged to the Earl, as his administrator with his will annexed; and the appellant Lady Mohun, being sole executrix and devisee of Charles, Lord Mohun, her former husband, who was executor and residuary legatee of Earl Charles the son, who was executor and residuary legatee of Earl Charles the father, was entitled to the said terms; and consequently, during the continuance thereof, the respondent Peter could have no right to the premises. And if any objection should be raised, by reason of the distance of time, since the former decrees were pronounced, or the nature of the proceedings had thereon; it might be answered, that all the laches throughout this whole affair, was to be imputed solely to the respondents; since they rested upon the first decrees in 1687, and never attempted to carry the same into execution, for near twenty years next after they were pronounced; during all which time, Earl Charles the father, and those claiming under him, enjoyed and continued in possession of the estate, acted as owners thereof, made settlements of the same for valuable considerations, and disposed of the inheritance thereof, without any claim, disturbance, or other interruption from the Minshulls, or any claiming under them, till the year 1706, when they preferred their bill against Charles Lord Mohun; and even since the decrees in 1711, they did not think fit to proceed, till a few months ago: And therefore it was conceived, that neither the distance of time since

the former decrees were pronounced, or the nature of the proceedings [40] which were had thereon, could be any hindrance or just objection to the appellants drawing the justice thereof into examination.

On the other side it was contended (T. Lutwyche), that after so great a length of time, and the several proceedings in the cause, the appellants ought not to be permitted to question the justice of the decrees in 1687; for, that after an ejectment brought by the appellants father, and great delays made use of, to hinder him of his right, the Earl, above forty-two years since, filed his bill; and, on the 19th of July 1682, an issue was directed to try, whether the lands in question were held *in capite* or not; and the Court then declared, that if the verdict should find they were so held, a commission should issue to set out the share of the respondents father; and after great delays, respecting this trial, the Earl at length waived it, by admitting the lands to be held *in capite*; but then he insisted on another point, viz. the terms of years; and thereupon the Court gave him leave to amend his bill. That it was now forty-one years, since the respondents father filed his bill, and above thirty-six years since an absolute decree was made; and a commission for the division and allotment of the estate executed; and upon exceptions taken to that allotment, it was, by consent of the parties, and of the then Lord Brandon, referred to arbitrators to set a value upon the share and interest of the respondents father, which by consent also, was to be paid him; and therefore it was insisted, that this reference was submitting to the justice of the decree, and a waiver of all objections to the title thereby established, and ought effectually to bind the appellants, as claiming both under the Earl and Lord Brandon.

But supposing the appellants at liberty to dispute the points made by their appeal, it was, on behalf of the respondents, contended, that Sir Edward Fitton's Lady being dead, without issue, he was by law, at the time of making his will, seised in fee of the whole estate, so that the Earl could take only as devisee; for the will, containing no reference to the deed of settlement, could not be construed to operate as an appointment; on the contrary, all former settlements were thereby expressly revoked: But if the will had referred to the settlement, yet, on account of the tenure *in capite*, it was undoubtedly void, as to a third part, and such third part descended to the testator's heirs at law. That though, as the settlement was stated in the Earl's answer, there did not appear to be any declaration of the trusts of the two 99 years terms; yet, it was reasonable to suppose, that they were raised for making provision for the younger children of the marriage, and were afterwards to attend the inheritance; for otherwise, the subsequent uses to the issue of that marriage, would, in effect, be thereby defeated: And as Sir Edward died without issue, it was apprehended, that even if no use was declared of these terms by the settlement, they could redound only to the benefit of those who had the inheritance. For all which reasons, and as this matter had undergone so long and expensive a litigation, and had been [41] so repeatedly determined against the appellants, and those under whom they claimed; it was hoped, that the decrees would be affirmed, and the present appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the several decrees therein complained of, affirmed. (Jour. vol. 22. p. 306.)

## PORTIONS.

CASE 1.—JOHN ORMSBY,—*Appellant*; HENRY DODWELL, et Ux,—*Respondents*  
[25th January 1702].

[Mew's Dig. x. 1255.]

A. on the marriage of his son, settles lands, which he covenants to be £800 per ann. reserving to himself a power of charging the same with £1200 for the portions of his younger children. A. charged the estate with only £600, but

because the value of the lands was defective, the son refused to pay these portions. Held, that the portions were well charged, as they only amounted to a moiety of what the father had power to charge, and, if there was a deficiency in the value of the lands, the son ought to sue upon the covenant for satisfaction, out of his father's assets.

DECREE of the Irish Chancery AFFIRMED.

Viner, vol. 16. p. 454. ca. 7. 2 Eq. ca. ab. 658. ca. 3.

Arthur Ormsby, esq. the appellant's father, by deed dated 29th of May 1686, in consideration of the marriage of the appellant with Elizabeth Kingdon, and of £200 her marriage-portion, to him paid; made a settlement of all his lands and tenements in the county of Limerick in Ireland, to the following uses: As to part of the lands of the yearly value of £400, to the use of the appellant for his life; remainder to the first, and other sons of that marriage, in tail male; with other remainders over: and as to the residue of the said lands, to the use of him the said Arthur, for his life: remainder to Elizabeth his wife, for her life; remainder to a trustee, for 100 years: remainder to the appellant, for his life; with such other remainders over, as were limited of the first mentioned lands. The trust of the 100 years term, was declared to be for the raising any sum, after the death of Arthur and his wife, not exceeding £1200, for the better provision of their younger children; in such manner and proportion, as he or his wife should by deed appoint. And the said Arthur Ormsby covenanted, that the lands so settled were then of the value of £800 per ann. besides quit-rent.

The said Arthur, by two deeds, both dated the 24th of April 1689, charged the said premises with £600, viz. by one deed, with £150 to his daughter Sarah, to be paid out of the first rents and [42] profits; and the like sum of £150 to his daughter the respondent Catherine, to be paid out of the next rents and profits; and by the other deed, with £300 to be next paid out of the rents and profits, to his two younger sons Arthur and Edward.

In September 1690, Arthur the father, having survived his wife, died; whereupon the appellant became intitled to the whole estate, subject to the aforesaid charges; but the premises lying near Limerick, which was at that time in possession of the rebels, the appellant could not enter till after the surrender of the town, which happened on the 3d of October 1691; and being then in England, he did not in fact take possession till May following.

The appellant refusing to pay the respondent Catherine's portion of £150, she and her husband, filed their bill against him in the Court of Chancery in Ireland, in order to compel such payment. To which bill the defendant by his answer insisted, that the settled estate was deficient in the covenanted value, upwards of £200 a year: that the charge ought not to be made good, before the covenant as to the value was specifically satisfied; and that the plaintiff Catherine had a very sufficient portion: viz. £1000 left her by her father's will, made subsequent to the deed of appointment.

On the 3d of December 1701, the cause came on to be heard; when the defendant was decreed to pay the £150, with interest from the time of filing the bill, within two months; and if not paid in that time, he was to pay the costs of the suit.

From this decree the defendant appealed, insisting (W. Cowper). that he was a purchaser for a valuable consideration, but that the value agreed for had never been made good to him; wherefore, and in regard the respondents claimed under a voluntary grant, they ought not in equity to recover on account of that grant; before the value of the estate was made good to the appellant, agreeable to the covenant. But supposing the charge to be good, yet the appellant ought not to have been decreed to satisfy it; because it was owing to the neglect of the respondents, and their trustees, that the £150 was not raised and paid, by the profits which accrued, between the time of Arthur's death, and of the appellant's entering into possession.

On the other side it was said (H. Poley, R. Turner), that it sufficiently appeared by the proofs in the cause, that the settled estate was £800 a year at the time of making the settlement; but if it had not been so, yet the value was no ways material as to Arthur's right of appointing provisions for his younger children; for that power was absolute, without any reference to, or dependence upon, the value of the estate. That if there really was any deficiency in value, the appellant ought to sue upon the

covenant, for satisfaction out of his father's assets, which were amply sufficient for that purpose; and that if the value of the lands was material to the present question, yet it was not pretended by the appellant, that the estate fell short of what it was covenanted to be, by more than a *fourth* part; [43] whereas, Arthur had charged it with *no more* than a *moiety*, of what he had power to do by the settlement.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 17. p. 257.)

CASE 2.—Lord Viscount ROSEBERRY, et UX.,—*Appellants*; JAMES TAYLOR, and others,—*Respondents* [5th February 1702].

[Mew's Dig. x. 1267.]

A term of forty years is limited for raising £2000, either by *profits* or *sale*; the trustee takes possession, but makes no interest of the profits. Held that the portion should carry interest, from the time it was payable; as the estate was sufficient, and the trustee might have raised it immediately.

DECREE of Lord Somers C. REVERSED.—See *post*, Ca. 10. [6 Bro. P. C. 81].

Viner, vol. 16. p. 442. ca. 1. Eq. ca. ab. 643. c. 11.

Everingham Cressy, by indenture dated the 19th of September 1670, in consideration of the marriage of his son Everingham with Anne his first wife, and of £2500, her portion, made a settlement of his estate; whereby, after the son's death, and failure of issue male of his body, a term of forty years was vested in trustees, for raising £2000, as a portion for the eldest daughter of that marriage, and £1000 for the portion of every other daughter; such portions to be raised out of the rents and profits, or by leasing. And subject to this term, the estate was limited, to the right heirs of Everingham the father.

On the 26th of May 1671, old Everingham made his will; and thereby devised his remainder in fee of the settled estates, to Everingham his son, and the heirs male of his body; with remainder to Gervas, the testator's brother, and the heirs male of his body; and soon afterwards died.

In Trinity term 1672, Everingham the son suffered a recovery of the estate; the uses whereof were declared to be, as to part of the premises, to trustees for a term of 200 years, to pay certain debts specified in a schedule; and as to the residue, to Everingham the son and his heirs.

In December 1674, Ann the wife of young Everingham, died without issue male, leaving the appellant Lady Dorothy her only daughter; and in November 1675, Everingham made a mortgage for 1000 years, of part of the premises comprized in the 40 years term, to the respondent Tyreman, for securing £700 and interest.

By indentures of lease and release, dated the 17th and 18th of May 1676, Everingham the son, in consideration of a marriage with Elizabeth his second wife, limited the estate to himself for life; with remainder (except such part as was to be to Elizabeth [44] for her jointure) to trustees for 500 years; the trust of which term was declared to be, that in case the £2000, secured by the term of 40 years for Dorothy, and the £700 and interest secured by the mortgage to Tyreman, should become due, to be raised and paid after Everingham's death, and during the life of Elizabeth; that then the said trustees might, if they thought fit, raise and pay the said sums; to the intent to secure and free Elizabeth's jointure-lands from the same, during her life; remainder, as to part of the estate, to Elizabeth for life, for her jointure; remainder to the first, and other sons of that marriage, in tail male; and in failure of issue male, a term of 200 years was limited to trustees, for raising portions for the daughters of that marriage. And by this deed, Everingham covenanted, that the estate settled for the jointure of Elizabeth, was and should continue of the clear yearly value of £320.

In August 1679, Everingham the son died, without issue by Elizabeth his second

wife; whereupon Francis Neville, the surviving trustee of the 40 years term, entered upon the premises comprized in that term; which were about £120 per ann. in order to raise Dorothy's portion of £2000 out of the rents and profits.

In July 1680, Elizabeth, the widow, married the respondent Taylor; and in Easter term 1681, they exhibited their bill in Chancery against Dorothy, then an infant and her trustee Neville, and also against Tyreman the mortgagee, and the trustees of the 500 years term, created by the second settlement; praying an account and redemption, and, after the £2000 and £700 were satisfied, to be let into possession, and to have the jointure made good £320 per ann.

On the 13th May 1685, the cause was heard before the Lord Keeper North; when his Lordship declared, that the defendant Dorothy's portion of £2000 ought in the first place to be raised out of the profits, *without interest*; and then, that the mortgagee should be satisfied what was due to him; and afterwards the plaintiff, Mr. Taylor, was to have the arrears of her jointure, after the rate of £320 per ann. and it was decreed accordingly. And it was further ordered, that a sale should be made for raising the portion, and the money due to the mortgagee; and that an account should be taken of what had been raised out of the estates, by the defendant Dorothy's trustee.

In pursuance of this decree, the master, on the 1st of May 1686, certified, that the trustee Neville, had received of the profits of the estate, £765 7s. 6d.; and on the 5th of March 1690, he further certified, that the trustee had received £731 8s. 6d. more.

In February 1690, the appellants intermarried; and the appellant Lord Roseberry, finding that the endeavours to sell the estate had proved ineffectual; and that his lady's maintenance from the death of her father, had been insisted on by, and allowed to her trustee, out of the principal of her portion, instead of having interest thereof allowed for such maintenance; he applied for a re-hearing of the cause, as to the question of interest.

[45] The cause was accordingly re-heard before the Lords Commissioners, on the 28th of July 1691; when it was decreed, that £40 per ann. should be allowed for Lady Dorothy's maintenance, from the time of her father's death, until she was seventeen years of age; and from thence, interest of the £2000 at £5 per cent. until her portion was paid; and that the maintenance and interest ought to be made good, out of the money in the trustees hands, so far as the same would extend; and it was referred to the master to compute such maintenance and interest: and it was further ordered, that the trustee should shew cause, why interest should not be paid by him, for what he had received; and after the master's report, the court would consider, how far the trust-estate should stand charged.

The trustee having made an affidavit, that he had made no interest of the money, received by him out of the profits of the estate, that part of the decree was no farther proceeded on; but the plaintiffs apprehending themselves aggrieved by this decree, applied for, and obtained a re-hearing of the cause, before the Lord Keeper Somers on the 2d of March 1694; when his Lordship declared, that from the words of the deed of settlement, made on the marriage of the Lady Dorothy's mother, he could not take the £2000 to be a gross sum, to carry interest from the father's death in 1679, while the trustee was in possession of the trust-estate, to the prejudice of the plaintiffs, who came in in remainder, and had exhibited their bill for the direction of the court, but no bill had been exhibited on behalf of Dorothy; and therefore it was ordered, that the Lords Commissioners decree should be set aside, and that the decree of the Lord Keeper North should stand.

From this last decree, the present appeal was brought; and on behalf of the appellants it was insisted (W. Dobyns, P. Crawford), that the portion being secured by a term of forty years, prior to the title of the respondents, and there being no objection to this term, in point of title; the portion might have been raised by virtue of the first decree, and put out at interest for the infant's benefit; whereas by this last decree, the appellants were not only deprived of any interest for the £2000, but the principal sum itself had been considerably lessened, by the appellant Dorothy's maintenance, prior to her marriage. That the Court of Chancery never allows the principal of a child's portion to be lessened and spent in its maintenance. That the respondents had no equity against the appellants, for their title was long subsequent to the appellants; and besides, the respondents had notice of this incumbrance, and had the whole inheritance to make them recompence and satisfaction. That no in-



erest could be had from the trustee, because he had declared on oath, that he had made none; and by this oath, the respondents had submitted to be bound. And that such submission amounted to a consent to, and an acquiescence in the decree of the 28th of July 1691; and therefore, the respondents ought not to have been admitted to a farther re-hearing of the cause. But that the decree made upon that re-hearing, ought to be reversed; and [46] interest allowed for the £2000, from the death of the appellant Dorothy's father; or at least, that maintenance and interest according to the decree of the 28th of July 1691, ought to be raised out of the estate.

On the other side it was alledged (W. Cowper), that there was due to the respondents for the arrears of the jointure above £5000; that the growing jointure of £320 per ann. still run on, and yet, that the estate of which they were in possession, and which was all they could ever have, amounted only to £220 per ann. That it appeared from the report in the cause, which stood absolutely confirmed, that the whole £2000 had been raised by the appellant's trustee; and therefore it was hard and inequitable, to attempt to load the estate with a farther charge for interest.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decrees therein complained of, should be reversed, *as to the interest*; and that interest should be paid to the appellants out of the estate, from the death of the said Everingham Cressy, the appellant's father, at £5 per cent. per ann. for the £2000 portion; discounting yearly, towards sinking the said principal and interest, the profits received by Mr. Neville, the trustee, out of the said estate; and that it should be sent back to the Court of Chancery, to take the said account, as directed. But this was to be done, without prejudice to Tyreman's mortgage. (Jour. vol. 17. p. 270.)

CASE 3.—CATHERINE STRODE, Widow,—*Plaintiff*; THOMAS ANDREWS, *Defendant* (in Error) [5th February 1706].

A. conveys lands to the use of himself and his wife for life, remainder to their first and other sons in tail; and for default of such issue, and in case A. should die, *or be dead* without issue male of his body born, or *in ventre sa mere* at the time of his death, and should leave one or more daughters, then to J. S. for 500 years, to raise portions for such daughters. A. dies, leaving both sons and daughters. The sons having afterwards all died without issue male, living the daughters; Held, that upon the death of the surviving son, the term arose and took place, and that it was not a *condition precedent*, but a remainder upon the determination of an estate tail.

JUDGMENT of the Court of K. B. REVERSED.

11 Mod. 88. Holt's Rep. 623: Viner, vol. 10. 225. note to ca. 4: 226. note to ca. 7: vol. 16. p. 453. ca. 6.

John Wyndham, esq. Serjeant at Law, was seised in fee of the manor of Blackford, and certain lands in the county of Somerset; and having issue three sons, William, Humphry, and Francis, he, by indentures of lease and release, dated the 9th and 10th of June 1685, in consideration of a marriage between his son William and Rebecca Strode, and of £3000 her marriage portion, settled the premises to the following uses; viz. To the use of his said son William, for his natural life; remainder to Rebecca, for her life; remainder to [47] the first, and every other son of the body of the said William Wyndham, on the body of the said Rebecca begotten, and the heirs male of the body of such son and sons; then follows a clause upon which the present question arose, in these words, viz. "And, for default of such issue, and in case the said William Wyndham shall die, *or be dead*, without issue male of his body, of the body of the said Rebecca Strode, born, or *in ventre sa mere*, at the time of his death; and shall leave one or more daughter or daughters of his body, on the body of the said Rebecca Strode begotten, or *in ventre sa mere*, at the time of his death; then, to the use and behoof of John Strode, and Saville Strode, their executors and administrators, for and during the term of 500 years; from thenceforth fully to be compleat and ended, upon such trusts, and to and for such intents and purposes, as are herein-after expressed and declared; *that is to say*, Upon trust, that the said John Strode, and

Saville Strode, their executors or administrators, shall, out of the rents and profits of the said manor and premises, or by sale or demise thereof, for all or any part of the said term, or otherwise, levy and raise £4000 for the portion or portions of such daughter or daughters, as the said William Wyndham shall beget on the body of the said Rebecca, *and shall be living, or in ventre sa mere, at the time of his death, to be* equally divided and paid in manner after mentioned; *that is to say*, Such of the said daughters as shall be unmarried, or under the age of 21 years, at the time of the decease of the said William Wyndham, shall have her respective portion paid unto her or them respectively, at the day or days of their respective marriage or marriages, or of their respective ages of 21 years, which-soever of them shall first happen, *after the death of the survivor of them the said William and Rebecca*. And such daughter or daughters as shall have attained her or their age or ages of 21 years, in the life-time of the said William Wyndham, the father, or the said Rebecca Strode, shall have her or their respective portion or portions paid unto her or them, within one year after the decease of the survivor of them the said William and Rebecca and not before: Provided, that in case any of the said daughters shall be preferred in marriage in the life-time of the said William, their father, her or their part or portion shall cease. And, in case any of the said daughters die *in the life-time* of the said William, or after his decease, *in the lifetime* of the said Rebecca and before their portion shall become due and payable; that then the part and portion of the daughter or daughters so dying, in the life-time of the said William or Rebecca, shall go and remain to the surviving daughter or daughters, equally to be divided between them. And further, that the said trustees, their executors or administrators, shall also, out of the profits of the said manor and premises, or by such means as aforesaid, pay and allow unto the said daughter or daughters respectively, interest, after the rate of £5 per cent. per ann. for the forbearance of the said several sums of money [48] and portions respectively, *from the time of the decease of the survivor of them the said William and Rebecca*, until such sums of money and portions shall be paid to her or them respectively, for their several maintenance and education; which interest shall be paid to her or them duly, by half yearly payments during the said term." And from and after the end, or other sooner determination of the said term of 500 years, to the use of the heirs male of the body of the said William Wyndham; remainder to the said John Wyndham the father, and the heirs male of his body; remainder to Humphry, the second son of the said John Wyndham and the heirs male of his body; remainder to Francis, (the lessor of the plaintiff) and the heirs male of his body; remainder to the right heirs of the said William Wyndham for ever.

The marriage took effect, and there was issue two sons, and four daughters: namely, John, Humphry, Jane, Rebecca, Joan and Katherine.

In April 1697, William Wyndham died; leaving John and Humphry, his two sons both living.—In August 1699, John, the eldest son, died without issue.—In July 1703, Rebecca, the mother, died; whereupon Humphry, her youngest son, entered and was seised; and in October 1704, he also died, without issue.

The several persons, to whom estates for life were limited, being dead, and all the precedent estates tail being spent; Francis, the youngest son of Mr. Serjeant Wyndham, entered by virtue of the remainder in tail limited to him.

But Katherine Strode, the plaintiff in error, being the administratrix of the surviving trustee of the 500 years term, entered upon the premises, in order to raise the portions for Jane, Rebecca, and Joan, the three surviving daughters of the marriage; whereupon the said Francis Wyndham, brought an ejectment in the name of Andrew's his lessee.

On the trial of this ejectment, the jury brought in a special verdict, finding the several facts above stated; and the single question was, Whether the term of 500 years was to begin upon failure of male issue, whenever that should happen; or, upon failure of male issue, if that happened at the time of William's death?

And, upon arguing this verdict in the Court of Queen's Bench, the Judges were unanimously of opinion, that the term never arose; because, it depended upon a condition precedent, viz. William's dying without issue male by Rebecca, *born at the time of his death*; which did not happen, for he left two sons by Rebecca, surviving him; and therefore, judgment was given for the lessor of the plaintiff.

To reverse this judgment, the present writ of error was brought; and, on behalf of the plaintiff in error, it was argued (T. Powis, R. Raymond), that the 500 years term arose and took place, upon the death of William's younger son Humphry without issue, and was still subsisting; for, that it was manifestly the intention of all parties to the settlement, that the £4000 should be raised for the daughters of that marriage, if there should be a failure of issue male. That the term was ex-[49]-pressly limited to take place, if William Wyndham should *die or be dead*, without issue male by Rebecca; and therefore, as his sons were both dead without issue, the contingency had happened, and he was dead without issue male, and consequently the term arose; and the rather, because there being no express time limited in the settlement, when the failure of issue male should happen, it might be at any time. As to the objection, that the contingency of the failure of issue male was confined to the time of the death of William, by the words, *at the time of his death*, and that both his sons having survived him, the contingency never happened; it was said, that these words, *at the time of his death*, related only to the expression immediately foregoing, viz. *in ventre sa mere*; and so the entire clause was not restrained by the words, *at the time of his death*, but they must be referred to the next preceding expression, *in ventre sa mere*; for, without adding, or subjoining that expression to those words, the expression itself would have been unintelligible, or at least, the sense of it incomplete. And, as to the other objection, that the maintenance was to commence from the death of the survivor of the father and mother, and from thence it must be inferred, that the failure of issue male must happen in the life-time of one of them; it was answered, that in penning declarations of trusts of such terms for years, the various accidents which might happen in families, could not all be foreseen; and therefore, the trusts were generally suited to such cases as were most obvious, but nothing could from thence be justly collected to defeat the term itself; besides, this objection did not prove what the other side chiefly contended for, viz. that the failure of issue male, must be at the death of the father; but, it rather proved the contrary; because, as the maintenance was limited to take place from the death of the survivor of the father and mother, and as the *mother* did survive; it shewed clearly, that the failure of issue male, was not intended to be restrained to the time of the *father's* death. But, supposing this to be a doubtful case, yet as there was ground for a construction in favour of the daughters, who were in the nature of purchasers for a valuable consideration, upon the merit of their mother's marriage and portion, and who were heirs at law both to their father, and grandfather, the maker of the settlement; it was hoped, that the *House* would rather incline to give them a provision out of the father's estate, than suffer his younger brother to carry away the whole of it, to the dear amount of £2000 per ann.

In support of the judgment it was contended (T. Parker, P. King), that if the term was to commence whenever there should happen a failure of males, then the words, *in default of such issue*, fully and clearly expressed the meaning of the parties; and so, all the rest of the clause on which the doubt had arisen might be rejected. But, it was apprehended to be very plain, that this term was not to begin barely upon default of issue male; but over and above that, a condition was added, in case William should die without issue male by Rebecca, *born, or in ventre sa mere, at the time of his death*; and should have [50] one or more daughters by her begotten, or *in ventre sa mere, at the time of his death*; so that the *having daughters, and having no sons*, and both restrained to the time of his death, were the *conditions* on which this term was to commence. The term therefore, was to begin immediately upon the death of William and Rebecca, or not at all, and so the trusts began from their deaths absolutely; the daughters who should attain 21 in the life-time of their father, were to receive their portions in a year after the death of father and mother; and those under 21, were to be paid when they attained that age; and, in the mean time, interest, at £5 per cent. was to be paid them from the death of the survivor of father and mother, out of the profits, and by half-yearly payments; which shewed plainly, that this term was only to arise upon the contingency of William's dying without issue male, *living at the time of his death*; for they could not have their portions within one year after William's death, if the issue male had lived 100 years; nor could the daughters have had the interest of their portions for their maintenance and education, *from the death of the survivor of William and Rebecca*, unless the contingency then happened: And,

it would be a very improper provision for a *present* maintenance for daughters, and for raising their portions, at their ages of 21, or marriage; when it might happen that the issue male of the issue male might not fail for 100 years, or perhaps, never. That it was an extraordinary construction, to make the trusts of a term, and the disposition of the profits by the trustees, begin before the term itself, which must enable the trustees to take those profits; and it could not be imagined, that the trustees were to maintain and educate the daughters, before the term vested; or, afterwards to allow them interest for their portions, 100 years backwards in one gross sum, when the interest intended by the parties was expressly directed to be paid by *half-yearly payments*. And, as to the hardship of the case alledged on the other side, merely to prove compassion, it had no foundation in fact; for, that Serjeant Wyndham, who survived his son William, and was perfectly sensible that William's daughters could have no provision under this settlement, made a very ample provision for them by his will; so that under this, and other wills, by different branches of the family, these very daughters were entitled to no less than £10,760.

But, after hearing counsel on this writ of error, it was ORDERED and ADJUDGED that the judgment given in the Court of Queen's Bench, should be reversed; and, that judgment should be given for the said Dame Katherine Strode, against the said Thomas Andrews, in the said action. (Jour. vol. 18. p. 228.)

[51] CASE 4.—MARGARET DAVIE, and others,—*Appellants*; NICHOLAS HOOPER & Ux.,—*Respondents* [14th February 1711].

By a marriage settlement, £2500 was provided for the portions of the issue of the marriage, in such proportions as the father should appoint. There was issue of this marriage, only one child; for whom the father, upon his second marriage, made provision by settling a real estate, and he also gave her a legacy by his will, but died without making any appointment of the £2500. Held, that this child was entitled to the whole £2500, and that none of the other provisions made for her should be deemed a satisfaction.

DECREE of Lord Keeper Harcourt AFFIRMED.

The statement of the case in all the other authorities referred to is short and incorrect.

2 Vern. 665. Viner, vol. 3. p. 437. ca. 10: 1 Eq. ca. ab. p. 336. ca. 6.

William (afterwards Sir William) Davie, in the year 1687, and in the life-time of Sir John Davie, his elder brother, married Mary Steadman; whose *only fortune* was a real estate in Somersetshire, of about £250 per ann. part in possession, but the greatest part in reversion, after the death of her mother, who lived till the year 1700.

Previous to this marriage, by indenture dated the 1st of April 1687, between the said William Davie and Sir John Davie, and Margaret Davie, Widow, their mother. of the one part, and Mary Steadman, Widow, the said Mary, her daughter, and Henry Long, of the other part; in consideration of the then intended marriage, (no portion being mentioned) the said William Davie, Sir John Davie, and Margaret Davie, for themselves, their heirs, executors, and administrators, covenanted with the said Mary Steadman, Widow, and Henry Long, that he the said William Davie should, within one year after the marriage, upon the request of the said Mary Steadman, Widow, and Henry Long, their executors or administrators, settle and assure, in such sort as they, or either of them, or their counsel should reasonably advise or appoint, the sum of £5000 in money and good securities, or in good securities alone, in manner following, viz. the sum of £2000 part of the said £5000 for the sole benefit of the said Mary, the intended wife, in case the marriage should take effect, and the said William should die in her life-time, without issue by her then living, or that should afterwards be born alive; but if William should die in her life-time, leaving issue by her, then only £1500, part of the £5000, was to be settled; which, as to the interest thereof, was to be

for the benefit of the said Mary for life, for her jointure; and, after her death, the principal of the said £1500 to be for the use of such child or children of the said William Davie, by the said Mary, as should be then living, in such proportions as the said Mary should by any writing limit or appoint; or in default thereof, equally between them; and, if but one child, the whole to that one child; but if all the children of the said William Davie by the said Mary, should [52] die before her, then she was to have the full sum of £2000 to her own use. And it was further covenanted, that the said William Davie should, at the like request, settle and assure £2500, other part of the said £5000, to the use of such child or children as he should have by the said Mary, whether born in his life-time, or after his decease, in such manner or proportion as the said William Davie, his executors or administrators, should by any writing appoint. And the residue of the said £5000 was, in every of the said cases, to be for the sole disposal, benefit, and use of the said William Davie, his executors, administrators and assigns. Provided always, that if the said William Davie should settle the said £5000, or securities for the same, within a year after the said marriage; or, if no such request as aforesaid should be made within one year after the marriage, for such settlement to be made; then the said Sir John Davie and Margaret Davie were to be discharged from the said covenant; but this proviso was not to extend to the said William Davie.

The marriage soon afterwards took effect, and in October 1687, the Somersetshire estate was, by fine and recovery, and deeds declaring the uses thereof, limited to the use of the said William Davie for his life; with remainder to said Mary Davie for her life; remainder to the trustees to preserve the contingent remainders; remainder to first and other sons of the said William Davie, by the said Mary, successively in tail male; remainder to the use of the daughter or daughters of the said William Davie, on the body of the said Mary begotten, or to be begotten; with remainder, to the use of the right heirs of the said William Davie for ever.

In 1690, Mrs. Davie died, leaving the respondent Mary, her only child; and soon afterwards, Sir John Davie died without issue; whereupon the title, together with the family estate in Devonshire, of about £1400 per ann. descended to the said William Davie.

In 1692, Sir William Davie married Dame Abigail, his second wife, who brought him a fortune of £5000, and by whom he had issue the appellants.

Sir William Davie, intending to make all his four daughters equal in point of fortune; and knowing, that by the settlement on his first marriage, the respondent Mary, his eldest daughter would, after his death, be entitled to the Somersetshire estate, which he estimated to be worth £5000; he, in October 1706, made a settlement of his Devonshire estate, to the use of himself for life; then to trustees for a term of 500 years, upon trust to raise £5000 a-piece for his three younger daughters, the appellants; and subject to this charge, to the use of his heirs male; remainder to his daughters begotten, or to be begotten, with remainder to his own right heirs. On the 10th of February following, Sir William made his will; and, after taking notice, that the estate which he had by his first wife, was settled on his eldest daughter Mary, he [53] devised to her certain other estates in the said county of Somerset, together with some specific legacies; and then he gave £500 a-piece to his three younger daughters, over and above their portions of £5000 a-piece, and appointed the same persons executors, whom he had named as trustees, in the settlement of his Devonshire estate.

In March 1706, Sir William died, and soon afterwards the respondents claimed the sum of £2500 under the agreement made upon Sir William's first marriage; whereupon the appellants exhibited their bill in Chancery against the respondents, to be relieved as to this demand; and praying, that what Sir William Davie had done for the advancement of the defendant Mary, in settling upon her the Somersetshire estate, giving her a legacy by his will, and making a further provision for her in the settlement of his Devonshire estate, might be decreed to be a satisfaction of her claim of the said £2500. The defendants also exhibited their cross bill, for a satisfaction of this £2500 out of the real and personal estate of Sir William Davie.

Both these causes were heard on the 17th of November 1710, before the Lord Keeper Harcourt; when the Court declared, that Mary Hooper was well entitled to the £2500 as a creditor, under her mother's marriage-agreement; and therefore decreed the same to be paid, with interest at £5 per cent. from the death of Sir William Davie.

But to reverse this decree, the present appeal was brought; and, on behalf of the appellants it was insisted (S. Cowper, S. Mead), that the intention of the marriage-agreement of 1687, being only to secure a provision for the issue of that marriage; such intention was fully and effectually answered by the settlement of the Somersetshire estate, which Sir William Davie was under no obligation to make. That in this agreement, no mention was made of any portion, nor in fact, had Sir William's first wife any other portion than the Somersetshire estate; which, if she had died before 21. would have descended to her heir; and Sir William might not have received any benefit from it. That till the death of Sir William, the respondent Mary could not, by the marriage-contract, have demanded any satisfaction for the £2500, because no time was thereby limited for the payment of it; and, as at his death the respondent became entitled to the Somersetshire estate, under the settlement, she thereby received a certain satisfaction for the £2500 at the very time that it became demandable, if it ever could be demanded. And as Sir William never barred the remainders of this estate, which was in his power to have done, it afforded a plain evidence, that he intended it as a satisfaction: And therefore it was apprehended, that the benefit which the respondent Mary took on the death of Sir William, by his settlement of the Devonshire estate, and by his will ought to be taken as a full satisfaction for the £2500 even if it had not been satisfied by the settlement of the Somersetshire estate. That it was fully proved in the cause, that Sir William intended to make all his four daughters equal in their fortunes; [54] and that he looked upon and intended the settlement of the Somersetshire estate, to be a full performance of the agreement, made on his said first marriage. For, being a very careful and exact man, in the management of his affairs; he, some short time before his death, set down in writing, an account of all the debts he owed, and which were indeed but very trifling, without ever taking notice of this pretended debt of £2500 to the respondents. It was therefore hoped, that the wise and just provision which Sir William had made, for the peace and quiet of his family, *and for the equal benefit of all his daughters*, should not now be frustrated by admitting the respondent Mary as a creditor for so large a sum as £2500 principal money; which, with the interest given by the decree, would amount to £3300 to the disappointment of Sir William's will, and contrary to his repeated intentions.

On the other side it was contended (T. Powis, J. Jekyll), that at the time of the settlement of the Somersetshire estate, which moved only from the respondent Mary's mother, Sir William had no interest in it; and therefore it could not be, nor was ever expressed or designed to be a satisfaction, for what was limited by the articles, to the issue of that marriage. That the respondents did not claim the Somersetshire estate, by the gift of Sir William Davie, but by the settlement and gift of his first wife, the respondent Mary's mother; and if the settlement of this estate was a satisfaction, it must have been so at the time of making it; but this could not possibly be, because the respondent Mary took nothing thereby, but in remainder after an estate tail which the tenant in tail might, by common recovery, have barred and destroyed. Besides, this settlement was never declared or agreed, either by Sir William Davie or his first wife, to be a satisfaction for the money agreed to be paid by the articles. That the legacies given to the respondent Mary by the will, were but of small value: and each of the appellants had more out of his estate, than the respondent Mary had, though she was his eldest daughter: And, as to the settlement of the Devonshire estate, she took nothing but a remainder, together with the appellants, after an estate tail which Sir William might have barred, whenever he thought fit: But it was not ever pretended that he ever meant, or declared, this settlement to be a satisfaction of what he was bound to do by the articles.

ACCORDINGLY, after hearing counsel in this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed. (Jour. vol. 19. p. 387.)

CASE 5.—DENNIS DALY, & Ux.,—*Appellants*; MARY FRENCH, and others,—*Respondents* [20th June 1715].

[Mews' Dig. x. 1275.]

Under what circumstances the payment of a portion from under a will shall be postponed, until all the father's debts are satisfied.

DECREE of the Irish Chancery REVERSED.

George French, esq. having six daughters, but no sons, made his will on the 17th of September 1689, and thereby devised to his eldest daughter Ann, and her heirs, all his lands, tenements, hereditaments, reversions, leases for years, and also all his right and interest in the several mortgages therein particularly mentioned; subject nevertheless, to the payment of his debts and legacies, and to the several uses, intents, purposes and reservations, therein after expressed; viz. that the mesne profits should go to his executors, or any three of them, his wife being always one, until his debts should be paid; and afterwards, until his legacies and children's portions therein after mentioned, should be satisfied; which, if the times should be peaceable, he trusted might be before his daughter Ann should attain her age of 16 years; but if they should not be paid by that time, then the profits of his estate were to remain to his executors, for four years longer, for the purposes aforesaid: And the testator bequeathed his personal estate to his wife, towards payment of his debts; declaring, that if his intention was observed, his debts must be paid, before any distribution of the mesne profits in legacies or bequests. The testator then bequeathed to the appellant Ellin, his second daughter, £500, to Mary, his third daughter, £500, and to Anstace, his fourth daughter, £500, all to be paid out of the mesne profits of his estate successively; the eldest to be preferred before the youngest. —To his mother, Ann French, afterwards Ann Browne, £10 per ann. for her life, and to his brother, Matthew French, £100, to be paid before any of his daughters' portions. And if it should happen, that the testator's said daughter Ann should die before marriage, and without issue, he devised his said real estate to his next daughter, and so in such case successively, from the eldest to the youngest; with remainder to the right heirs of his father, Patrick French. And if his said daughter Ann should happen to marry without the consent of his wife, and any two of his executors, or do any other act to the reproach or scandal of his family; it was his will and final settlement, to leave his estate to any other of his daughters, who should follow the advice of her mother, or any two or three of his executors (whereof his wife was to be always one) in marriage, and in such case the eldest to be preferred before the youngest; and that his daughter Ann, or any other of his daughters, being found guilty as aforesaid, should have no portion given them, nor should any be due to them, but what any three of his executors, his wife being [56] one, should think fit.—And, inasmuch as the distraction of the times, etc. might render his estate of no benefit to his said daughter Ann, the testator ordered, that any three of his executors, his wife being one, might diminish the said several portions, as they should think fit, due regard being had to the value and yearly profits of his estate; it being his intention, that where his younger daughters should be paid severally £500, his eldest should have the real value of £1000 *ultra* reprises. The testator also ordered, that if any of his younger daughters should die before marriage or preferment, the £500 payable to such daughter should determine, and his estate be discharged thereof. And he appointed his wife, Mary French, and his brothers-in-law Thomas Martin, John Beringham, Michael Lynch, and Patrick Bodkin, executors of his said will.

The testator soon afterwards died; as did also Anstace his fourth daughter, and his brother Matthew, without having received their respective legacies; and after the testator's death, all his executors proved his will.

About a year and a half after the testator's death, Mary, his widow, intermarried with George Lynch, gent.; but before this marriage, she relinquished the further execution of her husband's will, and accounted with his other executors, for what she had received out of his estate.

In December 1697, Ann, the eldest daughter, intermarried with Edmond Therry,

esq. but without the consent of any of the executors; and some time afterwards Therry and his wife, having filed their bill in the Court of Chancery in Ireland against the executors; all matters in difference between them were referred to arbitrators, who by their award, which by consent was made an order of Court directed the executors to pay Mr. Therry, £1350 for his wife's portion; and thus the appellant Ellin, the second daughter, became entitled to all her father's real estate subject to the trusts of his will.

In April 1701, a treaty of marriage was set on foot between the appellants; and by articles dated the 28th of that month, between Nicholas Lynch and Mary his wife, Thomas Martin, Patrick Bodkin, and Michael Lynch, the surviving executors of the testator George French, on behalf of the appellant Ellin of the first part, Dennis Daly, senior, on behalf of the appellant Dennis, his third son, of the second part; and Ann Browne, (formerly French) grandmother of the said Ellin, of the third part: taking notice of the said intended marriage, the testator's will, and the marriage of Ann his eldest daughter without consent, whereby his real estate had devolved, or would devolve, upon the said Ellin his second daughter; it was *inter alia* agreed, that the executors and the said Dennis Daly, senior, should receive the rents and profits of the said estate until the debts and legacies were paid; giving Ballynecarragh, which was about the value of £10 per ann. for the maintenance of the respondent Mary French, the third daughter, for four years; and that it should also be lawful for the executors, to pay Mr. Therry's portion of £1350 pursuant to the award and decree. [57] And the said Dennis Daly, senior, thereby agreed to give £1500 as a portion with his said son, to be settled on him and the issue of the marriage; and after payment of the testator's debts and legacies, the said Ellin was to have the quiet and peaceable possession of his estate, to her and the heirs of her body, except only one third part thereof to her mother Mrs. Lynch, for her life. And the said Ann Browne, the grandmother, for the better advancement of Ellin, covenanted to assign in trust for her, all her interest, as administratrix of Patrick French, her first husband, in a certain farm called Killcrivanta; and likewise the lease which she had obtained from the Earl of Clanrickard. Then followed this clause; viz. "That the said Mary French, immediately on her marriage-day, which is to be after four years from the date hereof, is to have the interest of her portion of £500, at the rate of £8 per cent. until paid, she marrying by consent, according to the said George French's will; and power in the said executors to appoint the time of paying the said £500 by Gales, if they or the survivor of them shall think fit to order it.

Differences afterwards arising between Mr. Daly the father, and the executors, touching the value of the testator's real estate, and the incumbrances affecting the same, and particularly concerning the payment of Mary's portion on the day of her marriage, whether the estate should be then clear or not, the intended marriage of the appellants was for a considerable time postponed; but these differences were length adjusted, by an indorsement on the marriage-articles, dated the 29th of Jan. 1703, to the following effect; viz. "That the within named Mary French shall have her portion, according to her father the said George French's last will, out of his estate as soon as it can thereout be collected; and that the within named Dennis Daly junior, and the said Ellin French, shall have such maintenance for five years to come as the executors shall order, out of the interest of the said portion of £1500, which is acknowledged to be paid before the date hereof; and that the rest and residue of the said £1500, over and above the said maintenance for the said five years, shall go towards the payment of the said Mary French's portion, until paid."

In consequence of this compromise, the marriage was soon afterwards had: Mr. Daly, the father, and his son, having purchased all the incumbrances affecting the estate, the possession thereof was delivered up to the son.

In May 1709, Mary French exhibited her bill in the Court of Chancery in Ireland against the appellants, and other proper parties, for payment of her portion and interest thereof, according to the articles.

On the 26th of January 1713, the cause was heard; when it was decreed, that the plaintiff should have and recover against the defendants Daly and his wife the rents of Ballynecarragh, for four years, from the 28th of April 1701, being the date of the articles, and £8 per cent. per ann. after the said four years, for the interest [20]



the £500 until her marriage; and, upon her marriage, she was to have the said portion and interest for the same until paid; and that the testator's estate, then in the hands of the said defendants Daly and wife, should stand charged with the £500 and the interest thereof, precedent to any other incumbrance.

From this decree, the defendants Daly and his wife appealed; and on their behalf it was insisted (S. Cowper, R. Raymond), that the appellant Ellin was entitled to the estate by virtue of her father's will, but that both she and her husband were minors, as well at the time of executing the articles, as of their marriage; that they were neither privy or assenting to those articles; and as the parties thereto had no power to charge the estate in any other manner, than according to the testator's will, the appellants were not bound by the articles; nor ought the respondent Mary's portion to be charged, otherwise than as the testator's will had directed. But if the appellants were bound by the articles, the will and the articles together ought surely to be the measure for payment of this portion; and yet the decree had pursued neither of them: It had not pursued the will, because no account was directed as to the value of the estate, or the amount of the debts either paid or remaining unpaid; so as that the portion might come in course of payment after the debts were satisfied: Neither were the articles pursued, for thereby the respondent Mary was not to have interest for her portion until she married; and she was not yet married; and by the decree, she was to have the £500 paid immediately after her marriage; whereas by the articles, the executors had a power of appointing the payment thereof by instalments, according to the condition which the estate might be in at the time of such marriage. That the indorsement having been made before the appellants married, and they marrying upon the foot thereof, the same ought to take place of the articles, and operate so as to leave the respondent Mary to recover according to her father's will. That the widow, who was a trustee of her husband's will for the payment of debts, legacies, and portions, could not by the articles reserve more out of the appellants' estate, than she was entitled to by law; but having so done, she ought to have been decreed to account for what she had received, over and above her dower, and which could be more than sufficient to satisfy the respondent Mary's portion: But it was highly unreasonable, that she should have interest for this portion, from four years after the date of the articles; when the maintenance had been all along continued.

On the part of the respondent Mary French (for none of the other parties seem to have concerned themselves in this appeal) it was said (J. Jekyll, T. Lutwyche), that the articles of 1701, were part of the appellants' marriage-agreement; and prepared by Dennis Daly, the father, who perfectly understood the testator's estate, and would not permit any other Lawyer to be concerned in the transaction. That provision being made by all the parties to these articles, for payment of the respondent's portion; no subsequent agreement entered into by them, could deprive her of the benefit of that provision, unless she had been a party, or otherwise consenting to such subsequent agreement. That the appellants enjoyed the benefit of the articles, notwithstanding the indorsement; and it would be very hard upon the respondent to lose the benefit of these articles, and be bound by the indorsement to which she was no party; neither was her grandmother any party thereto, tho' she was the articles, and gave a consideration for the same by parting with her interest in Kilcivanta. That if these articles, as to the respondent's portion, should be set aside, and she sent to an account with the executors and the appellants, she would lose her portion and be utterly undone; for she had nothing in the world to live on, but the interest of this £500, and consequently could not support the expence of such an account. That it was surely much more reasonable, that the respondent, who had behaved herself dutifully, should have her portion of £500 with interest; than that her eldest sister Ann, who had married without consent, should have £350; and if the estate was so incumbered, that it would not bear £500 for her portion and interest, it was unjust in the executors to give so large a portion to her eldest sister. That by the articles, the respondent was to have the rents and profits of Ballynecarragh, for four years, for her maintenance; and, at the end of that term, her mother was to have the rents; and this clearly showed the intent of the parties to be that the respondent was to have the interest of her fortune at the end of four years, otherwise she must starve; for if the articles were set aside, there was no provision for her maintenance, till her portion was paid.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be reversed: And, forasmuch as the personal estate, and the mesne profits of the real estate of the testator George French, were, by his last will, made subject, in the first place, to the payment of his debts; and the portion of £500 thereby given to the respondent Mary, was not payable until the testator's debts should be first satisfied; it was therefore ORDERED and ADJUDGED, that the respondents, the executors, and also the said Mary Lynch, the executrix, should forthwith account upon oath, for the personal estate, and for the rents and profits of the real estate, come to their or any of their hands, or to the hands of any other person, by their order, or for their use; and that for the better taking such accounts, the said executors should produce, upon oath, all books and papers in their custody, relating to the said personal estate, and to the rents and profits of the said real estate, and be examined on interrogatories; and that the appellants should also account, upon oath, for the rents and profits of the said real estate, which they, or either of them, or the said Dennis Daly the father, had respectively received, or might have received without their respective wilful default; and should produce, upon oath, all books and papers relating to such receipts, and be also examined on interrogatories touching the same; and that all just allowances should be made on the said several accounts, and particularly to the respon-[60]-dent Mary Lynch, for such part of the profits as she was entitled to in law or equity, in respect of her dower; but the sum of £1000 only, part of the sum of £1350 agreed by the executors to be paid for the portion of Ann the testator's eldest daughter, when the same should be paid, was to be allowed, as well as paid by the said executors, for the portion of the said Ann. And it was further ordered, that an account should be taken of what debts were owing by the said testator at the time of his decease, and of what legacies given by his will remained yet unsatisfied; and if any question should arise concerning the reality of any unsatisfied debt, the respondent Mary French, as well as the appellants, were to be at liberty to examine the creditor demanding the same on interrogatories: And it was further ORDERED and ADJUDGED, that from the end of four years, next after such time as the said Ann attained her age of sixteen years, (within which time, at the farthest, the testator supposed and intended that all his debts and legacies, and the portions given to his children, might and should be paid) the respondent Mary French should be allowed £40 per ann. out of the profits of the real estate, for her maintenance, until her marriage; and that the arrears of the said £40 per ann. and the growing payments thereof, should stand charged on the said real estate, until satisfied; and after satisfaction of the remaining debts, should be forthwith paid, and that upon the marriage of the said respondent, her said portion of £500, with interest for the same, from the time of her marriage until the payment thereof, should be paid out of the said real estate; the debts of the testator being nevertheless first paid and satisfied, according to his will: And it was further ORDERED, that the respondent Mary French should account, upon oath, for what she had received towards her maintenance, out of the rents of Ballynecarragh, or otherwise towards satisfaction of the interest of her said portion; and all just allowances were to be made to her on the said account; and that what she had clearly received out of the said rents, or for interest as aforesaid, should be discounted out of the arrears of maintenance by this order adjudged to her; and that she should have her costs in the Court of Chancery in Ireland, as well in respect of all proceedings already had in the said Court, as also on the several accounts now decreed, and such other proceedings as should be had thereon; and that such costs should be satisfied out of the profits of the said real estate: And the said Court of Chancery was to give all necessary directions for speeding the said accounts, and carrying this judgment into effectual execution (Jour. vol. 20. p. 78.)

CASE 6.—CHRISTOPHER CHAMBERLAIN,—*Appellant*; MARY WHITE, Widow,—*Respondent* [26th April 1720].

[Mew's Dig. x. 1257.]

In a marriage settlement it was agreed, that if there should be but one daughter, she should have £500 for her portion; and that £200 a piece should be paid to every of the other younger daughters. There were three daughters of the marriage, and the eldest claimed to be entitled to a portion of £500, but held, that she was only entitled to a portion of £200.

Decree of the Irish Chancery REVERSED.

The reason assigned in Vin. and 2 Eq. Ab. is the estate being small, and not able to bear a greater charge; and see MSS. Tab.

Viner, vol. 16. p. 440. ca. 7: 2 Eq. ca. ab. 644. ca. 14.

Michael Chamberlain, esq. the father of the appellant and respondent, being seized in fee of a real estate in the counties of Meath and Dublin, and possessed of several leasehold estates in Dublin, of the yearly value of £250 or thereabouts, by indentures of lease and release, dated the 16th and 17th of December 1672, in consideration of a marriage with Cicely Brown, and of £500, her portion, and in pursuance of articles, did settle and convey all the said premises to the use of himself for life; remainder (subject to a jointure of £150 per ann. to the said Cicely for her life) to the first and other sons of that marriage in tail male; remainder to himself in fee. And it was thereby agreed, that in case there should happen to be one or more son or sons, *and but one daughter* of their two bodies, *such daughter* should have, out of the rents, issues, and profits of the said estate, the sum of £500 sterling, as a portion, to be paid to her at her age of 15 years, or marriage, which should first happen; and also such competent maintenance, until the same should be paid, as the trustees therein named should appoint, not exceeding £40 per ann.: And that the sum of £200 sterling a piece, should be paid to every of the other younger daughters, and £100 a piece to every of the other and younger sons; with such competent maintenance as should be appointed as aforesaid, not exceeding £20 per ann. for every such daughter, and £10 per ann. for every such younger son. And the said Michael Chamberlain covenanted to lay out the said £500 portion in the purchase of lands, and to settle the same, and all other lands he should purchase, to the several and respective uses before mentioned. But he reserved to himself a power of charging the premises with a jointure for any second wife, not exceeding £50 per ann. and with £300 for the children of such second marriage.

Mr. Chamberlain had issue of this marriage, the appellant his only son, and the respondent and two other daughters, both since dead; and upon the death of Cicely his wife, he married a second, by whom he had issue; and for their benefit, he charged the premises with £300 by virtue of his said reserved power.

[62] In the year 1688, Michael Chamberlain was attainted of high treason, on account of the then wars in Ireland; whereby his estate for life, under the above settlement, became forfeited to the Crown.

By an act of Parliament made in England, 11th and 12th Will. III. c. 2. s. 16. all the forfeitures in Ireland were vested in certain trustees therein named, who were thereby authorized absolutely to determine the claims and rights of all persons in and to the same; and it was expressly enacted, "That the judgment of the said trustees should be final and conclusive; and that all infants, feme coverts, idiots, persons of unsane memory, or beyond the seas, and all other persons, bodies natural and politic, their heirs and successors, and their respective interests, should be bound and concluded by the judgment, determination, or decree of the said trustees, touching the premises, according to the tenor or purport thereof, any law, statute, or custom, to the contrary thereof in anywise notwithstanding."

Pursuant to this act, the respondent and her two sisters exhibited their claim before the trustees, praying that the respondent might be allowed her portion of

meaning of these presents are, that in case the said John Odell, the elder, doth not, *in his life-time*, dispose of his daughters in marriage, or raise for them portions out of the profits of the said estate; that then it shall and may be lawful to and for him the said John Odell, the elder, from time to time, and at all times during his life, by his last will and testament, or by any deed or deeds, or other instrument or instruments in writing, to charge and incumber the said estate, limited to him for life, as aforesaid, with a sum not exceeding £1500, as a portion for his daughters."—And by this settlement, both father and son covenanted, as they had before done by the articles, that the estate so settled, was subject to no more than £2000, and should be discharged before the father's death.

At the time of making this settlement, John Odell, the father, had two daughters, namely, the respondents Grizell and Mary; both of whom afterwards, *and in his life-time*, married, the first with Henry Graydon, and the other with Thomas Brown: But differences arising between the said John Odell, sen. and the relations of his son's wife, touching the incumbrances affecting his estate, which it was alledged, greatly exceeded the £2000 limited by his covenant; and the father falling into misfortune in consequence of these disputes, he was not only unable to discharge those incumbrances, but also to give his said daughters any portions on their respective marriages.

And therefore, by deed dated the 16th of February 1699, the said John Odell, sen. in pursuance of the power reserved to him by the above settlement, charged the estate therein comprised with £1500, to be paid to the said Henry Graydon and Thomas Brown; viz. £750 to each, for their said wives portions; and by his will of the same date, he confirmed this charge, and soon afterwards died in prison.

John Odell, the son, died about two years before his father, leaving his wife Constance, ensient with the appellant, who was soon after born; and the widow afterwards intermarrying with Sampson Cox, esq. they, as guardians of the appellant, entered upon and received the rents and profits of the whole settled estate; but neglected either to discharge the incumbrances, or pay the said portions.

Wherefore, in May 1700, Graydon and Brown, with their wives, exhibited a bill in the Court of Exchequer in Ireland, against the [66] said Sampson Cox, and Constance his wife, and the appellant, then an infant, praying a satisfaction of the said £1500 for their portions. To this bill the defendants put in their answer, and thereby admitted the articles and settlement containing the power to charge the estate, and the deed and will by which that charge was made; and also that Grizell and Mary were, at the time of the articles, unprovided for; but they insisted, that Odell the father, had no power to charge the estate with the £1500 for his daughters portions before the same was discharged from the incumbrances; nor even in that case, if his daughters were during his life-time married, or provided for.

On the 3d of July 1702, this cause was heard, when the Court decreed, that the plaintiffs should have and recover their several and respective portions of £750, with interest, out of the lands charged therewith, and liable to the same; and referred it to the Chief Remembrancer, to ascertain the value of those lands, and the several incumbrances thereon; and gave the plaintiffs leave to make the mortgagees and other incumbrancers, parties to the suit.

Soon after this decree, the suit abated by the death of some of the parties, and at the intercession of the appellant's friends, no farther proceedings were had till he became of age; when the cause being revived, he petitioned for a re-hearing, and accordingly, on the 25th of May 1720, the cause was re-heard, and the former decree affirmed.

From both these decrees, the present appeal was brought; and on behalf of the appellant it was contended (R. Raymond, T. Lutwyche), that the portions ought not to have been decreed against him, because his grandfather had no power to charge the estate, until after he had discharged it from all incumbrances, according to his covenant, and also, because the two daughters were married *in his life-time*, and otherwise provided for by him; and it was not pretended, that the power was executed until many years after the daughters were married. That if the £1500 was chargeable on the estate, yet after so long an acquiescence, as from the year 1702, the plaintiffs ought not to have interest, and thereby take advantage of their own laches: And besides, they had neglected to make the mortgagees and incumbrancers parties to the suit pursuant to the first decree. That it appeared by the deed and will of

Odell, sen. in 1699, whereby the respondents would charge the appellant's estate with £1500, that £750 thereof was expressly payable to the said Thomas Brown, the respondent Mary's first husband; and the other £750 to the said Henry Graydon, the late husband of the respondent Grizell; and therefore it was insisted, that the executor or administrator of the said Thomas Brown, ought to have been a party to the bill of revivor, and as the said Henry Graydon had died since the decree of the 25th of May 1720, the cause ought to have been revived in the name of his executor or administrator; and that therefore all the subsequent proceedings were irregular, for want of proper parties, viz. the legal representatives of Brown and Graydon respectively, to whom the £1500, if due, was made payable. [67] It was also insisted, that the appellant's mother, Constance, being a defendant to the original bill, and the cause being revived against her, and she afterwards dying in June 1719, all the proceedings since her death were irregular, for want of her legal representative; it appearing by the pleadings and proofs in the cause, that she had a great demand upon the estate in question; not only because the jointure-lands were £115 per ann. deficient, but also because all those lands, except £60 a year, were recovered from her by prior mortgages, in notorious breach of the covenants entered into by Odell, sen. upon his son's marriage. And therefore it was prayed, that for these errors and irregularities, the decrees might be reversed, and the respondents bill dismissed with costs.

On the other side it was argued (S. Cowper, S. Mead), that the respondents were entitled to their portions, under the same articles and settlement, by which the appellant claimed the estate; and were to be deemed purchasers as well as him, who enjoyed an estate of £1400 per ann. by virtue of that settlement. That the daughters were married in consideration of their said portions, and on an express agreement before their respective marriages, that their father should, by virtue of the power in that behalf reserved to him, charge the estate with the payment of such portions, and which he performed accordingly. That the acquiescence insisted on by the appellant, was in some measure occasioned by his minority and the interposition of his friends, who earnestly desired, that the first decree might not be carried into execution till he attained his full age; and this delay had been of great disadvantage to the respondents, by their being so long kept out of the receipt of their portions. And, that as they sought only to have these portions raised, it did not concern them to bring any other incumbrances on the premises before the Court; but if that objection had any weight, it was obviated by the decree, which directed an account to be taken of the several mortgages and incumbrances affecting the estate. It was therefore hoped, that the decrees would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the several decrees therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondents, the sum of £60 for their costs, in respect of the said appeal. (Jour. vol. 21. p. 564.)

[68] CASE 8.—JOHN IVIE,—*Appellant*; JOHN GYLBERTE, and others,—*Respondents* [6th February 1723].

[Mew's Dig. x. 1275, 1277, 1278 (*Ivy v. Gilbert*).]

Where a portion is directed to be raised by annual profits, and no particular time appointed for the payment of it, the portion is only due when the profits can raise it, and carries no interest in the mean time.

The above is only the statement of an abstract point in 2 Eq. Ab. 644. ca. 17. & 16 Vin. 443. c. 3.

The following, from 2 P. Wms. 13. seems correct.—“A trust term for raising daughter's portions, if it direct a particular method of raising the portions, implies a negative that they shall not be raised any other way.—

A trust-term to raise portions out of rents, issues, and profits, and by leasing for three lives or 21 years at the old rent; this extends only to raise the portions by annual profits of by leasing, and not by mortgage or sale: And if the trustee, in such trust-term, mortgages for the portion, the mortgage is [becomes] void [at the time] when the portion might have been raised by the profits."

Decree of Lord Macclesfield, C. affirmed; though it is said in *P. Wms* and 2 Eq. Ab. that it was thought a hard case: And Mr. Cox refers to *Pierpoint v. Cheney* (Ld.), 1 P. Wms. 493: *Lanoy v. Athol* (Duke), 2 Atk. 44: *Petre v. Petre*, 3 Atk. 511.

Though Equity will in general consider a charge on the rents and profits to raise portions, etc. as a charge on the land, if such charge be not restrained to the annual profits; yet if no time for payment be appointed, a sale shall not be decreed. Treat. Eq. i. c. 6. § 18. in. n. cites this case; and *Evelyn v. Evelyn*, 2 P. Wms. 669: *Okeden v. Okeden*, 1 Atk. 550.—Nor will Equity decree a sale of the lands if any other mode is prescribed by the conveyance to satisfy the charge; as if it contain a power of leasing or to mortgage the premises. Treat. Eq. *ubi supra* cites this case; and *Mills v. Banks*, 3 P. Wms. 1.—Nor indeed will Equity decree a sale in any case in which the rents and profits distinctly appear to have been exclusively intended to satisfy the charge. *Small v. Wing*, ante, [5 Bro. P. C. 66]. And see post, ca. 14 of this title [6 Bro. P. C. 114].

Prec. in Chan. 583: 2 P. Wms. 13: Viner, vol. 4. p. 474. ca. 20: vol. 15. p. 540. ca. 6; 548. ca. 3: vol. 16. p. 432. ca. 3; 438. ca. 11; 2 Eq. ca. ab. 644. ca. 16.

Roger Pomeroy, esq. being seised in fee, of the capital messuage, barton and demeene lands of Sandridge, and of the manor of Brixham, and of other lands and hereditaments in the county of Devon; by indenture dated the 29th of May 1651, in consideration of a marriage had between him and his then wife, and of £600 paid, or secured to be paid, as part of her portion, and in performance of articles, covenanted with trustees to levy a fine of all the said premises, to the use of Margaret Pomeroy, his mother, as to part of the premises, for her life; and as to the whole (subject to the estate so limited to his mother) to the use of him, the said Roger Pomeroy, for his life; and after, to the use of Joan his wife, as to part of the premises, for her life, for her jointure; with a remainder of the whole to his first and every other son, by his said wife Joan, in tail male; and for default of such issue, to the use of the trustees, for 120 years, upon trust, that they should and might raise, levy, and pay, out of the rents, issues, and [69] profits of the said capital messuage, barton and demesnes of Sandridge, and out of all other the premises, as well by demising, leasing, or granting, any particular tenements of the same, (the said capital messuage, barton and demesnes of Sandridge only excepted) for one, two, or three lives, at the most, in possession, reversion, or expectancy, or for any number of years, under 120 years, determinable upon the deaths of one, two, or three persons as\* for 21 years, or under, in possession; upon which grants and estates, the ancient rents and services, or more, should be reserved; unto one issue female of the said Roger, by his said wife, the sum of £1500, and if there should be more than one such issue female, then the trustees should and might out of the issues and profits of the said lands, or by demising, leasing, or granting the same, as aforesaid, raise and levy the sum of £20 more, to be equally divided between such issue female; and after such sum should be raised, then the manor, etc. and the said fine, should be to the use of the heirs of the said Roger Pomeroy, for ever.

The fine was accordingly levied, and by indentures of lease and release dated the 29th and 30th of March 1706, Roger Pomeroy conveyed the premises, to the use of himself for life, *sans waste*; and after his decease, to the use of trustees, for the term

\*or; In Reg. Lib. A. 1721 so. 458. the words are "upon trust to raise and pay out of the rents and profits of the said premises, and by leasing thereof for one, two, or three lives, etc. or for 21 years." 2 Cox's P. Wms. 13. in n.—In the report in 2 Eq. Ab. the word *sale* is unaccountably used for *lease*.

of ten years; and after the determination of the said estates, to the use of his nephew, Hugh Pomeroy, for life; remainder to trustees to preserve contingent uses; remainder to the first and every other son of the said Hugh Pomeroy, in tail male; remainder to the respondent John Gylberte, sen. for life, and after the determination of that estate, to the use of trustees to preserve contingent uses; remainder to the first and other sons of the said John Gylberte, in tail male, with remainders over: And as to the ten years term, the trust thereof was declared to be, that in case Humphrey Gylberte and Johan his wife, should at the request and costs of the said Hugh Pomeroy, or such other person or persons who, by virtue of any of the said limitations, after the death of the said Roger, should be entitled to the freehold of the premises, well and sufficiently release all their right to the £1500 directed by the settlement of 1651, to be raised out of the premises in the county of Devon, in trust for daughters as aforesaid; then the trustees should, out of the rents, issues, and profits of the premises, during the said term of ten years, raise £1900; and lay out the sum of £1500 part thereof, in the purchase of lands of inheritance in Devon, to the use of the respondent John Gylberte sen. and his heirs male, remainder to the said Johan Gylberte, daughter of the said Roger Pomeroy, and her heirs; and should pay the sum of £100 other part of the said £1900 to Elizabeth the wife of Gylberte Yard, for her separate use; another £100 to Humphry Gylberte, grandson of the said Roger; another £100 to Rawley Gylberte, another of his grandsons; and the sum of £100, remainder of the said £1900, to Hannah Voysoy, daughter of William Voysoy; and after the [70] £1900 should be raised, or if the person next in reversion, should, within six months after the death of Roger Pomeroy, secure the £1900 to be paid, within five years, to the approbation of the trustees, for the uses aforesaid; then and in either of the said cases, the trustees should be possessed of the premises, for the remainder of the said term of ten years, in trust for the next in reversion, expectant on the said term, and to fall in, and attend on the freehold and inheritance thereof.

Roger Pomeroy had issue by his said wife three children, namely Elias, his son, and Johan and Elizabeth his daughters; Elias died in the life-time of Roger, without issue; and Johan his wife, and Margaret his mother, also died in his life-time; as did Elizabeth his daughter, unmarried and without issue, having made her will, and thereof appointed her sister Johan executrix, who afterwards proved the same.

In July 1708, Roger Pomeroy died, leaving no other issue than his said daughter Johan, who, in his life-time, intermarried with Humphry Gylberte; and all the precedent uses and estates limited by the settlement of 1651, being determined, the said Humphry, in the right of Johan, became entitled to the £1500 and £20 charged upon the term of 120 years; and upon Roger's death, Hugh Pomeroy entered and took the profits of the premises, under the limitations of the settlement of 1706.

John Lampen, who was the surviving trustee of the said term of 120 years, having died intestate; letters of administration, as to that term only, were, on the 28th of February 1711, granted to the said Johan Gylberte.

The said Humphry Gylberte and Johan his wife, being entitled to the charge of £1500, Jonathan Ivie, the appellant's father did, by direction and appointment of the said Hugh Pomeroy, advance and pay the same; and as a security for the repayment thereof, by indenture tripartite, dated the 8th of May 1712, Gylberte and his wife assigned and set over to the said Jonathan Ivie, the said premises, for the residue of the said term of 120 years, and Hugh Pomeroy confirmed the same; under a proviso for redemption and re-assignment to the said Hugh Pomeroy, on his payment of £1500 and interest, on the 8th of November then following; and the said Hugh Pomeroy thereby covenanted to pay the same accordingly.

On the 8th of October 1715, Hugh Pomeroy died without issue, having made his will, and thereof appointed Gilbert Pomeroy executor; who afterwards died, having by his will made the respondent Daniel Pomeroy his executor. And upon the death of Hugh Pomeroy, without issue, the respondent John Gylberte sen. being next in remainder, entered and took possession of the premises.

On the 20th of January 1719, the appellant, as executor of his father, the said Jonathan Ivie exhibited his bill in the Court of Chancery against the respondents, to foreclose the equity of redemption of the premises. To which bill, the respondents Gylberte sen. and Gylberte jun. put in their several answers, insisting on the several

facts before stated; and the respondent Daniel Po-[71]-meroy by his answer denied assets of Hugh Pomeroy, come to his hands.

On the 13th of April 1722, the cause was heard before the Lord Chancellor Macclesfield; when his Lordship was pleased to declare, that by the intention of the deed of 1651, the £1500 was to be raised out of the rents and profits of the said premises, and by leasing thereof; and that in regard no time was appointed for the payment of the said £1500 the same could not carry interest during the life of Hugh Pomeroy, who ought to have applied the rents and profits of the said premises towards raising the said £1500. And that Johan Gylberte, having taken out administration to John Lampen, the surviving trustee of the term in question, and being entitled to the said £1500, and the plaintiff's father afterwards suffering the said Hugh Pomeroy to receive the rents and profits of the premises, and taking a covenant from him to pay the money, the said Hugh Pomeroy's receipts of such rents and profits, ought to be taken to be the receipts of the plaintiff's father; and therefore his lordship did think fit, and so order and decree, that it should be referred to a master, to take an account of the rents and profits of the mortgaged premises from the date of the mortgage to the death of the said Hugh Pomeroy; in the taking of which account the master should make all just allowances, and such profits as the master should find to have become due during all that time, were to go to sink the plaintiff's demand of £1500 for which the said master was not to compute any interest during that time; and what, upon the said account, should appear to be remaining unsatisfied of the plaintiff's demand of £1500 deducting such profits received as aforesaid; it was ordered and decreed, that the defendant John Gylberte sen. should answer and pay the same, together with interest and the plaintiff's costs of suit, to be computed and taxed by the master, out of the rents and profits of the said estate, or by leasing thereof; for which he was to come to an account before the master, and was to answer interest for what, upon the said account, he should appear to have received from the time he received the same: But in taking the account aforesaid, what should appear to have been received by Hugh Pomeroy, was to be paid to the plaintiff, together with interest and costs, to be computed and taxed by the master, out of the assets of the said Hugh Pomeroy, come to the hands of the defendant Daniel Pomeroy, or to the hands of Gilbert Pomeroy, so far as Gilbert left assets which came to the defendant Daniel's hands. And for that purpose, the master was to take an account of the assets of the said Hugh Pomeroy, come to the hands of the defendant Daniel, or of Gilbert Pomeroy, as also of the assets of the said Gilbert Pomeroy, come to the said defendant Daniel's hands; and it was further ordered and decreed, that the master should see how the estates stood at the time of the said Hugh Pomeroy's death, and what monies might have been raised, by filling up leases by the said Hugh Pomeroy; and after the master's report, his lordship would give further directions, how far the defendant Gylberte should be [72] chargeable therewith: And it was further ordered and decreed, that the master should take an account of the profits of the premises, received by the said Hugh Pomeroy, before the date of the said mortgage; and what, upon the said account, should appear to have been so received by him, was ordered to be paid to the defendant Gylberte, according to the course of administration; and for the better clearing the said several accounts, all parties accounting were to be examined upon interrogatories, as the master should direct: And the injunction formerly granted, for stay of the defendants proceedings at law, was continued.

From this decree the plaintiff appealed; for that as it stood, he, though the executor of a mortgagee for £1500 and about £600 interest, was turned round from a real security to not only a personal security, but, in effect, to none at all.—For here must be first an account taken, at above ten years distance, of the profits of the estate received by Hugh Pomeroy, from the date of the mortgage; and after that, an account of his assets, in order to gain a satisfaction for such profits, from an executor of an executor, who had denied assets; to both which accounts the appellant was a perfect stranger, and therefore liable to be over-charged, for want of the accounts and vouchers of the out-goings, and at last, likely to lose the whole profits; which, as given out by the respondents themselves, would be much more than half the debt.—And in further support of this appeal, it was argued (T. Lutwyche, W. Peere Williams), that the money to be raised, was for daughters portions, which, in their



nature, require to be paid in gross or entire sums, and was to be raised, as well by rents or profits, as by leasing for lives; and consequently might have been raised by a mortgage or sale of the trust-term, which, being for 120 years, was an estate in law sufficient for that purpose; and it could not be the intent of the settlement, to oblige the trustees immediately to enter on the estate, and that only the *immediate* profits, from the death of Hugh Pomeroy, should be applied to the payment of the portions; when the trustees had so long a term as a security, and might have entered at any time within the term. That as the nature of a daughter's portion requires it to be paid in an entire sum, so the support of the next taker of the estate, subject to the charge of a portion, requires that it should not be raised by *annual* profits; since that would, in many cases, be a means of starving the heir of a family, whose provision must be supposed to be intended, equally with that of the daughters; and especially where, as in the present case, the next taker, Hugh Pomeroy, nephew and heir male to Roger, was only tenant for life. It is a general rule in equity, that a tenant for life is, out of the annual profits, to keep down the interest of prior charges and incumbrances; and this was understood by all the parties to be the justice of the case at the time of making the mortgage; the principal portion (within £20) being then taken up on the mortgage, to continue a charge upon the estate; and the interest which had accrued from Roger Pomeroy's death, being paid off by Hugh, the tenant for life, who received the profits; [73] and the respondent Gylberte sen. was doubtless of the same opinion, when he, after the death of Hugh Pomeroy, paid the appellant's father part of the interest, and gave him notice also of paying in the principal; and this opinion of his was further evident from hence, that he, whilst administrator to the surviving trustee, and when, consequently, he had the estate in law in the term, permitted Hugh Pomeroy to continue in possession, and apply the profits to his own use. That it was apprehended no precedent came up to this decree, and that this might be a case of general extent, and therefore of great consequence, as well in relation to heirs, as to daughters portions, in all family-settlements, where the trusts for raising portions are often expressed in terms much the same as in the present case. But, supposing the appellant and his father were bound to take the mortgage-money, by receipt of profits only; yet, the appellant's father could not enter on the estate, till failure of payment of his money, at the time appointed by the mortgage, which was six months after its date; notwithstanding which, the profits of the estate, from the date of the mortgage, were decreed to go to sink the debt, and that for this reason, as mentioned in the decree, that the appellant's father suffered Hugh Pomeroy to receive the profits; and yet, by the same decree, the respondent Gylberte sen. was permitted to continue in receipt of the profits, whereby the like inconvenience might happen on his death, as had already happened on the death of Hugh Pomeroy, whose representative denied assets. That the appellant had the legal estate in the 120 years term, which was created to raise the portion, and on a mortgage of which, the money had been advanced to pay that portion, even to the father and mother of the respondent Gylberte sen. who claimed under a voluntary settlement; and would now have the appellant lose the greatest part of it, without any imputation of fraud, either in him or his father: And therefore it was prayed, that the decree might be reversed, and the usual order in cases of foreclosure made, viz. That the respondent do pay the principal, interest and costs, by a short day, or be foreclosed from all equity of redemption.

On the other side it was contended (N. Fazakerly, C. Wearg), that the plain intention of the deed of 1651, appeared to be, that the £1500 should be raised by the rents and profits of the premises comprised in the 120 years term, or by making leases thereof, according to that deed, and not by way of mortgage. That there was no express power given to the trustees, to mortgage the premises for raising this £1500; but they were expressly directed to raise it out of the rents, issues, and profits, or by leasing for three lives, or 21 years. The primary sense of raising money out of rents and profits, is to raise it as they arise; and though in some particular cases, depending on particular circumstances, a direction to raise out of rents and profits, has been held to give a power to raise the money by mortgage; yet, that is, where the intent of the parties does not appear otherwise, and where other circumstances occur, which make it necessary to raise by mortgage, lest the intent of the parties should [74] be frustrated. But nothing of that was in this case; here the £1500 was not to be paid

at any day certain, and the power of leasing seemed an unnecessary power, if the trustees had a power to raise the sum, by mortgaging the premises for a greater time; and though the capital messuage, barton and demesnes of Sandridge, were included in the said term of 120 years, for raising the said £1500; yet, so far was it from being the intention of the deed, that the same should be mortgaged by the trustees for the whole of that term, that they were even restrained from leasing the same for the term of three lives, or 21 years. That to construe this deed, so as to enable the trustees to raise the £1500 by way of mortgage, would give them a power to raise the whole, by anticipation of the profits, immediately upon the commencement of the term; whereas express care was taken by the deed, how far only the money was to be raised in that manner; viz. by leasing part of the premises for three lives, or 21 years, neither was there a power to raise any interest for the money, out of the profits of the estate. That by the deed of 1706, there was only a term of ten years created, for raising the sum of £1900, in which sum, the said £1500 was included; and though this could not alter the deed of 1651, yet it might well explain the intent thereof, both deeds being made by the same person, and by consequence was intended to affect the first person who came into possession, and not those in remainder. That when the legal interest of the term was in Johan, by taking administration to the surviving trustee, she was both trustee of the term, and also legal trustee for the £1500; and therefore ought to have the profits applied, to sink her demand; and had it not in her power to exempt Hugh Pomeroy, the then present possessor, and lay the load upon him in reversion. That the appellant's father, having taken an assignment of the term, upon advancing the money, with full notice of the trust, could not be esteemed otherwise than as an assignee of that trust; and he having, by his express covenant in the mortgage, agreed that Hugh Pomeroy should receive the rents and profits, without account, the receipt of such rents and profits by Hugh, could not be otherwise taken than as the receipt of the appellant's father, and consequently ought to be applied to sink the said debt of £1500. That a construction to raise money by mortgage, would leave it in the power of Hugh Pomeroy, by suffering an arrear of interest, to load the next remainder-man, not only with the principal, but all the interest: which would be very hard upon him, especially since there was no provision by the deed of 1651, that the estate should be liable to pay any interest: And therefore it was hoped, that the decree would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed (Jour. vol. 22. p. 253.)

[75] CASE 9.—THOMAS RERESBY, and Ux.,—*Appellants*; THOMAS NEWLAND—*Respondent* [14th February 1723].

[Mew's Dig. x. 1279.]

The trust of a term was for raising a portion for a daughter, in default of issue male, payable at 18 or marriage, *or as soon after as the same might conveniently be raised*. The mother died, leaving no son, and only one daughter; Held, that this portion could not *conveniently* be raised, by sale of the reversion of the term, in the father's life-time.

DECREE of Lord Macclesfield, C. AFFIRMED.

The general rule that portions may be raised by the sale of reversionary terms in the life of the tenant for life, cannot be got over; though, on the other side, there are cases in which it has been refused. But this must depend upon the circumstances of the deed, and the intent of the parties. And *first*: If a portion is directed to be paid at 18, or day of marriage, and the term is absolutely vested, there the daughter shall not expect during the life of her father; but it may be sold in the father's lifetime, although a term in remainder and not in possession.—*Secondly*; If the trust of the term had been upon a condition precedent; as to commence, if the father die without issue male by his wife, in trust to raise portions for daughters; there, if the wife be dead without issue male, leaving a daughter, though the father is living, the term has been decreed to be sold. For in equity the father is taken to be

dead without issue, when the wife is dead by whom he was to have issue: all that is contingent there, has happened by the death of the wife without issue male; and the husband must die, and when he dies it must be without issue male by that marriage, so that this is in truth a remainder, and depends no longer on a contingency.——Thus far the Court has gone for convenience, that young women may have their portions when they most want them, or else the father might live so long that the portion might be of little service. But, *thirdly*; If the agreement is that the portion should be paid after his death, it is hard to make it payable in his lifetime. For it would be to no purpose for any one to make deeds, if the argument of convenience or inconvenience should prevail to over-rule them: and the cases on this head have gone too far already, and mangled all estates: and therefore the Court will never decree portions to be raised in the father's lifetime, where the deed can possibly bear any other construction. See Treat. Eq. lib. 2. c. 8. s. 6: citing *Corbett v. Maydwell*, 1 Salk. 159: 2 Vern. 656: *Graves v. Mattison*, T. Jones, 201: *Gerrard v. Gerrard*, 2 Vern. 458: *Staniforth v. Staniforth*, 2 Vern. 460: *Butler v. Duncomb*, 1 P. Wms. 448: 2 Vern. 760: (all of which are also reported in 1 Eq. Ab. tit. Portions:) and the present case of *Reresby v. Newland*.

Mr. Fonblanque, in his note on the above passage, observes, that although the cases referred to, (*Graves v. Mattison*; *Corbett v. Maydwell*; *Gerrard v. Gerrard*; *Staniforth v. Staniforth*,) have never been directly over-ruled; yet in subsequent cases they have been considered as determinations in their principle so replete with inconvenience, that they ought to govern only cases precisely similar in all their circumstances; and refers to *Sandys v. Sandys*, 1 P. Wms. 707: *Kebblethwaite v. Cartwright*, Forrest. 31: [and see 2 Eq. Ab. 650, c. 31:] *Hall v. Carter*, 2 Atk. 354: *Lyon v. Chandos*, D. 3. Atk. 416: *Smith v. Evans*, Ambl. 633: *Conway v. Conway*, 3 Bro. C. R. 267. In those cases therefore, which can be distinguished from them, the Court will not decree the portion to be raised in the lifetime of the father or mother, as *where all the contingencies have not happened*. *Butler v. Duncomb*, 1 P. Wms. 448. *Reresby v. Newland*; the present case, See side-note. *post*, p. 79.——Or where maintenance is provided out of the rents and profits, after the term limited to raise the portion should take effect in possession. *Brome v. Berkley*, *post*, case 13 of this title—*Stevens v. Dethwick*, 3 Atk. 39: *Goodall v. Rivers*, Mosely 395: *Churchman v. Harvey*, Ambl. 335, and see *post*, *Evelyn v. Evelyn*, case 14 of this title.

Where there is a power, in a trust term to raise portions, that the father, with consent of the trustees, may revoke all the uses; this suspends the portion, and it cannot be raised until after the father's death.

2 P. Wms. 33. Viner, vol. 16. p. 432, note to ca. 21; 445. ca. 5. and note; 496. ca. 14: vol. 21. p. 426. ca. 8: 2 Eq. ca. ab. 644. ca. 15: 672. ca. 7; and note: 746. ca. 1. and note.

By indentures of lease and release, dated the 24th and 25th of November 1682, made previous to the marriage of the respondent and Mary his wife, the father and mother of the appellant Mary, and by a fine levied in pursuance thereof, in consideration of [76] the then intended marriage, and of £2500, the marriage-portion of the said Mary, and for the settling a jointure upon her, and for the advancement of the issue male of the said marriage, and raising competent portions for the issue female, in case of no issue male, William Newland and Mary his wife, the respondent's father and mother, together with the respondent, did convey to Sir John Matthews and John Gardner and their heirs, the manors of Chamberlyns and Challers, in East-Reed, and elsewhere, in the county of Hertford, with their appurtenances, and other the premises therein mentioned, to the use of the said William Newland, his heirs and assigns, until the solemnization of the said marriage; and afterwards, as concerning the manors of Chamberlyns and Challers, and the capital messuage of Newsall's, and the premises thereunto belonging, and all other the manors, messuages, and lands in

the said indenture of release mentioned, except the lands purchased of Gilbert *alias* Goodfellow, and the cottage and close called Morris's, to the use of the respondent for life, without impeachment of waste; and after the determination of that estate, to the use of Richard Nicoll and his heirs, during the life of the respondent, to preserve contingent remainders; and after the respondent's death, upon trust, that the said Mary, his intended wife, should, during her life, receive thereof £250 per ann. And as touching the freehold and inheritance of the same premises, charged with the said £250 per ann. from and after the death of the respondent, to the use of the first and other sons of the respondent, on the body of the said Mary begotten, in tail male successively; and for default of such issue, and in case the said Mary should be *ensient* of a child, at the respondent's death, then in trust for such posthumous child, in case it should be a son, and to the use and behoof of him and the heirs male of his body; and for default of such son, and the heirs male of his body, then to the use of the said Richard Nicoll and Edward Rudge, their executors, administrators, and assigns, for 500 years, upon the trusts aftermentioned: And after the determination of the said term, to the use of the respondent and his heirs for ever. And as concerning the said excepted lands, to the use of the respondent in fee. And the said term was declared to be upon trust, that the said trustees should, out of the rents and profits of the premises, so limited to them, or by sale, demise, or mortgage thereof, or of a competent part thereof, raise and pay the several sums after mentioned, as well for the maintenance and education, as for the portion or portions, of the daughter or daughters of the respondent, by the said Mary, in case of failure of issue male of their two bodies, viz. £3000 in case of but one daughter, for the portion of such daughter; and in case of two daughters, and no more, £2000 a-piece; and in case of more than two daughters, £4000 to be equally divided among them, for their portions, and to be paid at their respective ages of 18 years, or days of marriage, which should first happen, or within as short a time after as the same should or might be conveniently raised; the elder of the daughters [77] to be first paid: And for the yearly maintenance of such daughter, or daughters, until her or their portion or portions should or might be raised as aforesaid, if there should be but one, the yearly sum of £50, and if two, or more, the yearly sum of £35 a-piece, to be paid to such daughter or daughters, at the two most usual feasts, or terms in the year; that is to say, at the feast of St. Michael the Archangel, and the feast of the blessed Virgin Mary, by equal portions; the first payment thereof to begin at such of the said feasts, as should first happen, *next after the death of the respondent; it being the true intent and meaning of the parties, that no yearly maintenance should be due to, or raised for, any such daughter or daughters, during the life of the respondent.*

Provided always, and it was declared and agreed, by and between the said parties that after the said several sums or portions should be raised and received; or if the respondent should die without any daughter by the said Mary, *living at his decease*, and she should not be then *ensient* of a daughter, which should afterwards be born and live; or if all such daughters should die before such age of 18, or days of marriage; or if such person or persons, to whom the immediate reversion or remainder, expectant upon the said term of 500 years, for the time being should appertain, should well and truly pay or cause to be paid, or sufficiently secure or cause to be secured, the several and respective sum and sums of money before mentioned to be raised, for the portion or portions of every such daughter or daughters to be begotten, as aforesaid, to be paid to every of them, within three months (accounting 28 days to the month) after their respective age or ages of 18 years, or days of marriage, which-soever should first happen; and also for her and their maintenance and education in the meantime, as aforesaid: Or if all the daughters of the respondent, on the body of the said Mary to be begotten, should be by him preferred in marriage, *with such portions as aforesaid*, in his lifetime; that then the said Richard Nicol and Edward Rudge and their assigns, should dispose of the residue of the rents and profits of the premises, during the residue of the said term of 500 years, to them limited as aforesaid, and should stand and be possessed and interested, for and during the residue of the said term, upon trust, and for the benefit of the person or persons, to whom the immediate remainder or reversion of the premises, expectant upon the said term, should, for the time being, appertain; and to go with and attend the inheritance thereof, according to the limitations before contained, and should assign, surrender,

and yield up their estate and interest accordingly, upon reasonable request in that behalf; yet nevertheless it was declared by all the said parties, that in case all the issue male of the body of the respondent to be begotten on the body of the said Mary, should fail, before either of the said sons begotten between them should be preferred in marriage, and before such time, as all the daughters of the respondent, on the body of the said Mary, should be preferred in marriage; that then the daughter and daughters, so not preferred in marriage, should have such portion or portions, as was before expressed: And in case any sum should be raised or received for portions, and all such daughters should die before the same ought to be paid, as aforesaid; that all the monies so raised and received, should be paid to the person or persons, to whom the immediate reversion or remainder, expectant upon the said term of 500 years, should appertain.

Then follows a proviso for the respondent to lease for 21 years, at the best improved rent, subject to the said annuity of £250, and another proviso, that it should be lawful for the respondent and the said Mary his intended wife, and for the respondent alone, in case he should survive her, by and with the consent of the said Sir John Matthews and John Gardner, or their heirs, or the heirs of the survivor of them, and together with them, or their heirs, or the heirs of the survivor of them, by any deed, or deeds, writing or writings, sealed and subscribed, *in the presence of two or more credible witnesses*, to alter, revoke, frustrate, determine, extinguish, and make void all and every, or any of the use and uses aforesaid; and to limit or appoint any other use or uses, as the respondent and the said Mary, and the respondent alone, in case he survived her, by and with the consent of the said Sir John Matthews, and John Gardner, or their heirs, or the heirs of the survivor of them, should think meet; and should, by such deed or deeds, writing or writings, *in such presence as aforesaid*, limit or appoint.

The marriage, soon after executing of the said indentures, took effect; and the said Mary in some time after died, leaving issue by the respondent one son, named Thomas, and one daughter, the appellant Mary; which son, on the 19th of March 1703, died under age and without issue.

The appellant Mary had, before her brother's death, attained her age of 18 years, and thereby, as being wholly unpreferred, and the only daughter and surviving issue of her said father and mother, she became entitled to the sum of £3000, so limited and secured to be raised and paid for the portion of such only daughter: And the appellant Thomas Reresby, having married the appellant Mary, became entitled in her right to the said portion, together with interest for the same, from the death of her said Thomas, the appellant Mary's said brother.

But the respondent having married a second wife, by whom he had several children, insisted, that the appellant Mary's said portion of £3000 was not payable, unless she survived him; and therefore the appellants in Michaelmas term, 1718, exhibited their bill in the Court of Chancery, against the respondent, and the representative of the trustees; praying that the appellant Mary's said portion of £3000, with interest for the same from the death of the said Thomas Newland, her brother, might be forthwith raised, by sale or mortgage of the said term of 500 years, and paid to the appellants; and, that the respondent and the trustees, might be restrained from evoking the uses of the said settlement.

The respondent, by his answer to this bill, admitted the said [79] indenture of settlement; that the said marriage took effect; that his said late wife died about 25 years ago; that he had issue by her, six sons, who all died before the age of 21, unmarried; that he had no daughter by her, except the appellant Mary; that the appellant Mary's said brother, Thomas Newland, one of the said six sons, survived his mother, and also all the other issue male of the said marriage; and died about the 19th of March 1703, under age and unmarried; and that the appellant Mary had, before his death, attained her age of 18 years, and was not preferred with any portion: But he denied, that the appellant Mary, thereby, or otherwise, became entitled to the said 3000 portion to be raised forthwith, or that the same ought to be raised and paid, with interest from the death of the said Thomas Newland, her brother; and said he was advised, that by the tenor and construction of the said deed, the said £3000 did not become due to the appellant Mary, upon her said brother's death, nor could be due to her, or ought to be raised, until after his the respondent's death, in case she should be then living; and that in case she should be then dead, the same would not

be raisable, nor ought to be raised, nor would the estate be in such case chargeable therewith: He also denied, that he ever threatened to procure the consent of the trustees to revoke or alter the uses of the said settlement.

On the 20th of February 1722, the cause was heard before the Lord Chancellor Macclesfield; when his Lordship, upon the construction of the settlement, declared, he saw no cause to relieve the appellants as to the raising of the said £3000 in the life-time of the respondent; and therefore ordered, That the bill, so far as concerned that demand, should stand dismissed.

From this decree the appellants appealed, insisting (T. Lutwyche, S. Cooper, that, according to the tenor and true meaning of the settlement, the right to the appellant Mary's portion actually vested in her at the time of her brother's death, she having then attained her age of 18, and being wholly unprovided for; at which time, or marriage, or in as short time after as the same could or might be conveniently raised, the said portion was, on failure of issue male, expressly to be paid. That by the express words also of the deed it was declared, *that in case all the issue male of the body of the respondent, to be begotten on the body of the said Mary, should fail before any or either of them should be preferred in marriage, and before all their daughters should be preferred in marriage; that then such unpreferred daughter or daughters, should have such portion and portions as aforesaid*: And there being no negative put upon the payment of the portions, as there was on the maintenance, during the respondent's life, demonstrated it to be the intent of the parties, that the portions should be paid at the times before appointed; and not that the daughters should wait for the payment until their father's death, or that the right to the portion should depend on the contingency of the appellant Mary's being living at her father's death. It was therefore conceived, that the appellant [80] Mary, immediately upon the death of her brother Thomas, became entitled to the said £3000 portion, and that the same ought to have been forthwith raised and paid accordingly; but if this portion was not raisable till after the respondent's death, yet even in that case, the bill ought not to have been dismissed, but should have been retained until it should be known whether the contingency happened.

On the other side it was said (P. Yorke, C. Wearg), that from the whole scope and tenor of the settlement, it appeared not to have been the intention of the parties, that the daughters should be enabled to compel the raising of their portions during their father's life-time; for the words were very express, that no maintenance was to be paid during his life-time, nor any portions, but to such daughters as should be living at his death. That all possible care was taken in this settlement, to oblige the respondent's children, as well sons as daughters, to their duty and obedience to their father: and for this reason it was not only declared, that the daughters should have no maintenance during their father's life, nor any portion unless living at his death; but there was also a power left in the father, with the consent of the trustees, to revoke all the uses of the settlement: And therefore, to give the appellant Mary her portion in her father's life-time, would be to make a new settlement, and to render his power of revocation, and the provident care he had taken to keep his children in their duty, fruitless and ineffectual. That if settlements, made with great consideration and prudence, were broke into in such instances, it would tend to the ruin of families, not only by making daughters independent of their fathers and thereby more liable to become a prey to designing persons; but also by bringing heavy loads upon estates, by the sale or mortgage of reversionary terms; which was never intended, nor could be done but at a great disadvantage. That no right to this portion was yet vested, for the meaning of the clause so much relied on by the appellants, was only to ascertain, that in case of such failure of sons, an unpreferred daughter should have the like sum for her portion, as if there had been no son born of the marriage; but, notwithstanding that, her portion would still depend upon and be subject to the same contingency, viz her being living at the respondent's death, and his not revoking the uses of the settlement; the declaration of the trust of the term being entire, and to be construed and taken all together. It was therefore hoped, that as the appellants had commenced their suit, when they had no right accrued, nor any demand in equity, the dismissal of their bill was just, and ought to be affirmed.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed; and that so much of the decree, as was therein complained of, should be affirmed. (Jour. vol. 22. p. 259.)

[81] CASE 10.—WALTER BAGENAL,—*Appellant*; ANN BAGENAL, Widow, and others,—*Respondents* [31st March 1725].

[Mews' Dig. x. 1267.]

A term is created for the purpose of raising out of the yearly profits, several sums for the maintenance and education of younger children, until their portions become due; and then, upon trust, for raising such sums of money out of the estate, not exceeding £2000, as the father and mother, or the survivor of them, should appoint: Held, that this £2000 should carry interest from the time that it might have been raised out of the yearly rents and profits of the lands; and an enquiry was directed in order to ascertain that time.

DECREES of the Irish Chancery REVERSED; in part. See Notes to Cases 8 and 9, and ante, Case 2 [6 Bro. P. C. 43].

After publication, the plaintiff files a supplemental bill, and examines witnesses to prove matters which were in issue in the original cause: Held to be irregular, and the supplemental bill dismissed. 2 Eq. Ab. 172. c. 4: Vin. iv. 439. c. 8; xii. 114. c. 9. If there be no proof to the new matter in the supplemental bill, it must be dismissed. 4 Vin. 439. c. 9. cites MSS. Tab.

Viner, vol. 16. p. 442. note to ca. 1: 2 Eq. ca. ab. 646. ca. 20.

Dudley Bagenal, esq. deceased, the appellant's father, being seised in fee of the manor, town, and lands of Dunleckny, and other manors and lands in the county of Carlow, in Ireland; did, in the month of May 1668, upon his intermarriage with the respondent Ann, in consideration of £1500, her marriage portion, convey the said manors and lands to trustees, to the use of himself for life, and afterwards, as to a considerable part thereof, to the use of the respondent Ann, as a jointure, for her life; and as to all the estate, after their deaths, to their issue male; with several remainders over. Subject to a power of revoking or altering the said uses and remainders, except the use limited to the respondent Ann.

The marriage took effect, and the said Dudley had issue by the said Ann, the appellant, their eldest son, Nicholas, George, and Dudley Bagenal junior, and Ann, Helen, Catherine, and Mary Bagenal.

On the intermarriage of Ann, his eldest daughter, with Sir Gervas Clifton, bart. it was, by articles dated the 16th of June 1687, agreed, that the said Dudley should pay Sir Gervas £7000 as a portion; viz. £2000 immediately, which was accordingly paid, £2000 more to be secured by mortgage of the said Dudley estate, and the remaining £3000 on a contingency which never happened.

Dudley Bagenal afterwards, by deeds of lease and release dated the 16th and 17th of October 1688, conveyed all his estate to trustees and their heirs, to his own use during his life; and afterwards, as to the said jointure lands, with an additional jointure, to the respondent Ann for her life; and as to all the rest of the estate after the said Dudley's death, and as to the said jointure after the death of his wife, to the use of Walter Butler and Patrick Colclough, other trustees, for 500 years, upon the trusts therein mentioned; with remainder to the appellant for life; remainder to his first and every other son in tail male; with several remainders over; and with a power for those in remainder, to make leases for any term not exceeding 21 years, at the full improved rent, and without taking any fine.—The term of 500 years was [82] declared to be upon trust, that the trustees and the survivor of them, his executors, administrators, and assigns, should, out of the yearly profits of the estate, raise and pay several yearly sums for the maintenance and education of the said children, until their portions became due; and then, upon further trust, for the raising such sum and sums of money out of the estate, not exceeding £2000, as the said Dudley Bagenal and Ann his wife, or the survivor of them, should limit and appoint: Which power was intended and reserved, for paying the £2000 agreed to be paid to Sir Gervas Clifton, and to be secured by mortgage of the estate as aforesaid, and for no other purpose.—And it was also agreed, that the trustees, or the survivor of them, his executors, administrators, or assigns, should mortgage, lease, set over, or assign the said estate, for all or any part of the said term, for raising the sum of £5000 for the portions of the said younger children, as the said Dudley and Ann his wife, or the survivor of them, should appoint.

Mr. Bagenal, in pursuance of the marriage articles of June 1687, did in 1693, or 1694, or at some other time after the year 1688, execute a deed which was made to bear date the 16th of October 1688, and thereby bargained and sold unto Sir Gervas Clifton, all the said Dudley's estate, for 500 years; upon condition to be void, on payment to Sir Gervas of £2000 in a month after he should settle £500 per ann. jointure on his wife. And which deed was intended as an execution of the power reserved in the settlement of the 17th of October 1688, for raising the said sum of £2000 as aforesaid.

The said Dudley Bagenal was afterwards attainted of high treason, on account of the rebellion in 1688, and all his estate became thereby forfeited, and vested in king William and queen Mary. Whereupon Sir Gervas Clifton presented a petition to their majesties, for relief as to the said £2000 and interest, and obtained an order for referring the matter to the attorney-general, who, in the year 1695, made a report, that his case was very compassionate; and the then lord deputy of Ireland having signified to the lords of the council in England, that he agreed with the said report; Sir Gervas and the respondent Ann, who was very active in managing this matter, thereupon procured an order to receive some money, and did accordingly receive some money out of the said forfeited estate.—But the most part of the £2000 still remaining due, and the estate being by act of parliament vested in the trustees for sale of the Irish forfeitures, whereby Sir Gervas's order for receiving the money became of no effect, and the appellant being willing to make Sir Gervas what satisfaction he could towards the same; certain articles were, on the 22d of June 1700, entered into between the respondent Ann of the first part, the appellant of the second part, and Sir Gervas Clifton of the third part, reciting the articles of the 16th of June 1687; that Sir Gervas had settled the said jointure of £500 per ann. on his wife; and that it was doubtful, whether he could in law or equity, by virtue of the articles only, charge the said Dudley's forfeited estate for life [83] with the said £2000; and also reciting, that the said Dudley made the settlement of his estate in October 1688, with a power for him and his wife, or the survivor of them, to charge the same with any sum not exceeding £2000; and further reciting, that during the said Dudley's life, by his attainder, they became incapable of executing the said power; but that if the said Ann survived, she might charge the said sum on the estate, for the benefit of the said Sir Gervas; and that the said Ann and the appellant thought themselves obliged to do what they could, to secure the said £2000, or part thereof; and in consideration of 5s. paid her pursuant to an agreement made between her and the appellant, the respondent Ann thereby agreed, that if she should survive the said Dudley, she would, within a month after his death, charge the term of 500 years with the said £2000, as required by Sir Gervas, and for his use, or with so much thereof as should be then deficient, without interest; and the appellant did thereby also agree, that if the said Ann should die before Dudley, so that the said £2000 could not be charged for Sir Gervas, that then the appellant would secure the sum of £1000 to Sir Gervas, as council should direct; and in case the respondent Ann should live, and charge the estate with the said £2000, that Sir Gervas should give four years for the payment thereof, without interest; but if he should recover the £2000 out of the said Dudley's forfeited estate, then this agreement was to be void.

The appellant claimed his remainder in the estate under the aforesaid settlements, before the trustees of Irish forfeitures, and was decreed to the same accordingly. The respondent Ann also claimed, and was allowed her jointure; and the said Nicholas, George, Dudley, and Helen, being then all minors, by their guardian claimed, and were allowed their interests in the premises; and John Butler, executor of Walter Butler, the surviving trustee of the 500 years term, claimed and was decreed to the same.

Sir Gervas Clifton also was allowed his claim to the £2000, and afterwards received the same out of the estate, during the life of Mr. Bagenal the father, in full satisfaction of the £2000 wherewith the estate, or the term, was chargeable.

The said Dudley Bagenal and the respondent Ann his wife, by deed dated in December 1702, apportioned the £5000 in manner following; viz. to Helen, then married to Sir John Hales, the sum of £1900, to Dame Ann, wife of the said Sir Gervas, being provided for before, £5, to Mary and Catherine, £100 each, to Nicholas and George £1000 a-piece, and to Dudley junior, £895.



The forfeited estate for life of Dudley Bagenal, continued in the trustees of forfeitures and their purchasers till his death, which happened in July 1712; before which time, all his children arrived to their respective ages of 21, and all their portions were then payable. And the appellant thereupon became entitled to all the estate, except what was limited to the respondent Ann for her jointure. Sir John Hales and his wife, and George Bagenal pressing for payment of their portions; the appellant procured Thomas [84] Acton, esq. to advance and pay them the same, upon the appellant's joining in a conveyance of their share and interest in the £5000 and the 500 years term. But the respondent Nicholas having been found a lunatic, and the care of him committed to the appellant, he maintained him for the space of fourteen years, and expended therein, and in endeavouring his cure, the sum of £700. The appellant also paid his sisters Mary and Catherine their several portions of £100 each.

The appellant being willing to have all these portions raised and paid, endeavoured so to do by making leases of part of his estate, out of the said term of 500 years, at the same rents which the tenants then actually paid, upon leases made about six years before; and by selling the surplus advanced rent at 17 or 18 years purchase. And he accordingly made agreements with some of the tenants for that purpose, and requested John Butler, as the representative of the surviving trustee of the said term, to join and concur with him in those measures: But Butler, colluding with the respondent Ann, not only refused so to do, but brought an ejectment for recovery of the appellant's estate, by virtue of the term; and in Michaelmas term 1714, judgment was obtained thereon, and possession taken from the appellant accordingly.

Soon afterwards, Butler assigned over the term and his trust to the respondent Benjamin Burton; who also refused to execute the trust, by raising the portions according to the directions of the settlement of 1688; but continued in the receipt of the rents and profits of the estate.

On the 24th of April 1716, the respondents Ann, Nicholas, and Dudley Bagenal, together with Philip Savage, esq. preferred their bill in the Court of Chancery in Ireland, against the appellant and the respondent Burton, the respondent Ann and the said Savage thereby praying to be decreed the sum of £2000 and interest, out of the appellant's estate; alledging, that the respondent Ann had charged the same by deed of the 6th of February 1712, to be paid to the said Philip Savage, according to the power in the settlement of 1688, for that purpose; and the respondents Nicholas and Dudley, prayed to be decreed their said several portions.

The appellant by his answer to this bill, declared his willingness that his brother's and sister's portions should be raised and paid according to the settlement, but as to the £2000 alledged to be charged for the benefit of the respondent Ann, the appellant insisted, that she was not entitled thereto; that money having been intended for Sir Gervas Clifton, and he having received the same out of Dudley's forfeited estate as aforesaid. And the respondent Burton also answered, and admitted the trust term to have been assigned to him.

On the 12th of May following, the appellant preferred his cross bill against the respondents and others, to compel the respondent Burton to join in making the leases out of the said term, or otherwise by means thereof, to raise the said sum of £5000 for the portions; and for relief against the respondent Ann's demands.

[85] Both causes being at issue, and witnesses examined, were heard before the Lord Chancellor of Ireland, on the 27th of May 1717; when his Lordship was pleased to decree the payment of the said £2000, with interest from the date of the deed by which the same was charged on the said estate; and that the respondents Nicholas and Dudley Bagenal should have their portions, with interest from the death of their father.

Soon after this decree, the appellant, by chance, found one part of the articles of the 22d of June 1700, in London, and sent the same forthwith to Ireland, and thereupon an order was obtained for rehearing the causes; and on the 13th of June 1717, the appellant exhibited a supplemental bill, setting forth the said articles, and praying a discovery of the same and the benefit thereof in the said causes.

The respondent Ann put in her answer to this bill, and thereby denied that she ever executed the articles; but insisted that if she had, they could be no bar against charging the said £2000.

On the 25th of June following, both causes were reheard before the Lord Chancellor, assisted by the Lord Chief Justice Whitahead, the Lord Chief Justice Foster, and the Lord Chief Baron Gilbert; when the respondent Ann's last answer being read, and the Court not being satisfied therewith, she was examined *viva voce* in open court, and still denied the execution of the articles: Whereupon the Court was pleased to order and decree, that the said Philip Savage should have and recover, according to the deed made by the respondent Ann for that purpose, the sum of £2000 out of the rents and profits of the trust lands; and that the respondents Dudley and Nicholas, should likewise have and recover out of the said lands, their respective portions, with interest for the same at £8 per cent. per ann. from the death of the said Dudley Bagenal, senior; and it was referred to a Master to state the account. And it was ordered, that the respondent Ann should have an allowance for what she had expended in law suits, for recovery of the said trust lands, and the said sums of money decreed thereout, and in executing the said trusts, together with the costs of these causes; both parties were to have all just allowances, and on return of the report, the court would consider from what time the £2000 should carry interest.

Some time afterwards, the subscribing witnesses to the articles of the 22d of June 1700, being examined for the appellant, fully proved the execution thereof by the respondent Ann, and the other parties; and the appellant coming to the knowledge of the deed of the 16th of October 1688, tho' really made several years afterwards for securing the £2000, and of the several proceedings of Sir Gervas and the respondent Ann in relation to that sum; he, on the 1st of July 1718, preferred a further supplemental bill against the respondent Ann, Sir Gervas Clifton, and others, setting forth these several matters, and praying a discovery of the same, and relief.

In the mean time the said Philip Savage died; and an order being made for reviving the causes on that occasion, the Master on [86] the 23d of May 1723, made his report, and thereby computed £2000 as due to the respondent Ann, and also a considerable sum for costs relating to the trust; he also computed the portions of the respondents Nicholas and Dudley, with interest from the death of their father; and reported several sums to have been received by the respondent Burton out of the appellant's estate, and several sums by him paid to the respondent Ann, on account of her said demand, and of the portions of the respondents Nicholas and Dudley.

To this report the appellant took several exceptions, for that the Master had omitted to certify the portions of all the children, and what they had received on account thereof, and had allowed the respondent Ann the sum of £327 for costs; and for that he had omitted to charge the respondent Burton with the whole rents he received out of the estate, and had omitted to give the appellant credit for several sums, which he had expended in the support, and endeavouring the cure of the respondent Nicholas.

On the 20th of February 1723, the causes, as well on this report as on the appellant's supplemental bills, were heard before the Lord Chancellor; when his Lordship was pleased to over-rule the appellant's exceptions. And on the next day, his Lordship was pleased to refuse to allow the reading of the said articles of the 22d of June 1700; and also refused to admit the appellant's proofs of the execution of them, and of the aforesaid matters and proceedings to be read, and would not enter into the merits of the appellant's case; but ordered the appellant's said bills to be dismissed with costs.

From all these decrees the appellant appealed; insisting (C. Wearg, J. Rocha). that the power in the settlement of the 17th of October 1688, for raising £2000 was intended and reserved by Dudley Bagenal, sen. for the satisfying Sir Gervas Clifton the £2000 agreed to be paid him, by the articles on his intermarriage in 1687, and to be secured by mortgage of Mr. Bagenal's estate in Ireland. That this intention was further manifest, not only from the deed made some years after the settlement of October 1688, (tho' appearing to bear date the day next before the day of the date thereof) by which Mr. Bagenal raised a term of 500 years in his estate, for payment of £2000 to Sir Gervas; but also from the articles of the 22d of June 1700. And it was apprehended, that the deed so antedated, ought to be construed in equity, as a full execution of the power contained in the settlement of October 1688. That Sir Gervas having recovered and received this £2000 out of the estate, the respondent

ent Ann ought not to have executed the power over again, or to have received the money out of the estate a second time, for her own benefit; and if the £2000 was to be charged on the appellant's estate, the same ought not to have carried interest, as decreed, it being to be raised out of the rents, issues, and profits. That the respondent Burton ought not to have applied all the rents [87] of the appellant's estate, to the payment of the younger children's portions, while the appellant could not receive a penny thereout for his own support; but the court ought to have decreed Burton to have raised the £5000 for these portions, by leasing, selling, mortgaging, or assigning the trust term, or part thereof, according to the directions of the settlement of October 1688, for that purpose. That the several exceptions taken by the appellant to the Master's report, ought to have been allowed; and the Court ought also to have admitted the said deeds and articles, and the appellant's said proofs to have been read. That by the decree of the 25th of June 1717, the said sum of £2000 being ordered to be paid to the said Philip Savage, who soon afterwards died, the said several suits ought to have been revived against his representatives, and the Master ought to have proceeded on the account; nor should the Court have made any further decree in the causes without the representatives of Savage being made parties. It was therefore hoped, that the said several decrees and proceedings would be reversed; and the appellant's said deeds, articles, and proofs admitted to be read.

On the other side it was argued (P. Yorke, C. Talbot), that the respondent Ann, having survived the said Dudley Bagenal her husband, had full and absolute power, by virtue of the said settlement of October 1688, to limit or appoint any sum of money, not exceeding £2000, to be raised and paid according to such limitation or appointment, out of the rents and profits of the trust estate; and having by deed, in 1712, limited and appointed the same to be paid to Philip Savage, it became thereby a proper charge on the said lands, and a due execution of the power in the said settlement. That this power to raise £2000 was not intended for raising the £2000 due to Sir Gervas Clifton by his marriage articles, as the appellant would suggest, nor expressed so to be; for it appeared, by the appellant's own shewing, that the £2000 to be paid by those articles to Sir Gervas, was to be paid within one month next after he should have appointed to his wife, lands of the yearly value of £500 and which appointment was accordingly made in July 1692, after Sir Gervas came of age; but the 500 years term, on which the respondent Ann had power to raise the £2000, was only to commence upon the death of her husband, which did not happen till the year 1712. That Sir Gervas Clifton claimed before the trustees of the forfeited estates, the £2000 due to him by virtue of his marriage articles only, and the same was accordingly decreed to him; the respondent Ann also claimed before the trustees, the power of charging the trust estate with £2000, and the same was likewise decreed to her. Which claims and decrees were not only several and distinct, and had no relation to each other, but shewed, that these two sums of £2000 were also several sums of money. That the pretended articles of the 22d of June 1700, supposing the respondent Ann to have actually executed them, could not take from her any right which she might have to charge the said £2000; because it appeared, by the appellant's own shewing, [88] that the provision in those articles was contingent, and to take place only, in case Sir Gervas did not recover £2000 on his marriage articles; and he being decreed to this £2000 by the trustees, the articles of June 1700, became, by an express clause therein, utterly void. Besides, Sir Gervas having received the said £2000 before the death of Dudley Bagenal, and consequently before he appellant became entitled to his remainder, and before the respondent Ann had any power to charge the said £2000; these articles of 1700, were only made use of by the appellant, as a pretence to put the respondent Ann to great expence and trouble on so many bills, hearings, and rehearings. That these articles were in issue in the original causes, but not proved therein; and therefore, after publication and hearing, it was irregular in the appellant to examine witnesses to the proof of the articles, especially upon a bill of discovery only. But as the appellant had examined the same witnesses on his supplemental bill, to the proof of the articles, and being allowed to read the same, and all the other proofs taken in the cause; he had no just ground of complaint, that his proofs were not admitted to be read: And having offered no proof in support of any new matter alledged in his said supplemental bill, it was but just that the same should be dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of the 25th of June 1717, should be affirmed; saving that part thereof which directed, that the respondent Ann should have an allowance for what she had expended in law suits; which direction was reversed: And it was further ORDERED and ADJUDGED, that so much of the order of the 20th of February 1723, as over-ruled the appellant's third exception, and directed the interest of the £2000 to be computed from the date of the deed of the 6th of February 1712, should be reversed: And it was further ORDERED, that the Court of Chancery should cause an account to be taken, from what time the said £2000 might have been raised out of the yearly rents and profits of the lands; and that from that time, the said £2000 should be payable with interest; and that so much of the money, as had been already paid to the respondent Ann, should, in the first place, go towards discharging the interest, and the surplus towards the discharge of the principal money; and so much as remained unpaid of the said principal and interest, should be paid to her by the respondent Burton, out of the money in his hands: And it was likewise further ORDERED and declared, that the £5000 to be raised for the younger children of the respondent Ann and her deceased husband Dudley Bagenal, was to be raised by mortgage or sale; and that the appellant, out of the profits of the lands subject to the said portions, by him received, was to be accountable for no more than was sufficient to keep down the interest of the said portions; and that what remained due to the said children, for principal money and interest, should be raised by mortgage or sale: And it was further ORDERED and ADJUDGED, that the Court of Chancery should cause an account to be taken, of what was due to the re-[89]-spondents Nicholas and Dudley Bagenal, for the interest of their portions respectively; and that what remained due to them respectively for such interest, should be first paid by the appellant, out of the rents and profits of the lands by him received; deducting all reasonable allowances, for money expended by him on account of the estates, or of the said Nicholas and Dudley respectively; and that what yet remained due for principal and interest, should be paid by the respondent Burton, as far as the money in his hands would extend: and if that was not sufficient, the residue should be raised by mortgage or sale of the lands: And that all other parts of the orders, decrees, and proceedings complained of, which varied from, or were inconsistent with the directions now given, should be reversed; but that the same, as to all other parts thereof, should be affirmed: And it was further ORDERED, that the said Court of Chancery should give such proper directions, for the better execution of this judgment, as should be just (Jour. vol. 22. p. 478.)

CASE 11.—SIR JOHN RUSHOUT,—*Appellant*; ELIZABETH RUSHOUT,—*Respondent*  
[28th February 1725].

[Mew's Dig. x. 1257.]

Lands charged with a portion, afterwards descend to the party entitled to the portion; but this is no extinguishment of the charge, although the value of the lands greatly exceed the amount of the portion.

DECREE of Ld. Cowper, C. AFFIRMED.

The point of this case is thus stated in 2 Eq. Ab. 655. c. 8: and 16 Vin. 449. c. 11. "*Part of lands charged with £400 portion are devised to the party to whom the portion is payable; although the lands devised are more than the portion, yet it is no extinguishment of the charge.*"

In 16 Vin. 333. c. 11. a collateral point is thus shortly stated, "*Chattel leases cannot be entailed*"—and cites MSS. Tab.

Viner, vol. 16. 449. ca. 11. 2 Eq. ab. 655. ca. 8.

Sir James Rushout, father of the appellant, and grandfather of the respondent in consideration of a marriage between him and Alice Palmer, and of her marriage portion, by lease and release, dated the 13th and 14th of September 1669, conveyed to Sir George Benyon and other trustees, and their heirs, (among other lands), the manors of Maylards in Essex, and of Upperswell, alias Overswell, in Gloucestershire, and of Stone in Worcestershire; to the use of himself for his life, remainder to trustees

to preserve contingent remainders; remainder to the use of the said Alice for her life, for her jointure; remainder to the use of the first and other sons of the marriage, in tail male successively; remainder to the use of the right heirs of Sir James. With a power reserved to Sir James, to revoke all the uses of this settlement, except the estate for life of the said Alice his wife.

The marriage took effect, and Sir James had issue by Dame Alice his wife three sons, namely, James the respondent's father, [90] the appellant Sir John, and George, who died without issue; and three daughters, Elizabeth, afterwards married to Sir George Thorold, Alice, married to Edwyn Sandys, esq. and Catherine, married to Samuel Pitt, esq.

On the 23d of October 1695, Sir James Rushout made his will; wherein taking notice of the settlement, and of his wife's jointure, and that she had released the same, and in lieu thereof had accepted of an annuity of £600 per ann. for her life; he by his will, confirmed the said settlement upon his sons, subject to the said annuity; and appointed that the manors and premises comprised in his settlement, together with the manor and rectory of Harrow in Middlesex, subject to the said annuity, should be a provision for his eldest son, till his age of 24; and he devised to his executors, and the survivor of them and his heirs, his manors of Northwick, North and Middle Littleton in Worcestershire, and Egarton and Swingfield in Kent, and all other his lands in those two counties, not before settled; in trust, that they should receive the rents thereof, until some son of his should attain the age of 24, and apply the same and the proceed thereof, for the payment of the testator's debts and legacies; and the surplus to be laid out for the benefit of his eldest son and heir. He then devised his lands in North and Middle Littleton, subject to the trusts aforesaid, to his executors, and the survivor of them and his heirs, in trust, that they should, out of the rents and profits thereof, raise £200 per ann. for his younger sons John and George, equally for their lives, from their respective ages of 21; but if it should be thought for their advantage, to turn the said annuities into money, then his eldest son should pay them £1100 in lieu of each £100 per ann. And he devised his said manors of Northwick and North and Middle Littleton, and all other his lands in Blockley and Hampton, subject to the charges in his will, to his eldest son James, afterwards Sir James Rushout, for life, without impeachment of waste; remainder to his first and other sons in tail male successively; remainder to the appellant Sir John, the testator's second son for life; remainder to the appellant's first and other sons in tail male successively; remainder to the testator's son George, for life; remainder to his first and other sons in tail male successively, with divers remainders over. And he devised his manors of Egarton and Swingfield, and all other his lands in Kent, to his executors, in trust, that they should sell the same, and out of the purchase money pay all his debts and legacies, which his personal estate and his lands before appointed for a term of years, should not be sufficient to pay; and after such debts and legacies were paid or secured, the surplus, together with the growing profits of all his estates appointed for the maintenance of his eldest son, and all other monies and proceed whatsoever, should, by his executors, be laid out in the purchase of lands of inheritance, or copyhold or leasehold estates, held of any Bishop, or Dean and Chapter, lying in or near Blockley, or any other of his estates, in the name and for the use of such eldest son, as should be living at the time of such [91] purchase, and the heirs male of his body; remainder to his daughter Elizabeth for life; remainder to her first and every other son in tail male successively; remainder over to his own right heirs. And the testator gave to his sons John and George £500 a-piece, over and above £500 a-piece which had been given them by a deed dated the 5th of October 1694, payable at 21; and he gave to his daughter Elizabeth £4000 to be paid at her age of 21, or marriage; and made Sir Rushout Cullen and Richard Freeman, esq. executors.

The testator on the 4th of February 1697, made a codicil to his will; whereby, among other things, he willed, that all his lease lands in Blockley in Worcestershire, should go along with his manor of Northwick and free lands there, and attend the imitations thereof, so far as by law they might; subject to the payment of his debts and legacies, and such other charges and contingencies, as Northwick was subject to by the will and codicil. And taking notice that he had, by his will, devised his lands in Kent to his executors to be sold, and the surplus money, after debts and legacies

paid, together with the growing profits, to be employed for the purposes therein mentioned; he did by the said codicil direct, that such estate so to be purchased, should be purchased in the name and to the use of his son James, and the heirs male of his body; remainder to his son John, and the heirs male of his body; remainder to his son George, and the heirs male of his body; remainder to his daughter Elizabeth for life, and with such remainders over as were mentioned in his will. And he gave to his said sons John and George £500 a-piece, more than the £500 a-piece given them by his will.

The testator soon afterwards died, leaving such issue as aforesaid; and thereupon the executors proved his will and codicil.

Sir James Rushout, the testator's eldest son, in consideration of a marriage between him and Arabella, the daughter of Sir Thomas Vernon, and of £5000 portion, by lease and release, dated the 17th and 18th of January 1699, and by a common recovery, conveyed the manors of Maylards, Overwell, and Stone, and all the lands thereto belonging, to the use of himself for 99 years, if he should so long live, without impeachment of waste; remainder to trustees to support the contingent remainder: remainder to the use of the said Arabella for her life, for her jointure; remainder to the use of Sir Thomas Vernon and Sir Rushout Cullen for 99 years, for raising such portions for the younger children of that marriage, as the said Sir James Rushout should appoint, not exceeding £5000; remainder to the use of the first and other sons of Sir James by the said Arabella, in tail male successively; remainder to the use of Thomas Vernon and Richard Freeman for 500 years, upon the trusts after expressed: remainder to the use of the right heirs of Sir James Rushout. And it was thereby declared, that the said term of 500 years was upon trust; that the trustees should, out of the rents and profits of the premises, or by lease or mortgage thereof, raise and pay the several sums following, viz. in case [92] Sir James should have issue by Arabella one or more daughters, and no issue male; or if his issue male should die without issue before the age of 21; that then the trustees should raise £5000 for such daughter, if but one; and if more than one, then £5000 to be divided between them, to be paid at 18, or marriage; and £100 per ann. for maintenance in the mean time, if but one daughter; and if more than one, then £200 per ann. between them.

The manor of Egarton in Kent was afterwards sold, towards payment of Sir James the father's debts; and Sir James the son suffered a common recovery of the manor of Harrow, and declared the use thereof to himself in fee.

On the 12th of November 1705, Sir James the son made his will; and thereby devised the manor of Harrow, and all the lands and hereditaments thereto belonging, to Sir Rushout Cullen, Thomas Vernon, and Richard Freeman, (whom he made executors), for 99 years, upon the trusts after expressed; remainder to his son James, the respondent's brother, in tail male; remainder to his the testator's brother Sir John, the appellant, in tail male; remainder to his brother George in tail male: remainder to his own right heirs.

The trusts of the 99 years term were declared in the words following; viz. "And as to the term of 99 years limited of the said manor and premises, my will is, and I do declare, that the same is and shall be in trust and to the intent, that my said executors and the survivor of them, and the executors, administrators, and assigns of such survivor, shall, out of the rents, issues, and profits of the said manor, and the lands, tenements, and hereditaments thereunto belonging, or by leasing or demising the same, or any part thereof, or by mortgaging the whole or any part thereof, or by all or any or such of the said ways or means or otherwise, as shall be needful and expedient, raise and pay such portion and maintenance to and for my daughter Elizabeth Rushout, as is herein-after limited and appointed; (that is to say), the sum of £5000 which I give my said daughter for her portion, to be paid her when she shall attain the age of 21 years, or be married, which shall first happen: And if my said daughter should happen to die before her said portion shall become due and payable according to the limitation herein-before in that behalf expressed; that then and in such case, the said £5000 shall not be raised, but shall cease or remain, and belong to such person and persons as shall be entitled to the reversion and inheritance of the said premises, expectant upon the said term of 99 years, by virtue of the limitation aforesaid.—And upon this further trust, that the said trustees shall, by all or any of the said ways or means, raise and pay to and for my said daughter for her maintenance, the

sum of £60 per ann. at two usual days or times of payment in the year ; (that is to say), the feast of the Annunciation of our blessed Lady Saint Mary the Virgin, and the feast of Saint Michael the Archangel, by [93] equal portions, without any defalcation or abatement, until she arrive to the age of 10 years ; and from and after her age of 10 years, the sum of £80 per ann. until she arrive to the age of 15 years ; and from thence, until her portion shall be due and payable, the sum of £100 per ann. in manner aforesaid, and without any defalcation or abatement whatsoever : The first of such payments to begin and be made, on the first of the before-mentioned feasts, that shall next happen after my decease.—Provided always, and my will and meaning is, that if my said son James Rushout, or such other person or persons to whom the freehold or inheritance of the said manor, lands, and premises, shall appertain, by virtue of the limitations aforesaid, shall pay or cause to be paid unto my said daughter, the said sum of £5000 when she shall come to the age of 21 years, or be married, which shall first happen ; and shall also pay the said several sums for the maintenance of my said daughter in the mean time, and until her said portion shall become payable as aforesaid ; that then and from thenceforth, the said term of 99 years, limited to my said executors, shall cease, determine, and be utterly void, to all intents and purposes whatsoever.—Provided further, that if my said daughter shall, at any time hereafter legally demand and insist upon any portion or sum of money, to be paid to her by means or by virtue of any deed of settlement, made by me on the intermarriage of her mother, my dearly beloved wife, now deceased, (the contents of which settlement I may have forgot, and by reason of my present illness cannot immediately refer to), that then my said daughter shall have no benefit by this my will ; it being my true intent and meaning, that she should have the said sum of £5000 to her portion, and no more.”

On the 2d of December 1705, the testator made a codicil to his will ; wherein he took notice of his devise of the manor of Harrow to his executors for 99 years, upon trust for the raising and paying to his daughter, for her portion, £5000 at such time as therein mentioned ; and from and after the determination of that term, to his son James in tail male, with such other remainders over, as in the will are mentioned ; and then by this codicil he expressed himself as follows ; viz. ‘ Now I the said James Rushout, being of sound mind, memory, and understanding, praised be Almighty God, do, upon more deliberate thought and consideration, add his, by way of codicil, to my said will, which shall be taken as part thereof ; and do hereby declare and appoint that if my said son shall happen to die, before he comes to the age of 21 years, without leaving issue male of his body, lawfully begotten, that then and in such case, the trust of the term of 99 years limited to my said executors as aforesaid, shall likewise be for raising and paying my said daughter the sum of £3000 above and besides the said sum of £5000 which I have given and devised to her in and by my said will, and to be paid in like manner.”

[94] The said Sir James Rushout soon afterwards died ; leaving issue Sir James his only son, and the respondent Elizabeth his only daughter : And on the 21st of September 1714, Sir James the son died an infant, without issue and intestate, leaving the respondent his sister and heir ; who thereupon became seised in fee in possession, of the manors of Maylards, Overswell, and Stone ; and being heir general both of her brother, father, and grandfather, she also became entitled to all such real estates as they died seised of in fee ; but the manor and lands of Harrow came to the appellant, under the limitations of his said brother's will.

The respondent, in Easter term, 1714, and during her infancy, exhibited her bill in Chancery, against the appellant, and the executors of her father and grandfather and others, to have an account of the several trust estates created by the will of her grandfather, and of the personal estates of her said brother, father, and grandfather ; and for the recovery of the leasehold estates in Blockley, and to ascertain her portion, and the legacies to which she was entitled under her father's settlement, will, and codicil, and for the arrears of her maintenance.—To which bill the appellant having put in his answer, afterwards exhibited a cross bill against the respondent and others ; insisting, that the respondent was only entitled to one sum of £5000, and that the appellant's estate ought not to be charged with the payment of any of the said sums of £5000, £5000, and £3000.

On the 24th of April 1716, both causes were heard together before the Lord Chancellor Cowper ; when his Lordship declared, that the respondent was not

entitled to £5000 by the settlement of her father, and also to the £5000 and £3000 by his will and codicil; and was of opinion, that the descent to her of the three manors of Maylards, Overswell, and Stone, on which the said £5000 were charged by the settlement, was no extinguishment of the contingent sums of £5000 by the settlement, or of the £5000 and £3000 given by the will and codicil; and that the said £5000 and £3000 given by the will and codicil, were only to be extinguished by the respondent's making her election, when she came to the age of 18, whether she would choose the first £5000 by the settlement, or the £5000 and £3000 given her by the will and codicil, payable at her age of 21, or marriage; but if she should elect to take the £5000 by the settlement, she ought not to have the £5000 and £3000 by the will and codicil, or either of those sums; and if she should elect to take the said £5000 and £3000 by the will and codicil, in that case his Lordship declared, that the £8000 was not extinguished by the descent to her of the said three manors, which were charged with the £5000 by the settlement. As to the provision of maintenance for the respondent, made by the will, his Lordship declared, that the same being payable yearly, and at different rates, according to the age of the respondent, did not depend upon the same contingency; but was meant by the will and codicil to be vested in the devisee for maintenance, till the contingency happened; and that [95] therefore the same ought to be applied according to the will and codicil, with respect to the respondent's attaining her several ages therein expressed; and did order and decree the same accordingly. And it was referred to the Master, to take an account of the rents and profits of the real estate, during the life of Sir James the respondent's brother, and of his personal estate, and also of the personal estate of his father devised to him; and to the end it might appear what was such personal estate of the father, the Master was to take an account of the rents and profits of the trust estate, until Sir James the father attained his age of 24, and to see whether Sir James the father wasted any of the personal estate of Sir James the grandfather, which was by him devised to Sir James the father, for payment of his brothers and sisters portions. If the Master should find that Sir James the father misapplied the personal estate of his father, or the rents and profits of the trust estate by him received, till his age of 24, then the personal estate of Sir James the father was, in the first place, to go to make good such misapplication; his Lordship declaring, that the respondent was entitled to no more of the personal estate of Sir James the father, than would be afterwards remaining; and that such personal estate so remaining did belong to the respondent. And if the personal estate of Sir James the father should not be sufficient to make good such misapplication, then it was decreed, that the 99 years term in the premises at Harrow, should be applied to make good the deficiency. And Sir James, the brother of the respondent, being tenant in tail, his lordship declared, that the chattel leases did belong to him, and were part of his personal estate; and if there were any leases for lives, or descendible freehold leases, which had been taken instead of such leases for years, they ought to go as the leases for years, and were also part of the personal estate of Sir James, the respondent's brother; but if there were any descendible freehold leases, of which Sir James the grandfather was seised at the time of making his will, his Lordship declared, that they belonged to the appellant, as tenant in tail; and ordered that the Master should look into the leases, and see to whom they did belong. And it was decreed, that the parties who had received the rents and profits of the three manors, which were descended to the respondent, should account before the Master to her for the same; and the executors were also to account for such part of the personal estate as they had received; and what upon the account should be found coming to the respondent, over and above what should be allowed for her maintenance, was to be brought before the Master, to be by him put out at interest from time to time, on good government or other security, for the benefit of the respondent; and the Master was to tax all parties their costs, which were to be paid them out of the said estate.

The respondent having attained her age of 18, did, by a writing under her hand dated the 6th of July 1721, in pursuance of the decree, elect to take the £5000 and £3000 given and devised to [96] her by the will and codicil of Sir James Rushout her father; and upon the same day this writing was left with the appellant.

The respondent having attained 21, and being about to carry this decree into execution, the appellant thought proper to appeal from it; insisting (T. Lutwyche



C. Talbot), that she was not entitled to, nor was it designed that she should have any more than one sum of £5000 and for which she had received satisfaction, by having the three manors of Maylarde, Overswell, and Stone, which were charged therewith, and were of the yearly value of £800. That the respondent having a larger maintenance out of these manors than was provided for her by her father's will, the appellant ought not to have been decreed to pay or allow any maintenance to her, out of the manor of Harrow. That the chattel leases were, by the decree, declared to belong to the respondent's brother, and to be considered as part of his personal estate; whereas, by the will and codicil of Sir James the grandfather, these leasehold estates were directed to go along with his manor of Northwick and free lands there, and attend the limitation thereof, so far as by law they might; and therefore they ought to have been settled in such manner, as that the appellant might have the benefit thereof. That there was no direction given by the decree, touching the sale of the manors and lands in Kent, or the money arising by such sale; whereas that money ought to have been applied, according to the will and codicil of the appellant's father. And therefore it was hoped, that the decree would be reversed, and such directions given, as were agreeable to equity and justice.

To this it was answered (P. Yorke, W. Peere Williams) on the other side, that as Sir James Rushout, the respondent's father, after suffering a recovery of the manor of Harrow, was seised thereof in fee, and had an absolute power to charge it in such manner as he thought fit; so he had accordingly by his will and codicil, charged this manor with the payment of the said several sums of £5000 and £3000 to the respondent, at her age of 21, or marriage; and had thereby transferred the charge of £5000 from the three manors comprised in his marriage settlement, to the said manor of Harrow, devised by his will. That with the terms of this will, and also of the decree, the respondent had complied, by making her election in the manner before mentioned; and the appellant had no reason to complain of the respondent's father for making this will, since if he had made no will, the respondent, as the heir at law of her said father and brother, and not the appellant, would have been entitled to the fee simple and inheritance of the said manor of Harrow. That the respondent's father had, by the express words of his codicil, charged the 99 years term in this manor, with the more effectual and further securing the payment of all such legacies, as were given to his brothers, John and George, and his sister Elizabeth, by his father's will; and in conformity thereto, the decree had gone no further than to charge the said term in Harrow with the deficiencies of the trust and personal estate of Sir James the grand-[97]-father, so far only, as to make good the payment of those legacies; nor did the respondent insist upon any more, under that part of the decree. That all the leasehold estates for years, being devised by the will of Sir James the grandfather, in trust to attend the manor of Northwick and the limitations thereof, so far as by law they might; and Sir James the grandson becoming entitled to an estate tail in this manor of Northwick, he thereby became entitled to the absolute estate and interest in all these leases for years; for they could not, by the rules of law or equity, bear any limitations over after an estate tail, because it would introduce the inconvenience of a perpetuity, which neither law or equity ever tolerate. That it was conceived not to be proper for the Court of Chancery, to give any direction for the sale of the manors and lands in Kent, or touching the application of the surplus money to be raised by such sale, until the account directed by the decree of the rents and profits of the trust estate, and of the personal estate of Sir James the grandfather, and the misapplications of Sir James the father, and of his personal estate liable to make good the same, were taken; in regard it could not till then be known, how much of the lands in Kent would be necessary to be sold, or what the surplus money would amount to.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be affirmed: Nevertheless it was declared, that either party should be at liberty to apply to the Court of Chancery, touching the sale of the manors of Egerton and Swinfield, in the county of Kent, and other the lands in the said county, of the late Sir James Rushout; and likewise touching the monies arising by such sale, and by the rents and profits thereof. (Jour. vol. 22. p. 607.)

CASE 12.—EARL FERRERS,—*Appellant*; COUNTESS DOWAGER FERRERS, and others,—*Respondents* [8th March 1725].

[Mews' Dig. vi. 1472; x. 1255.]

- A. by several deeds, charges different parts of his real estates with portions for his younger children, and afterwards by his will confirms the charges so made: and then gives the residue of his personal estate, after payment of his debts and legacies, to trustees, in trust to lay out the same in the purchase of land to be settled to particular uses. The eldest son brings his bill controverting the validity of the deeds, and insisting that the personal estate was liable to make good the several charges so far as it would extend: Held, that the personal estate should go according to the will, and that each particular estate should bear the specific charge made upon it.

DECREE of the English Chancery AFFIRMED by agreement.

Robert Earl Ferrers, being seised of an estate of near £10,000 per ann. and being desirous to make some provision for the respondent his wife, and his children by her; by lease and release dated the 2d and 3d of March 1713, conveyed to trustees, [38] his estate in the county of Warwick, to the use of himself for life; remainder to the respondent Robert Shirley for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of Robert in tail male; with like remainders to the respondents his younger sons, and their sons in tail male; remainder to his own right heirs.

The said Earl, by another deed dated the 19th of January 1714, settled his estate in Ireland, after his own decease, to the use of the respondents his sons by the Countess in tail male, as tenants in common; with remainder to his daughters by her in like manner.

By other deeds of lease and release, dated the 22d and 23d of November 1717, the said Earl conveyed to trustees and their heirs, all his estates in the counties of Leicester, Derby, and Nottingham, to the use of himself for life; remainder, as to the premises in Derby and Nottingham, to Rowland Cotton and Samuel Sheppard, their executors, etc. for 1000 years, in trust for the Earl, his executors and assigns: And as to the manor and lands of Ragdale, Radcliffe, Willows, and Thrushington, being part of the premises in the county of Leicester, after the said Earl's death, to the use of the Countess Selina his wife for life, if she continued his widow and unmarried; and as concerning the same, after her death or marriage, and as for the other premises in the county of Leicester, after the Earl's death, and also all the premises in the counties of Derby and Nottingham, after the determination of the 1000 years term, to the use of the appellant for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the appellant; with other remainders over.

By other indentures of lease and release of the same date, the Earl conveyed his estate in the county of Stafford, to the use of himself for life; and after his decease, to the use of Samuel Sheppard and George Townsend, their executors, etc. for 1000 years, without impeachment of waste, in trust for the Earl, his executors, etc. and after, to the use of the appellant for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; with other remainders over.

The earl, by his last will, attested by three witnesses, and dated the 25th of November 1717, after reciting the limitations by the first mentioned deed of release of the 23d of November, of the premises in the counties of Derby and Nottingham to Cotton and Sheppard for 1000 years, in trust for the Earl, his executors and assigns; devised and appointed, that the said Cotton and Sheppard, their executors, etc. should so stand possessed thereof, upon trust, out of the profits to pay yearly £100 to each of his sons Henry, George, Sewallis, and John, and all other sons he should have by his then wife, during their several lives, free from taxes. And after payment of his debts and legacies, the testator gave all the residue of his personal estate to the respondents Sir George Beaumont, George Townsend, Samuel Sheppard and Thomas Harlewin, whom he made his executors; upon trust, during such time and times as there should arise and happen any suit or controversy be[39]tween

the testator's said wife, and any or either of his sons by his first wife, or any of their issue, touching the settlement or provision he had made for her, by the indentures of the 22d and 23d of the then present month of November, to pay or cause to be paid out of the same unto his wife, the yearly sum of £1000 by quarterly payments, until such dispute, suit, or controversy should be fully determined; and so *toties quoties* as any such dispute, suit, or controversy should arise and happen. And he further willed, that the overplus of his personal estate should be laid out and disposed of by his executors, in the purchase of lands in England, and settled to the same uses as were limited of his estate in the county of Warwick, by the indenture of release of the 3d of March 1713. And after reciting, that by the said indentures of lease and release of the 22d and 23d of November 1717, he had conveyed and settled his estate in the county of Stafford, after his own decease, to the use of the said Sheppard and Townsend, their executors, etc. for 1000 years, in trust for himself, his executors, and assigns; the testator by his said will devised, directed, and appointed, that Sheppard and Townsend, and the survivor of them, his executors and administrators, should so stand possessed of the said estate, upon trust, for the more effectual securing the payment of his debts, and the annuities, legacies, and sums of money directed to be paid by his will; and upon further trust, by and out of the said Staffordshire estate, and the rents and profits thereof, or by sale or mortgage thereof, for the said term of 1000 years, to raise and levy so much money as should, from time to time, be sufficient to indemnify, secure, and save harmless his said wife, and all and every his children by her, and all and every his trustees, in any provision or settlement he had made for the benefit of her, them, or any of them, by deed or deeds, or by his said last will, and also his executors, of, from, and against all costs, damages, troubles, losses, and expences, which she, they, or any of them should sustain, or be put unto, for or by reason of any action or actions, suit or suits, either in law or equity, which might or should be commenced or prosecuted against her, them, or any of them, for or on account of any settlement, annuity, legacy, or provision, which he had, or should make, grant, or provide for his said wife, or any of her children by him, and to pay and apply the same from time to time accordingly: The testator thereby expressing it to be his intention, that all such settlements, provisions, annuities, gifts, or bequests, should be quietly held and enjoyed by them respectively, without any let, suit, or disturbance, of any of his children by his former wife, or any other person or persons claiming by, from, or under them, or any of them; or in default thereof, that whatsoever loss his said wife, or any of his children by her, should sustain by reason of such let, suit, or disturbance, should be made good to her and them by his said trustees, out of the said Staffordshire estate so limited to them for the said term of 1000 years. And from and after these trusts should be fully performed, then the trustees were to stand possessed of the said Staffordshire estate, for the residue of [100] the said term, in trust to attend the reversion and inheritance expectant on the determination of the same term.

On the 25th of December 1717, the Earl died; and he having by a clause in his will, and also in the deed whereby the Leicestershire estate was settled on the respondent the Countess, directed that she should release all dower out of his estate, she accordingly executed a deed for that purpose.

Soon after the Earl's death, the appellant, as his eldest son and heir, entered upon all the estates designed as a provision for the respondents, and all the other estates of which his father died seised, and also upon the estate in Ireland, settled on the respondents his younger sons; whereupon, in Trinity term 1719, ejectments were brought for recovery of those estates; but the appellant, instead of trying the title at law, gave judgment in all the ejectments with stay of execution for a limited time.

And in Michaelmas term 1719, a little before that time was expired, the appellant exhibited his bill in Chancery against the respondents; stating, that by indenture dated the 26th of September 1678, the late Earl Ferrers was seised of the estates in the counties of Leicester, Derby, Warwick, and Nottingham for his life; with remainder to Robert, his then eldest son and heir apparent by Elizabeth his first wife, in tail male; remainder to all other the sons of the late Earl by his then wife, in tail male. That by articles dated the 26th of September 1688, made on an intended marriage, which was afterwards had, between the said Robert and Ann Ferrers, it was agreed, that within twelve months after Robert should attain his age of 21, the said late Earl and Robert his son, or one of them, would by fines and recoveries, or other-

wise, convey to trustees and their heirs, the said estates in the counties of Leicester, Derby, Warwick, and Nottingham, to the use of the late Earl for life; remainder to the said Robert for life, *sans* waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Robert and Ann in tail male; remainder to the appellant, the second son of the late Earl, for life; remainder to trustees for preserving contingent remainders; remainder to the appellant's first and other sons in tail male; with other remainders over: In which settlement there should, *inter alia*, be contained a power for the late Earl, to revoke or alter all or any of the said uses or estates, except those limited to the said Robert and Ann, or to the use of the issue of their two bodies.—That Robert attained 21 in the year 1694, when the late Earl and he joined in suffering common recoveries of the said estates; but that the said Robert, contrary to the articles, was prevailed on by the Earl to join with him in an indenture, dated the 18th of October 1694, whereby the uses of those recoveries were declared to the use of the said Earl and his heirs; who by indentures of lease and release, dated the 12th and 13th of November 1694, for the settling those estates, conveyed the same to trustees and their heirs, to the use of himself for life, *sans* waste; remain-[101]der to the said Robert his eldest son, and the heirs male of his body; remainder to the appellant his second son, and the heirs male of his body; with like remainders to the Earl's other sons, in tail male; remainder to the Earl in fee; with a power therein contained for the Earl, by deed, to revoke all or any of the said uses, and appoint others. That the said Robert afterwards died, leaving a son named Robert, who also died without issue in the year 1714; whereby the appellant was then next heir male of the late Earl. That the said late Earl did not make any such deeds and will, in favour of the respondents as before mentioned; and therefore the bill prayed, that all those deeds and will might be set aside; and that an injunction might be awarded, to stay the respondents proceedings on the ejectments.

The respondents, by their answers to this bill, admitted, that such deeds and articles had been executed, and such recoveries suffered, as in the bill were mentioned; but as to the deed declaring the uses of the said recoveries, the respondents stated, that they had only in their custody a draught or copy thereof, and of which the appellant was so informed before he brought his bill, and that the respondents knew not what was become of the original deed. They also stated, that the late Earl, after the death of his said eldest son Robert, and failure of his issue male, did, pursuant to his power, revoke the uses in the deed of the 13th of November 1694, of the said estates, and limit the same to himself and his heirs, before he made the deeds and will as a provision for the respondents his wife and children; and insisted, that the said deeds and will were duly and fairly made, and that they were severally entitled to the estates and provisions thereby settled and appointed for their benefit; but that the appellant had immediately on the late Earl's death, in December 1717, got possession of all those estates, and had ever since withheld the same from them, notwithstanding the information he had received of the respondents right thereto as aforesaid; and that therefore, being thus distressed, they caused declarations in ejectment to be delivered for the same, as above-mentioned.

The appellant having, in the usual manner, obtained an injunction, upon the respondents praying time to answer; they, on the 24th of October 1720, after the answer was filed, moved the Court to dissolve the injunction; whereupon it was ordered, that the respondents should be at liberty to proceed to trial, upon the declarations which had been delivered for the premises in question, or to bring new ejectments as they should be advised; but the taking out execution was stayed, till the further order of the Court: And it was also ordered, that both sides should, before such trial, produce upon oath before a Master, all deeds and writings in their custody relating to the said premises, to be inspected by either party.

This inspection was accordingly had; and the respondents not finding the original deed for leading the uses of the recoveries suffered in 1694, were advised that they could not proceed on the [102] ejectments; but in regard the late Earl had effectually conveyed and subjected his estate in Staffordshire, which he had an undoubted power over, for the making good his settlements and provisions for the respondents his wife and children, out of the estates in the other counties; the respondents were advised to deliver ejectments for the Staffordshire estate, which the appellant, on the Earl's

death, had got possession of, as well as of the other estates, in order to obtain satisfaction of their demands, according to the late Earl's will.

Ejectments were accordingly delivered for the Staffordshire estate, and by rule of Court, the same were to be tried in Michaelmas term 1723; but about a fortnight before the day of trial, the appellant filed a supplemental bill, charging, as new matter, that the late Earl's personal estate was, by his will, made liable in the first place to make good the provisions made for the respondents; and that the same being sufficient for that purpose, no trial ought to be had, touching a satisfaction of any of the respondents demands out of the Staffordshire estate, until an account was taken of the personal estate; and in case the same should not be sufficient to answer such demands, then, until a satisfaction could be sought for out of the estates in the counties of Derby and Nottingham, subject to the term of 1000 years limited to Cotton and Sheppard, which was by the will directed to come in aid of the personal estate; and the appellant thereby insisted, that he ought not to be stripped of the possession of the Staffordshire estate, until it should appear that such other provisions proved deficient. But should such be the case, then upon a fair trial to be had for any of the said estates in the counties of Leicester, Derby, Warwick, and Nottingham, if it should appear that the late Earl was capable, and had duly made such settlements and will, the appellant, by his said bill, undertook to make good all such matters and things to the respondents, as any of them should appear to be entitled to a satisfaction for, out of the said estate in the county of Stafford; the personal estate being first accounted for and applied, as by the will was directed.

On the 4th of November 1723, immediately after filing this supplemental bill, the appellant moved the Court for an injunction, to stay the proceedings on the ejectments brought for the Staffordshire estate, and that the same might extend also to stay the trial; whereupon it was ordered, that on the appellant's giving judgment in the said ejectments in three days, with a release of errors, an injunction should be awarded till the hearing of the cause, which the appellant was to speed to a hearing; and he was, by consent, not to bring any writ of error, and to deliver possession of the premises, or any part thereof, from time to time, as the Court should direct.

The respondents soon afterwards put in their answers to the supplemental bill; and thereby insisted, that it was apparent from the will, that no part of the late Earl's personal estate was subject or applicable to make good the settlement of his Warwickshire estate by the deeds of March 1713, for the benefit of his son the respondent Robert Shirley, and his issue male; nor to make good the annuities of £100 per ann. a piece to his younger sons, the respondents George, Sewallis, and John Shirley, by the will directed to be raised and paid out of the Earl's estates in the counties of Derby and Nottingham, by virtue of the 1000 years term, vested in Cotton and Sheppard by the deeds of November 1717; but that the Staffordshire estate was by the will expressly subjected to make good those settlements and provisions, in case the same were withheld, as had been done by the appellant: The respondents also insisted, that no part of the personal estate was, by the will, liable to make good to the respondent the Countess, such provision as the Earl had made for her out of his estate in Leicestershire, which was limited to her by his other deeds of November 1717, during her widowhood, or to discharge the Leicestershire estate therefrom; but only for the raising and paying out of the said personal estate, the yearly sum of £1000 to the Countess, so long as any dispute, suit, or controversy should depend between her and any of the Earl's sons by his first wife, touching his said settlement of the Leicestershire estate; and which was intended only as her support, until such controversy should be ended and determined.

Both sides afterwards examined their witnesses, and the respondents fully proved the due execution of the said deeds, and also of the late Earl's will, and the value of the several estates settled as a provision on them; and on the 22d of February 1724, the cause was heard before the then Lords Commissioners for the custody of the Great Seal; when it was ordered and decreed, that it should be referred to the Master, to take an account of the rents and profits of the lands, which were settled on the respondent the Countess Ferrers, in jointure, and to see what the same amounted to, since the death of the late Earl, after all just allowances; and what the Master should certify due to the respondent for the arrears of her jointure, was to be made good to

her out of the Staffordshire estate; and the Master was to see what was the annual value of the jointure lands, and to see that lands of the same annual value, in lieu thereof, were settled on her for her jointure, out of the Staffordshire estate: And the Master was to take an account of the rents and profits of the Warwickshire estate, settled on the respondent Robert Shirley, and to see what the same amounted to since the death of the late Earl, after all just allowances; which were to be made good to the said respondent Robert Shirley, out of the Staffordshire estate: And the Master was to enquire and see, what the inheritance of the Warwickshire estate was worth: and what he should certify the same to be worth, was to be made good out of the said Staffordshire estate; and the Master was to see the same, when raised, laid out in a purchase of lands, to be settled to the same uses as the Warwickshire estate was settled. And the Master was to take an account of what was due to the respondents the three younger sons of the late Earl, by the respondent the Countess, for the arrears of their annuities of £100 per ann. a-piece, which arrears were to be paid to them out of the Staffordshire estate; and the said Master was to see that so much of the Staffordshire estate, as should be sufficient to answer the said three annuities of £100 each for the future, should be settled for that purpose. And the Master was to enquire and see, whether the late Earl had a power to make the settlement of the Irish estate on the respondents his sons; and if he should find he had such power, then the Staffordshire estate was to be charged only with what the arrears of the rents of the Irish estate since the Earl's death amounted to, after all just allowances made; but if the Master should find, that the Earl had no power to make such settlement of the Irish estate, then the persons claiming under that settlement, were to have satisfaction out of the Staffordshire estate: And the Master was to settle the value of the inheritance of the Irish estate, and what he should certify the same to be, so much money was to be made good, and raised out of the Staffordshire estate; and the Master was to see the same, when raised, laid out in a purchase of lands, to be settled to the same uses as the Irish estate was settled. And the Master was to see the Staffordshire estate, and the timber growing thereon, or so much thereof as should be necessary for discharging what was charged thereon, in respect of the said other estates so settled as aforesaid, sold for that purpose, to the best purchaser or purchasers that could be got for the same, subject to the Countess's jointure, and the annuities to the younger children; but care was to be taken in the sale, that such part as should be most beneficial, should be preserved unsold for the benefit of the person or persons entitled to the remainder, in case there should be no occasion to sell the whole estate: And in case the Staffordshire estate should be sufficient to raise the whole that was charged thereon, then no account was to be taken of the rents and profits thereof, which had been received by the appellant; but in case it should not be sufficient to answer all the charges thereon, then the appellant was to account before the Master, for the rents and profits thereof received by him, or any other for his use, since the late Earl's death; and the Master, in taking that account, was to make the appellant all just allowances.—And if the Staffordshire estate, and the rents and profits thereof, from the time of the late Earl's death, should not be sufficient to answer the said several charges thereon; then the Master was to apportion the said rents and profits, and the money for which the said estate and timber thereon should be sold, between the parties who were to have a satisfaction thereout, in proportion to their several demands, and the deficiency of the estate to answer the same. And the respondents, the executors of the late Earl, were to account before the Master for his Lordship's personal estate come to their hands or use, in which he was to make all just allowances; and also to take an account of the Earl's debts and legacies, which were to be paid thereout; and the surplus of the said Earl's personal estate was to be laid out in a purchase of lands, with the approbation of the Master, to be settled for the uses and purposes directed by the Earl's will: And the Master was to appoint a fit person to be receiver [105] of the rents and profits of the Staffordshire estate, in the possession of the appellant, (except the house and park and the grounds therewith used), and such receiver was to give security, to be allowed by the Master; and was thereupon, with the approbation of the Master, to be at liberty to take any legal course to recover the possession thereof from any other persons, in the names of the respondents the trustees; and the Master was to settle an annual value to be paid for the house and park, and grounds used therewith, which was to be paid by the appel-

lant to the receiver: And the said receiver was, out of the rents and profits of the said estate, to pay what the Master should certify due to the respondent the Countess, for the arrears of her jointure, and to the younger children, for the arrears of their annuities; and to the respondent Robert Shirley, what should appear due to him, for the arrears of the rents and profits aforesaid: And the Master was to tax the respondents their costs, both at law and equity; which were to be paid out of the Staffordshire estate: And it was further ordered, that a perpetual injunction should be awarded, for stay of the respondents proceedings at law, on the ejectments brought by them or any of them, for the estates in the counties of Leicester, Derby, Warwick, and Nottingham, and all further proceedings at law for the rest of the estates in question.

On the 6th of March 1724, and before this decree was drawn up, the respondents applied for and obtained an order, directing the Master to appoint a receiver; and both sides attending him for that purpose, the Master, by his report, dated the 12th of that month, certified that he had appointed one Mr. William Busby the receiver; to whom the appellant himself declared he had no objection, save only that he was of the respondents naming, or their agent, and therefore insisted, that the Master should appoint another; but as Mr. Busby was a gentleman of an undeniable character and a good estate, the Master thought fit to appoint him, and he entered into a recognizance with the respondents Sir George Beaumont, Robert Shirley, and another sufficient person, in a considerable penalty for his true accounting.

The appellant, however, petitioned the Court to discharge him; but upon full hearing of counsel on both sides, the Court dismissed the petition.

The appellant therefore appealed from the decree, order, and report, as being erroneous in the following particulars: I. That the Court of Chancery had not directed an issue at law, to try whether there was any settlement formerly made of the manor and estate at Charly; whereby the same was so settled, as to come to the appellant in tail, or in any other and what manner. II. That directions were given by the decree, touching the Irish estate, whereas there was no sufficient foundation for them; there being nothing either in the appellant's original or supplemental bills relating thereto, nor in any of the defendants answers to those bills; save only in the answers of the respondents Townsend, the Countess, and Robert Shirley, to the supplemental bill; wherein [106] they only said, they conceived that no part of the late Earl's personal estate was applicable to make good his estate in Ireland, for which they had exhibited a bill against the appellant. III. That in case the Staffordshire estate should not be sufficient to answer all the charges thereon, then the appellant was decreed to account for the rents and profits thereof, received since the Earl's death; whereas it was conceived, he ought not to account for any of such rents and profits, or at least only from the time of making the entry upon, and bringing the ejectment for that estate. And IV. For that Mr. Busby was allowed the receiver of the Staffordshire estate, the appellant's petition touching the nomination of a receiver for that estate was dismissed, and no regard had to the persons who were nominated by him.

And in support of this appeal it was said (P. Yorke, C. Wearg), that it appeared from certain letters written by Mr. Serjeant Bigland, before September 1688, that the late Earl told him, the Staffordshire estate was settled on Mr. Robert Shirley, the appellant's elder brother; and it also appeared from a letter of Dame Elizabeth Ferrers, on the 31st of August 1688, that the Earl had mentioned to her the strict settlement of his estate, and that his paternal estate was settled by his father, and the other part by himself on his marriage; and this paternal estate must mean the Staffordshire estate. That endeavours were proved to have been used, to conceal or make away with the deeds or settlements of the estates, and even to get in the very draughts of them; and as the indenture of the 18th of October 1694, was not to be found, it might well be presumed that the settlements of the other estates were lost or destroyed also. That if the late Earl, in his life-time, intended to have made the respondents an effectual provision or settlement, he would primarily have charged the same on the Staffordshire estate, if he had been conscious that he had sufficient power so to do; and not have made such provision in the first place out of the other estates, which he could not but know was thereby defective, and liable to be defeated. That it appeared by the deeds and will, on which the respondents founded their charge

on the Staffordshire estate, that the same was only in the nature of a mortgage or security, in case the other estates proved defective; and the respondents could not but know that the titles were defective, though they were not pleased to discover the same to the appellant; but on the contrary, brought ejectments for those estates, which they afterwards relinquished, and which occasioned the appellant to pay £15,000 to the Lord and Lady Compton, or else he had not had one foot of land whatsoever: And as the respondents did not bring any ejectment, or make any entry for several years on the Staffordshire estate, they ought not to have any account of profits but from the time of such ejectment or entry.

On the other side it was contended (T. Lutwyche, C. Talbot), that there was no occasion for any issue to be directed, it fully appearing by the deeds produced and read in Court, that the late Earl had an undoubted power over the Staffordshire estate, to make the settlement which [107] he had done, for the benefit of the respondents; nor did the appellant or his counsel ever controvert the same, and therefore there could not appear to the Court, any colour or foundation for directing an issue. As to the directions in the decree concerning the Irish estate, that estate was sufficiently mentioned in the respondents answers, to be settled by the late Earl upon the respondents his sons, as part of the provisions intended for them; and the Staffordshire estate was expressly subjected by the testator's will, to make good all his settlements and provisions whatsoever, for the respondents his wife and children: The decree therefore had done the appellant no hurt in this matter, for it had not determined the title, but only directed the Master to see whether the late Earl had power to settle the Irish estate on the respondents; and if he had, then the Staffordshire estate was only to be charged with what the arrears of the Irish estate amounted to: But if he should find that the Earl had no power, then the persons claiming under those settlements, were to have satisfaction out of the Staffordshire estate; and which directions, were only conformable to the express directions of the testator. That if the Staffordshire estate should prove deficient to answer all the charges thereon, it was but reasonable and just, that the appellant, who, from the late Earl's death in 1717, got the possession, and had all along received the profits till the cause was heard, should answer and make good to the respondents all that he, in their right, had received; more especially, as he likewise got and held the possession of the other estates, which were immediately settled upon them. That as to the receiver, there could be no colour for an objection; for as he was appointed for the respondents benefit, and as the estate of which he was so appointed receiver, was but a slender fund for their satisfaction; it highly concerned them to get a person named, in whom they could confide, and who would make the most of the estate: That they knew of no other person in the country so proper as Mr. Busby, and as undoubted security had been given for his true accounting, if any misbehaviour should appear, the appellant would have his remedy in the Court of Chancery, under the recognizance. That the appellant was in the possession of a large estate, over and above the provisions made for the respondents, and which he might ultimately have, freed from those provisions; the settlement on the Countess being only during her widowhood, and the three small annuities to the three younger sons only for their lives: But forasmuch as those provisions were for the respondents support and maintenance, and as the appellant had, by all possible delays, kept them out of the same for seven years: it was hoped, that the decree and orders would be affirmed, and the appeal dismissed with costs.

After hearing counsel on this appeal, Mr. Attorney-general, on the part of the appellant, acquainted the House, that the parties were come to an agreement, and that the same was put into writing, and signed as well by the Countess and Robert Shirley, as by the Earl: And the counsel for the respondents likewise acquaint[108]ing the House, that they consented to the said written agreement; the same was delivered in at the bar and read, and after consideration had in relation to this matter, it was ORDERED and ADJUDGED, according to the said agreement, that the decree should be affirmed, with the following directions, viz. "That the possession be delivered of the Warwickshire estate to Mr. Robert Shirley, before Lady-day next; that the possession of the jointure estate in Leicestershire, be delivered to the Countess before Lady-day next; that the annuities to the younger sons, be charged on the Staffordshire estate; that the possession of the Irish estate be delivered, before the 1st day of May



next, to Mr. Robert Shirley, and his three younger brothers; that thereupon the receiver of the Staffordshire estate be discharged, and possession thereof delivered to the Earl before Lady-day next; that all arrears, profits, and costs, and all other matters in dispute, be referred to the right honourable the Lord Chancellor, Lord Viscount Harcourt and Lord Trevor, or any two of them, to be adjusted and moderated as their lordships shall think fit; and that their Lordships, or any two of them, be desired, for the quieting the family, to propose a plan of an act of parliament, for settling the jointure estate upon the Lady Dowager Ferrers, during her widowhood; the Warwickshire estate, according to the uses of the deed of the 3d of March 1713; and the Irish estate, according to the deed of the 29th of January 1714; and to secure the annuities to the three younger sons on the Staffordshire estate; and to secure the benefit of the term of 1000 years on the Staffordshire estate, to the Earl, his executors, or administrators." (Jour. vol. 22. p. 613.)

CASE 13.—JOHN BROME, & Ux.,—*Appellants*; HENRY BERKLEY, and others,—*Respondents* [5th March 1728].

[*Mews'* Dig. x. 1274.]

In a marriage settlement, lands are limited to the husband and wife for their lives, remainder to the first and other sons in tail; and in default of issue male, to trustees to raise £2500 for daughters, payable at 21 or marriage, which should first happen, and out of the profits to pay £100 per ann. for maintenance; *the first payment of the maintenance to commence after the estate of the trustees shall have come into possession.* The husband dies without issue male, leaving the wife and a daughter: Held, that the portion shall not be raised in the mother's life-time, because the maintenance, which is naturally to precede the portion, is not to be paid till the trustees are in possession.

DECREE of Lord King, C. AFFIRMED. See *ante*, Note to Ca. 9. of this title [6 Bro. P. C. 75].

2 Wms. 484: Viner, vol. 16. p. 437. note to ca. 10: 1 Eq. ca. ab. p. 340. ca. 7. and 2 Eq. ca. ab. p. 657. note to ca. 11; as to the portions being transmissible interests.

By indentures of lease and release, dated the 17th and 18th of February 1689 between George Earl of Berkley and Elizabeth Countess of Berkley his wife, of the first part, the Lady Arabella Berkley, their daughter, of the second part, Dr. John Tillotson and [109] Robert Nelson, Esq. of the third part, Sir James Hayes and Martin Folkes, Esq. of the fourth part, William Smith, Esq. and the respondent Harry Cole of the fifth part, Dr. George Berkley, son of the said Earl and Countess, of the sixth part, and Anne Cole, widow, and Jane Cole, her daughter, of the seventh part; reciting, *inter alia*, that the manor, lands, etc. therein after mentioned, had been conveyed to the Lady Arabella Berkley, and her heirs, as security for £2000 and interest, redeemable by the Earl and his heirs; and that the said John Tillotson and Robert Nelson were seised of the equity of redemption of the said premises, for such uses and trusts as the said Elizabeth Countess of Berkley, whether sole or covert, by any deed or writing under her hand and seal, testified by three or more credible witnesses, should, from time to time, appoint; and farther reciting, that a marriage was shortly intended to be had between the said George Berkley and Jane Cole; in consideration thereof, and of £2000, being the marriage portion of the said Jane, paid by her mother to the Lady Arabella Berkley, and for providing a competent jointure for the said Jane, and for settling the premises to the uses therein after mentioned; the said Earl and Countess, together with the Lady Arabella, Dr. Tillotson, and Robert Nelson, conveyed to the said James Hayes and Martin Folkes and their heirs, the manor and rectory of Lakenham, etc. in the county of Norfolk, to the use of the said George Berkley, for his life, without impeachment of waste: and after the determination of that estate, to the use of the said William Smith and Harry Cole and their heirs, for the life of the said George Berkley, upon trust to reserve the contingent uses; and after the decease of the said George Berkley, to the use of the said Jane Cole for her life, for her jointure, and in bar of dower; and

after her death, to the use of the first and every other son and sons of the said George, on the body of the said Jane lawfully issuing, in tail general; and in default of such issue, (after a proper limitation to trustees, for the use of any son or sons, wherewith the said Jane might be esient at the decease of the said George Berkley) to the use of the said William Smith and Harry Cole, and their heirs for ever; upon this trust, that in case the said George Berkley should have no son or sons of the body of the said Jane Cole begotten, or having one or more son or sons of her body begotten, such son or sons should all die under the age of 21 years, without issue, and there should be one or more daughter or daughters of the said George Berkley, on the body of the said Jane Cole; then that the said William Smith and Harry Cole, and the survivor of them and his heirs, by and out of the rents, issues, and profits of the said manor and premises, or by absolute sale, or leasing of the same, or any part thereof, or otherwise as they in their discretion should think fit, should raise for such daughter, if but one, the sum of £2500 for her portion, and pay the same to such only daughter at her age of 21 years, or day of marriage, which should first happen; and also raise for and pay to such only daughter, the yearly sum of £100 for her maintenance and education, until her said portion should grow due; the said yearly sum of £100 to be paid [110] to such daughter by half yearly payments, viz. Christmas and St. John Baptist, by equal portions, *the first payment thereof to begin and be made at the first of those feasts next coming or happening, after the estate so limited to the said William Smith and Harry Cole, and their heirs, should take effect in possession*; and if there should be two such daughters and no more, then in trust to raise £2500 for their portions, to be equally divided between them, and to be paid them at their respective ages of 21, or days of marriage, which should first happen; and to pay them £60 yearly a-piece, in like manner by half yearly payments, for their maintenance and education, until their portions should grow due; *the first payment to begin and be made at the first of the said feasts next coming or happening, after the said estate limited to the said Smith and Cole should take effect in possession*; and if there should be three daughters, in trust to raise £3000 to be equally divided between them, and to pay them yearly £50 a-piece in like manner, and to commence at the like time, for their respective maintenances and education, until their respective portions should grow due; and in case there should be more such daughters than three, upon this further trust, that they the said William Smith and Harry Cole, and the survivor of them and his heirs, should stand and be seised of the said manor, lands, etc. in trust for the benefit of all and every the daughters of the said George Berkley, on the body of the said Jane Cole to be begotten, equally to be divided amongst them, to take as tenants in common, and not as joint tenants of the said trust, and of their several and respective heirs and assigns for ever. But in case the said George Berkley should have no daughters by the said Jane Cole, then upon trust for the benefit of the issue of the said George Berkley, on any other wife, as therein mentioned; and in case of no issue by a second marriage of the said George Berkley, then in trust for the benefit of such persons, and for such estates and uses, as the said Elizabeth, Countess of Berkley, notwithstanding her coverture, should, by deed or will, testified by three or more witnesses, direct; and in default of such direction, in trust for the Earl and Countess, and the survivor of them, and the heirs and assigns of the Countess for ever.

By a memorandum indorsed on the said deed of settlement, before the execution thereof, a power was given to Dr. Berkley, in case he left no issue, to charge the premises, from the decease of the said Jane, his intended wife, with any sum not exceeding £2000 for such uses as he thought fit to appoint; and that after such charge, the said Smith and Cole and their heirs should stand seised of the said premises, after the decease of the said Jane, and not before, in trust for the raising and paying the same.

The marriage took effect, and on the 15th of October 1694, Dr. George Berkley died, leaving issue by the said Jane Cole, who survived him, only one daughter Elizabeth.

Elizabeth, Countess of Berkley, by her will, dated the 26th of August 1706, after taking notice that the said premises were in jointure to her daughter-in-law, late wife of her son George Berkley, [111] and were charged with £2500 for the portion of her grand-daughter Elizabeth Berkley; devised the reversion, remainder, and

equity of redemption in the same, to her son Charles, Earl of Berkley, and his heirs, on condition that he paid a debt of £500 owing on bond, and all her other debts.

Earl Charles, by his will, dated the 9th of March 1708, devised the premises; expectant upon the death of Mrs. Chaplain, the mother of Elizabeth, and all his interest therein, unto George Berkley his son, and the heirs of his body begotten; with remainder to the respondent George Berkley in like manner, remainder in fee to the testator's grandson William Chamber, esq.

On the 22d of March 1712, the said Elizabeth Berkley attained her age of 21, and in April 1717, married the appellant John Brome.

In Trinity term 1725, the appellants exhibited their bill in Chancery against the respondents and the said William Chamber, setting forth several of the facts before mentioned, and that the appellant Elizabeth, from the time she attained her age of 21, became well entitled to have the £2500 raised; but that Cole, the surviving trustee, refused to raise the same, and alledged he had no authority so to do, till the death of the appellant's mother; whereas the appellants insisted, that £2500 was directed to be raised and paid at the appellant Elizabeth's age of 21, or marriage, which should first happen, and that the reversion of the premises ought to be sold for the payment thereof, with interest from the time it became payable. The appellants likewise set forth, that the respondents Henry and George Berkley and William Chamber, claiming title to the premises under the wills of the Countess of Berkley and Earl Charles, had got into their custody the said deed of settlement, and other the title deeds of the premises, and concealed the same, to disappoint the appellants from having an execution of the said trust; and therefore, and in regard the appellant Elizabeth had no other provision, they prayed, that the respondent Cole might be compelled to act in the trust, and that the other respondents might set out their title to the premises, and that the reversion thereof, expectant on the death of the appellant Elizabeth's mother, might be decreed to be sold, for payment of the said £2500 portion, due at the appellant's age of 21, and all interest for the same.

The respondents Henry and George Berkley, by their answers to this bill, alledged that the reversion of the premises, expectant on the death of the appellant Elizabeth's mother, was devised by the will of their grandmother Elizabeth, Countess of Berkley, to their late father Charles Earl of Berkley, in fee; and by his will, to the said Henry Berkley, and the heirs of his body, with remainder to the said George Berkley and the heirs of his body, remainder in fee to the said William Chamber; and insisted, that according to the true intent and meaning of the said indenture of release, the £2500 ought not to be raised, till after the decease both of the said George Berkley and Jane his wife; and that till then, the trust estate could [112] not take effect in possession, and that no interest ought to be paid for the £2500 until after the decease of the appellant's mother; they also insisted, that the appellant Elizabeth had other provision, besides what was made by the settlement, and which fact was afterwards fully proved in the cause.

On the 10th of May 1727, the cause was heard before the Lord Chancellor King, who directed a copy of the limitations in the deed of settlement, and of the memorandum indorsed thereon, and also a copy of an order in a certain cause between *Sandys* and *Sandys*, to be laid before him to consider thereon; and declared, that he would desire the assistance of his honour the Master of the Rolls.

These copies, together with some other precedents, were accordingly laid before the Lord Chancellor and the Master of the Rolls; and on the 13th of November 1728, the cause came on for judgment, when his Lordship, assisted by his Honour, was pleased to declare, that the appellants came too soon to have this portion raised, and that there appearing no cause to give them any relief, the bill should stand dismissed.

From this decree, the appellants thought fit to appeal; insisting (C. Talbot, T. Lutwyche), that their application to have the £2500 raised and paid by a sale the reversion of the premises, was not too early; but that the same ought to have been decreed to be so raised, subject to the estate for life of the jointress, with interest from the time that it became payable by the settlement, and that the appellants ought also to have had their costs of suit. And in support of this relief it was argued, that the words of the settlement were plain and positive as to this particular of raising the portion, viz. that in case George Berkley should have no son of the marriage, the trustees, in whom the reversion in fee, subject to the jointure, was

vested, should raise £2500 for an only daughter, and should pay the same to her at her age of 21, or marriage, which should first happen; without restraining it to be done till after the death of the mother. That it was highly reasonable, that this provision in the settlement should have its full force and effect, because the appellant Elizabeth, who was the only issue of the marriage, claimed as a purchaser for a valuable consideration, under a settlement made in consideration of marriage, and of a portion paid; whereas the respondents claimed only under a voluntary disposition, and subject to the portion. That if there had been more than three daughters, the whole reversion in fee would have been vested in those daughters, and as a provision for them, and to be at their disposal; in which case, if the appellant Elizabeth had had three sisters, she would have had a fourth part of this reversion in her immediate disposal, even in the mother's life-time; whereas now, though she was the sole issue of the marriage, she was to have no portion or provision during the mother's life, if the construction contended for should prevail. The objection is, that by the settlement, the trustees, until the portions should be payable, were to raise £100 per ann. for the maintenance of an only daughter, payable at Christmas and [113] Midsummer, the first payment to be made at the first of the said feasts next coming, after the said estates so limited to the trustees should take effect in possession, which was not to be till after the mother's death; and that as the maintenance is to be paid before, and until the portion is payable, this shewed the intent of the parties to be, that the portion of £2500 also was not to be raised till after her death. But to this it was answered, that the reason of making that provision in relation to the maintenance was, because the annual rents and profits are the proper fund for an annual maintenance; and as those rents and profits were limited to the appellant Elizabeth's mother for her life, and could not, during her life, be received by the trustees, and as it might be inconvenient to raise a maintenance by sales or mortgages to be made every half year; the parties to the settlement had therefore expressly guarded against that inconvenience, by postponing the commencement of those half yearly payments for maintenance, till after the mother's death. But there are many instances, where portions have been raised by sale of reversions, in the lifetime of the tenant for life; and the inconvenience on the other side would be very great, if a daughter's portion should not be raised when she most wants it, either upon her attaining her age of 21, or for her advancement in marriage: and therefore in this settlement, there was no provision which postponed the raising of the portion, longer than the time appointed for the payment of it. That as the settlement had made a difference between the two cases, founded upon different reasons, it did not follow from the postponing of the maintenance till after the death of the mother, that the portion should not be raised, if it became payable, as in fact it did, during her life; nor was the provision for maintenance thereby rendered ineffectual, since it might have happened, that both the father and mother had died, before the appellant Elizabeth had either attained 21, or been married; in which case, this provision for maintenance would have taken place; but which, in the present case, it could not do, according to any construction of the settlement, and therefore no argument could be drawn from the provision about maintenance, for delaying the raising of the portion. Besides, there are several precedents in the Courts of Equity, of decrees for the sale of reversionary estates for payment of portions, some of which, at least, come up to the circumstances of this case, if they are not stronger.

On the other side it was contended (P. Yorke, J. Willes), that the sale of reversionary terms for raising portions for children in the lifetime of the father, or of a jointress, is of pernicious consequence to estates and families, and therefore the Court of Chancery avoids it as much as possible; and never decrees it to be done, unless where it appears clearly to have been the intention of the parties to the settlement. That in the present case, the intent of the parties appeared to the contrary; for it was expressly appointed by this settlement, that the £100 per ann. for maintenance should not commence till the first of the feast days next after the estate limited to the trustees [114] should take effect in possession, which was not till after the death of the jointress. That the payment of the maintenance or interest, was not to commence until after the estate took effect in possession, and to continue until the portion should grow due to be paid; and the time of the portion's growing

due, being plainly, in the apprehension of the parties, subsequent to the commencement of the maintenance or interest, the deed ought not to be so construed, as that the portion should be absolutely payable at the age of 21, notwithstanding the estate for life of the jointress continued, when the maintenance or interest was not to commence, until the determination of that estate for life. That Earl Charles, by paying the debts of the Countess, might be considered as a purchaser of the reversion for a valuable consideration; but if the sale prayed by the bill should be made, his devisees, who were his children, would have very little, if any, benefit from the reversion; it not being, at present, worth much more to be sold than the £2500 and the interest of it. And lastly, that there was no room in this case for an argument, which had been sometimes urged, that the portion ought to be raised, in order that the appellant Elizabeth might be advanced in marriage; for she had been many years married, and had a considerable provision besides the portion now in dispute.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 23. p. 340.)

CASE 14.—ANN EVELYN, and others,—*Appellants*; EDWARD EVELYN, and others,—*Respondents* [25th May 1733].

[Mews' Dig. x. 1277. See *Ancaster v. Mayer*, 1783-85, 1 Bro. Ch. 454: *Woods v. Huntingford*, 3 Ves. 128.]

Where portions for daughters are secured by a trust term, to be raised by rents and profits, and no time is limited for the payment of them; they shall neither carry interest or be raised by sale or mortgage, but by perception of the rents and profits only.

DECREE of the English Chancery AFFIRMED, by agreement.

This was but one point of many in this case which was ultimately concluded by an agreement, confirmed by act of parliament: As to the several points, see the places in Viner cited: On the question of Portions, the decision is thus stated in 2 P. Wms.

"A term of 500 years created to raise portions for daughters in failure of issue-male as soon as conveniently may be after the father's death; but no maintenance or any express time mentioned when the portions are payable: There are three daughters, and the eldest but eight years old, the father is dead, but the mother, who has a jointure on the estate, is living: The Court will not raise the portions for daughters so young out of the reversionary term."—See *ante*, Note to Ca. 8 [6 Bro. P. C. 68].

2 P. Wms. 659: Viner, vol. 14. p. 240. note to ca. 11; 285. not to ca. 18; 286. ca. 22: vol. 16. p. 433. ca. 4. 6; and note to ca. 5; 478, note to ca. 5; 486. note to ca. 4: 2 Eq. ca. ab. 501. ca. 34.

George Evelyn, the elder, esq. had issue five sons, namely, John the eldest, George the respondent, Edward, Richard, and William; and being seised of an ancient family estate, part of it, viz. the manor of Walkamstead, *alias* Godstone, and other estates [115] in Surry, in fee, and as to the rest, called Nobred, and some other lands in the said county, for life only, with remainder to his eldest son John Evelyn in tail male; and remainders to his other sons successively in tail male; came to an agreement with his eldest son John for making a new settlement thereof, in order to continue the same in his name and family: Accordingly, by indenture tripartite, dated the 20th of October 1698, made between George Evelyn sen. of the first part, John Evelyn, the eldest son, of the second part, and Richard Bromhall and Thomas Bromfield of the third part; it was witnessed, that in consideration that the said George Evelyn sen. did agree to settle the manor of Walkamstead, *alias* Godstone, in the county of Surry, (except so much thereof as lies within the borough of Brindley Heath, with the quit-rents of the said manor, and the advowson of the parish church of Godstone, and the tythes of Godstone and Tandridge, and coppice woods in Godstone, and wood lands, containing 300 acres, and other lands in those two parishes particularly mentioned, of which he was then seised in fee) to the same uses and estates, and subject to the like provisoes, as the lands and tenements therein after limited, to George Evelyn, sen.

for life, and after his death, to his first and other sons in tail male successively, were thereby limited and settled; as also for barring all remainders and intails of the lands and hereditaments therein after mentioned, and settling the same to the uses, and subject to the provisos therein after mentioned; the said George Evelyn, sen. and John his son, covenanted with Bromhall and Bromfield, to suffer a common recovery of the messuage and lands called Nobred, and of several lands and woods in the parishes of Godstone and Tandridge aforesaid, to the following uses, viz.

As to the said messuage and lands called Nobred, and the lands and woods thereto belonging, and 86 acres of the wood lands, to the use of George Evelyn, sen. in fee: and as to all the rest of the said lands, to the use of the said George Evelyn, sen. for life without impeachment of waste; remainder to John, his eldest son, for his life; remainder to trustees to support contingent remainders; remainder to his first and other sons successively in tail male; remainder to George Evelyn, jun. the second son, for his life, *sans* waste; remainder to trustees to support contingent remainders; remainder to his first and other sons successively in tail male; remainder to the respondent Edward Evelyn, the third son, for his life; remainder to trustees to support contingent remainders; remainder to his first and other sons successively in tail male; with like remainders over to Richard and William Evelyn, the two other sons of the said George Evelyn, sen. successively, for their several lives, and to their sons successively, in tail male; remainder to the heirs male of the body of the said George Evelyn, sen. remainder to him in fee.

Provided, that it should be lawful for George Evelyn, sen. by deed or will, to charge, by way of lease, mortgage, or otherwise, the lands and premises so limited to him for life, with the raising and payment of any sum of money, not exceeding £6000 pay-[116]-able as therein mentioned; or by lease or leases, or otherwise, to charge the premises with the payment of any annuity for the life or lives of any person or persons, to be computed at the rate of ten years purchase, and that not to exceed £6000. And, that it should be lawful for George Evelyn, sen. with such of his sons who should be next in remainder, and after his death for his sons, when in possession of the premises, by virtue of the said limitations, by deed, to limit a jointure before or after marriage, to the wife or wives of the said sons, for her or their life or lives, of all or any part of the premises, after the rate of £100 a year, for every £1000 portion.

Provided also, that it should and might be lawful to and for the said George Evelyn, the father, together with such of his said sons as, for the time being, should be next in remainder after his death; and after the death of the said George Evelyn, the father, then to and for all and every the son and sons of the said George Evelyn, the father, severally and successively, when they should be respectively in possession of the said messuages, lands, tenements, hereditaments, and premises, by virtue of any of the limitations aforesaid; by any deed or deeds, writing or writings, under their or their hand and seal, hands and seals, signed and sealed by him or them respectively, in the presence of three or more credible witnesses, to make any lease or leases for years, without impeachment of waste; but without prejudice to any jointures or jointures that should be made by virtue of the before mentioned proviso; for raising a portion or portions for the daughter or daughters of such son or sons, making such lease or leases; so as the portion or portions to be raised, should not exceed the portion or portions, fortune or fortunes, in money, goods, or chattels, of the wife or wives that such son or sons so making such leases, should marry; and so that such lease or leases should not take effect, till there should be a failure of issue male to such son or sons so making such lease or leases.

Proviso for George Evelyn, sen. and for his sons, as they should respectively come into possession, to make leases of the premises for any number of years, not exceeding 21 years, in possession and not in reversion, at the best rent, payable quarterly or half yearly, without taking any fine.

A recovery was suffered accordingly, and by indentures of lease and release, made between the same parties, and dated the 21st and 22d of October 1698, in consideration that the said John Evelyn had joined with his father in suffering the said recovery of the premises, and settling the same to the uses, and subject to the provisos in the said indenture limited and expressed; and in pursuance of the agreement therein mentioned for that purpose, George Evelyn the father, granted and confirmed to the trustees and their heirs, the manor of Walkamstead, *alias* Godstone, and

tithes and other lands and estates in Godstone, to the same uses, upon the trusts, and subject to the same powers and provisos, as were limited and declared by the former settlement; except, that in the power to raise [117] portions for daughters, the following words were added; viz. "and so as such lease or leases be determinable upon the raising the said portion or portions, and of the costs and charges of raising the same."

George Evelyn, sen. in pursuance of the power reserved to him by the last deed, executed his power of raising £6000, as to the sum of £1500 part thereof, by making a mortgage of the premises, dated the 1st of April 1699, to one Thomas Gregg, for 500 years, for securing £1500 and interest; which mortgage afterwards, by mesne assignments, became vested in Sir Thomas Pope Blount, and remained a charge upon the estate.

In June 1699, George Evelyn, sen. died, leaving issue the said John, his eldest son, George Evelyn, jun. father of the appellants, his second son, the respondent Edward Evelyn his third son, and Richard and William his two other sons; and in 1703, John, his eldest son, died without issue, and unmarried; whereupon the remainder limited to George the second son, came into possession.

By indenture of three parts, dated the 22d of August 1720, made between George Evelyn, jun. of the first part, Thomas Garth and Mary his daughter, of the second part, the respondent James Worsley, and other trustees since deceased, of the third part; reciting a marriage intended between George Evelyn, jun. and Mary Garth, whose portion was agreed to be £8000, for settling a suitable jointure on her and her issue male; and that £8000 should, on failure of issue male, be secured to their daughters.—and reciting the said indenture of the 20th of October 1698, and the recovery thereon, and the indentures of the 20th and 21st of October 1698, and the several provisos in the said indentures; it was witnessed, that in consideration of the said marriage, and marriage portion of £8000, and in pursuance of the agreement made for settling a suitable jointure on Mary Garth, the said George Evelyn the younger, by virtue and in pursuance of the powers and authorities to him given, as well by the said recited settlement, as by any other power and authority, did assign, limit and appoint, to the use of Mary Garth, for her life, to take effect after the death of the said George Evelyn the younger, as and for her jointure and in bar of dower, the messuages, lands, tithes, and tenements, in Godstone, Tandridge, and Bletchingly, in the county of Surrey, not exceeding £800 a year, being suitable to her portion.—And the said indenture further witnessed, that in consideration of the said intended marriage, and marriage portion paid, and for the settling a suitable portion or portions on the daughter or daughters of him the said George Evelyn, to be begotten on the body of the said Mary his intended wife, in case of failure of issue male of his body upon the body of the said Mary to be begotten; or if the issue male between them should happen to die, and there should be issue of the body of the said George Evelyn, on the body of the said Mary, one or more daughter or daughters; he the said George Evelyn, by virtue and in pursuance of the powers and authorities to him given, as well by the said recited settlements, as also by vir-[118]-tue of any other powers or authorities to him given, or in him being, did demise, grant, and lease, to the respondent James Worsley, and the other trustees since deceased, their executors and administrators, all and singular the lands and premises therein before mentioned, and limited to the said Mary for her jointure, and all other the manors, lands, and hereditaments, in the said recited indentures of settlement comprised and limited to the said George Evelyn the younger, for his life; to hold the said premises to the said trustees, their executors and administrators, for the term of 500 years, to commence and take effect from and after the failure of issue male of the body of the said George Evelyn the younger, to be begotten, and from thence next ensuing, and fully to be compleat and ended without impeachment of waste; but without any prejudice, and subject to the jointure of the said Mary his intended wife; at the yearly rent of a pepper-corn during the said term, at the feast of St. Michael the Archangel, if the same should be demanded, upon the trusts, and for the purposes, and under the provisos therein after mentioned; upon trust, that if there should be failure of issue male of the body of the said George Evelyn the younger, on the body of the said Mary begotten, and the same should be begotten on the body of the said Mary his intended wife; that then the said trustees, and the survivor of them, and the executors and administrators of such survivor, should and

might, out of the rents, issues, and profits of the said messuages, lands, tenements, hereditaments, and premises, to them limited for the term of 500 years as aforesaid, or by sale, mortgage, or lease thereof, or of any part or parcel thereof, for all or any part of the said term, or by all or any of the said ways and means, or by any other ways or means, as to them in their discretion should seem meet, as soon as conveniently might be after the decease of the said George Evelyn the younger, or in his lifetime, if he should think fit to have the same sooner raised, and so direct, levy, and raise the sum of £8000, for the portion or portions of such daughter or daughters, to be paid to her or them, and equally divided among them, if more than one, share and share alike:—With a proviso, that the said term of 500 years should in no sort prejudice the jointure; and that immediately after the raising, paying, and discharging the said £8000, together with all costs and charges which should be expended in raising the same, the said term should cease and determine.

The marriage took effect, and on the 20th of June 1724, George Evelyn, jun. died intestate, without issue male; but leaving Mary his widow, and the appellants his only daughters. Whereupon Mary the widow (who afterwards married Charles Boone, esq.) procured letters of administration of her said husband George Evelyn's personal estate, and entered on the estates limited to her in jointure; and the respondent Edward Evelyn, entered upon the rest of the estate not limited in jointure, but comprised in the said term of 500 years, for raising the daughters portions, and became [119] seised in reversion of the estate limited in jointure on Mrs. Boone, after her death, for such estate as was limited to him by virtue of the settlements in October 1698.

In Michaelmas term, 1725, the appellants exhibited their bill in Chancery against the respondents, and also against Thomas Garth, James Worsley, and Thomas Gregg, the then surviving trustees in the settlement of August 1720, praying, that the trustees might execute the said trusts, by raising the £8000, in such manner as by the said settlement was directed for the appellants portions; and that the same might be placed out at interest, and such interest applied for their maintenance. To which bill the defendants Garth and Gregg put in a joint answer, and the defendant Garth thereby submitted to act in the trust; but the defendant Gregg desired to be discharged thereof; and the defendant Worsley did the same by his answer. But the defendant Edward Evelyn insisted by his answer, that this £8000 was only to be raised out of the rents and profits, when the term came into possession.

Soon afterwards, the respondents Edward and James Evelyn his son exhibited a cross-bill against the appellants, and against the said Mary Boone, the widow and administratrix of the said George Evelyn jun. and the trustees, and also against Sir Thomas Pope Blount, the mortgagee of the said estates for £1500, in order to have an account of the said George Evelyn's personal estate; and that the surplus thereof, after his debts paid, might be applied in exoneration of the said mortgage of £1500, and to have a discovery of the settlements and writings of the family come to the hands of Mrs. Boone, after her late husband's death.

These causes being at issue, came on to be heard before the Master of the Rolls in the absence of the Lord Chancellor, upon the 27th of May 1728; when it was declared, that the power in the deeds of the 20th and 21st of October 1698, was well executed; and it was ordered, that it should be referred to the Master, to enquire into the value of the estate in jointure to the defendant Mary, and the value of the estate not in her jointure; and his Honour reserved all further directions, till after the Master's report.

The Master, by his report, dated the 17th of December 1729, stated the yearly value of the estate limited in jointure to amount to £803 a year, for some part whereof the tenants were to pay taxes; and that the annual payments thereof amounted to £4 15s. a year; and that the estate not in jointure amounted to £91 5s. a year only.

Afterwards the respondents Edward Evelyn and James his son apprehending that the declaration which had been inserted in drawing up the decree made by the Master of the Rolls, that the power was well executed, might be construed to mean not only that the term in the deed of the 22d of August 1720, was well raised, but that the trusts of it were well declared; were advised to prefer their petition of appeal to the Lord Chancellor, against that part of the decree; and they accordingly obtained an order for re-hearing both the causes as to that particular, at the same [120] time that they were to be heard on the Master's report for further directions.



The causes came to be heard before the Lord Chancellor King, on the 19th and 20th of July 1730; when his Lordship was pleased to desire the assistance of the Lord Chief Justice Raymond, and the Master of the Rolls.

And accordingly, on the 26th and 27th of October following, the causes were heard before the Lord Chancellor, assisted as aforesaid; when, after a full hearing, the Court declared, they would take time to consider of the matters in question: Which they did, till the 4th of February 1731; when the causes standing in the paper for judgment, the Lord Chancellor, the Lord Chief Justice Raymond, and the Master of the Rolls, declared their opinions unanimously, that the £1500 mortgage, being originally a charge on the real estate, the personal estate of George Evelyn the son, ought not to be applied to pay off the said mortgage; and that the £8000 claimed by the appellants, ought not to be raised by sale or mortgage of the said term of 500 years, granted by the said settlement of the 22d of August 1720, of the said trust estate, but only out of the rents and profits arising out of the said trust estate; and thereupon it was (among other things) ordered, that so much of the respondents cross-bill as related to the exoneration of the said mortgage on the real, and to have the same paid out of the personal estate, should be dismissed with costs; and decreed, that the said £8000, for the appellants portions, should be raised out of the rents and profits of the trust estate; and the defendant James Worsley, the surviving trustee in the settlement, declining to act, the Master was to appoint new trustees; and the defendant Worsley was to assign to them, with a power for them to cut down timber from the premises, with the Master's approbation: And the respondent Edward Evelyn was to account before the Master, for the rents and profits of the trust estate in his possession; and what upon the balance of such account should appear to have been received by him, he was to pay the same to the new trustees, towards satisfaction of the said £8000, and deliver possession of the trust estate to them, and they were to receive the growing rents and profits thereof, and also of the estates in jointure, to Mrs. Boone, when they should fall in, during the remainder of the said 500 years term, till the remainder of the said £8000 was raised thereout; and all parties were to be paid their costs in the original cause, out of the profits of the trust estate.

From so much of this decree, as declared that the £8000 ought not to be raised by sale or mortgage of the 500 years term, but only out of the rents and profits of the trust estate, the present appeal was brought; and on behalf of the appellants it was argued (C. Talbot, T. Lutwyche), that the £8000 for their portions, became due upon the death of George Evelyn, the son, without issue male, and was no more than their mother's portion. That there was no particular method of raising the same, prescribed by the power in the settlement of October 1698, any otherwise than by giving power to George to [121] make leases, without impeachment of waste, for raising portions for daughters; but the settlement did not direct, that these portions should be raised by rents and profits, or in any other particular method, and therefore the trustees were left to do it in the most effectual way; and since no particular method was thereby directed, the methods which were particularly mentioned in the execution of the power, by George Evelyn, the son, were very reasonable. That in cases where portions have been expressly directed to be raised by rents and profits of a term for years, Courts of Equity have frequently directed the term to be sold or mortgaged for the raising such portions, especially if they could not be raised in a reasonable time by any other method; and in this case, there being but £91 5s. per ann. not covered by the jointure, there was no probability of raising the portions under a great number of years, and but by small sums. That there was no difference between the power in the settlement of the 20th of October 1698, and that of the 21st of October 1698, save only, that in the latter it was added, "that the lease should determine and be void, upon raising the portions;" and from thence it was inferred, that the portions could not be raised by mortgage or sale, because, as soon as the money was paid, the lease would be void. But it was hoped, that no such inference could reasonably be made from these words, and that the meaning of them could only be, when the land, or the reversion, had answered the portions; for, if the sale or mortgage was defeated, the portions could not be said to be raised. If, however, this was an objection as to the lands comprised in *that* settlement, it did not hold as to the lands comprised in the *other*, nor prevent the portions from being raised by sale or mortgage of those lands. That the daughters had no maintenance provided for them, and therefore their portions ought to vest, and be immediately raised upon their father's death, without issue male. That

portions ought regularly to be raised in entire and gross sums, to answer the end for which they are given ; whereas, in the present case, they were decreed to be raised by small sums, out of rents and profits, so that the appellants might be forced to spend the principal for their bare subsistence, and might very probably wait so long, as never to have the real use and benefit of them ; which could never be the intention of the marriage agreement, or of the power vested in and executed by their father. It was therefore hoped, that the decree would be varied in the particulars complained of, and that the portions of £8000, with interest for the same, from the time of George Evelyn's death, would be directed to be raised by sale of the lands comprised in the 500 years term, or a sufficient part thereof.

In support of the decree it was contended (P. Yorke, D. Ryder), that there was no ground to raise these portions by sale or mortgage, either upon the foot of the original powers reserved by the deeds of October 1698, or even of the execution of those powers, by the deed of August 1720. For, with respect to the jointure lands, which were al-[122]-most the whole of the estate, the term of 500 years was a mere reversionary term, to take effect after the death of a young jointress ; and a sale, or even mortgage of it, at present, (in which case the interest would be adding to the principal during all her life), would, with the £1500 mortgage, possibly swallow up the whole value of the term, and leave only a naked reversion in the heir male, never to take effect in possession, till after the expiration of 500 years, and therefore nothing but the plainest intention of the parties who had the absolute power of disposing of this estate, could warrant such a proceeding ; but instead of any such apparent intent, a contrary one was manifest upon the very face of the deeds. That the only method prescribed by the deeds of October 1698, for raising the portions, was, by making leases without impeachment of waste, the most natural meaning of which was, to raise them out of the rents, or by felling timber ; but there were no words which imported, that they should be raised by sale or mortgage, or any general words, which are commonly inserted as words of course, where a general power of raising is intended, and were expressly so in these very settlements, as to the method of raising the sum of £6000 for George Evelyn the elder, which was intended to be raised in all events, if he pleased. That in this case there was no particular time appointed when the portions were to be raised, which, therefore, was left to be determined by the nature of the estate, and the necessities of the children. The eldest of the appellants was under five years old when the bill was brought ; and it could hardly be imagined, to have been the intent of the grandfather, who was taking so much care to secure a family estate in the male line, that all his care should be defeated, and the estate taken away from the family (as it certainly must, in effect, by a sale or mortgage of this reversionary term) in order to raise portions for grand-daughters, who did not yet, and possibly never might, want them ; and which, if they should happen to die while incapable of disposing of them, or intestate, would go to the mother, or her second husband. That no time being expressly appointed for the payment of these portions, the consideration of the estate from whence they were to arise pointed out the time, viz. when that estate naturally furnished a fund for it ; that is, when it should come into possession. That by the express words of the proviso in the second settlement of 1698, the term to be created for raising the portions was to cease and determine as soon as the portions were raised ; but this could not be, if, after those sums were raised, and the children paid, the term was still to subsist for the benefit of a purchaser or mortgagee ; neither was it possible for the term to cease, upon raising the portions in any other sense or way, than by raising them from out of the growing profits : And this proviso was expressly inserted in the settlement of 1720, and extended to the whole term. Besides, the daughters were not even now unprovided for, for they had two thirds of their father's personal estate, which, by the schedules annexed [123] to the mother's answer, appeared to be considerable ; and they would also, on the foot of the decree, as it now stood, have the growing profits of the residue of the estate not in jointure, besides the support and assistance of their mother, who had an ample jointure. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

After counsel on both sides were partly heard upon this appeal, they informed the House, that all the parties capable of consenting were come to an agreement, and that the same was put into writing and signed by them ; and it was submitted to their

Lordships, if the same was thought proper, to dismiss the appeal, but without prejudice to the bringing another, in case an act of Parliament could not be obtained, as in the agreement mentioned. Whereupon the written agreement was delivered in and read by the Clerk, as follows:

"Agreed, that the whole estates comprised in the recovery and deed of the 20th of October 1698, to lead the uses thereof, and in the deeds of lease and release of the 20th and 21st of October 1698, mentioned in the pleadings in this cause, whereof the greatest part is settled on Mrs. Boone in jointure, and in her possession, and the residue, being £91 5s. per ann. in the possession of Mr. Edward Evelyn, together with the advowson of the parish church of Godstone, in the county of Surry, be sold to Mr. Boone for £24,000, to be paid as soon as an act of Parliament can be obtained for confirming this agreement, and proper conveyances of the said estates to Mr. Boone and his heirs shall be executed by all proper parties: That out of the said sum of £24,000 Mr. Boone and Mrs. Boone, his wife, shall be allowed £8000 for her jointure, and the appellants shall have £5500, equally to be divided between them, in satisfaction of their portions provided by the settlement of the 22d of August 1720, made on their father and mother's marriage; and the same shall be placed out on government or real security, for their benefit during their respective minorities, or until they shall severally marry, and shall then be paid to them respectively; and if all or any of them shall die before her or their ages of 21 years and unmarried, the share of such daughter or daughters, so happening to die, shall be paid to her or their respective executors or administrators: And that the sum of £1500 shall be allowed to Mr. Boone, for the mortgage made by George Evelyn, the appellants grandfather, on the said estate, which was vested in Sir Thomas Pope Blount by mesne assignments, and is now vested in trustees for Mr. Boone: And that £1000 more of the said £24,000 be laid out in lands, and settled on Mr. Richard Evelyn for life; with remainder to his first and other sons in tail male; with remainder to William Glanwill, esq. in tail male; with remainder to Richard Evelyn the father, and the heirs of his body, for his consent to the sale of the said estate; remainder to the said Edward Evelyn, and his heirs: That the profits of the said lands [124] of £91 5s. per ann. in the possession of Mr. Edward Evelyn as aforesaid, and which have been received by him since the death of the appellants father, or which shall be received thereout, till the said sale shall be completed, be applied towards the costs of all parties; and if the same shall not be sufficient for that purpose, that so much as shall be wanting shall be paid by the said Edward Evelyn: And that the residue of the said purchase money be invested in a purchase of lands and tenements of inheritance, to be settled on the respondent Edward Evelyn for life; remainder to trustees to preserve contingent uses; remainder to his first and other sons in tail male; with such remainders over, and under and subject to such powers, clauses, provisos and agreements, as are mentioned and contained in the said deeds of the 20th and 21st of October 1698, touching the said estates, hereby agreed to be sold; and in the mean time, till a proper purchase be found, be placed out at interest in the names of trustees, upon trust, to be laid out in such purchase as aforesaid, and in the mean time, the interest to go to the same uses as the profits of the lands to be purchased ought to be applied: That all parties concerned, do join in using their best endeavours to procure an act of Parliament, for sale of the said estates to the said Mr. Boone, for the said sum of £24,000, and for applying the said £24,000 to the uses and for the purposes aforesaid: That in the mean time, application be made to the Right Honourable the House of Lords, that the further hearing this cause upon the appeal, may be adjourned to the next session of Parliament."

It was, however, ORDERED, that the appeal should be dismissed; but without prejudice to the bringing another, in case the said agreement should not be perfected\*.  
(Jour. vol. 24. p. 280.)

\* The agreement was afterwards confirmed by act of Parliament, 7 Geo. 2.—  
2 Cox's P. Wms. 673 n.

[125] CASE 15.—LEWIS PUGHE, et Ux.,—*Appellants*; THOMAS DUKE OF LEEDS, and others,—*Respondents* [15th March 1780].

By settlement on the marriage of G. E. and E. M. a term of 600 years was created to raise portions for daughters; by which it was provided that in case there should be but one daughter, the sum of £5000 should be raised for such only daughter, to be paid at 18 or day of marriage, with maintenance in the meanwhile. And there was a proviso in the settlement, that in case the daughters should be advanced with portions in money or lands, equal in value to the portions thereby provided, in the lifetime of G. E. or he should give or leave them money or lands not equal in value, the trustees should raise only so much as should make the money, or value of the lands so given, equal to the portions provided. The appellant Elizabeth, being the only daughter of the marriage, attained her age in her father's life-time; who many years (26) afterwards, being possessed of £5000 East India annuities, which he had saved from the income of the estate, transferred them to the appellant Elizabeth then a widow.—A bill was filed, and the cause was heard before Ld. Bathurst; in which there was a decree in favour of the appellant for her portion of £5000, with interest from her father's death; the question of satisfaction not being then before the Court.—The respondents afterwards exhibited their bill of review, stating, that since the former decree they had discovered that G. E. had transferred to the appellant these East India Annuities, in part of her portion. On the hearing of that cause it was declared by the Chancellor, that the annuities were to be considered as having been so transferred in part satisfaction of the portion, and he therefore varied the former decree so far.—This appeal was then brought in Parliament against the first decree, on the question of the time of payment by which the interest was to be regulated; and against the second, on the question of satisfaction.

The DECREES (which were both of them made by Ld. Bathurst, C.) were AFFIRMED.

As to the question of interest, see *ante*, Note to Case 9; and see also Ca. 2. 10. 14; and for other cases of satisfaction, *ante*, Ca. 4. 11.

See 1 Bro. C. R. 67. in n.

In Michaelmas term 1738, the respondent, the Duke of Leeds's late wife, then Lady Mary Godolphin, by Francis late Earl Godolphin, her father and next friend, together with the said Francis Earl Godolphin, and Sir John Evelyn, baronet, surviving Executors of Henrietta late Duchess of Marlborough, deceased, late mother of the respondent the Duke of Leeds's said late wife, in trust for her, together with Ellen Godolphin, spinster, Sarah Davies, widow, and Richard Davies, gentleman, creditors of Samuel Edwards, esquire, deceased, exhibited their bill in the Court of Chancery against Godolphin Edwards Esquire, and John Spicer, gentleman, executors of the said Samuel Edwards, the Governor and Company of the Bank of England, Thomas Edwards, Alice Edwards, John Langley, and Henry Wood, trustees named in the will of the said Samuel Edwards, deceased, Thomas Lord Onslow, Robert Pennant, gentleman, and Montague Earl of Abingdon and Mary Countess of Abingdon his wife, thereby praying, amongst other things, an account of the said Samuel Edwards's real and personal estate, and to be paid their several debts and demands set forth in the bill, and to have the trusts, created by the will and codicil of the said Samuel Edwards, carried into execution; to which bill all [126] the defendants appeared, and put in their answers, and issue was joined, and witnesses examined, and the cause was set down to be heard; but before the hearing thereof, the respondent, the Duke of Leeds and his said late wife, intermarried, whereby the cause as to them abated; but was afterwards duly revived.

The said Mary Countess of Abingdon, by her next friend, in Trinity term 1738, exhibited her bill in the Court of Chancery against the said Godolphin Edwards, John Spicer, the Governor and Company of the Bank of England, the respondent the Duke of Leeds's said late wife, by her then name of Lady Mary Godolphin, the said Francis Earl Godolphin, Sir John Evelyn, Thomas Edwards, and Alice Edwards, John Langley, Henry Wood, Samuel Edwards, and Montague Earl of Abingdon, praying.

amongst other things, that proper directions might be given to the executors and trustees of the said Samuel Edwards for the due execution of their trust; to which bill the several defendants put in their answers, and that cause was also at issue.

The said John Spicer, in Hilary term 1738-9, exhibited his bill against the said Montague Earl of Abingdon and Mary Countess of Abingdon his wife, the said Mary Duchess of Leeds, late wife of the respondent the Duke of Leeds, by her then name of Lady Mary Godolphin, the said Francis Earl Godolphin, Sir John Evelyn, Ann Coney, Mary Wingfield, Francis Bowdler, Robert More, esquire, the said Samuel Edwards, Ellen Godolphin, Sarah Davies, Richard Davies, Edward Lloyd Jwyllym, the Governor and Company of the Bank of England, Godolphin Edwards, Thomas Edwards, John Langley, and Henry Wood, praying, amongst other things, that the real and other estates, devised to be sold by the said Samuel Edwards, for payment of his debts, might be sold; and that all proper parties might join in such sale, and thereout make good and pay the several debts of the creditors of the said testator, and might carry the trusts, created by his will and codicil, into execution.

The several defendants put in their answers to the said bill, and that cause was also at issue; and on the 27th day of October 1740, all the said causes came on to be heard before the Lord Chancellor Hardwick; when his Lordship declared the will and codicil of the said Samuel Edwards well proved, and decreed that the same should be established, and the trusts thereof performed and carried into execution; and that the reversion in fee of the estates comprized in the settlement made on the marriage of the said Godolphin Edwards, of the 23d of April 1724, and in the articles of the 3th of October 1737, whereby certain premises at Presthorpe were agreed to be limited to the same uses, was vested in the testator Samuel Edwards, and passed by his codicil; and in case the money arising by the several funds mentioned in the decree should not be sufficient to pay what should be found due to the testator's creditors, then it was ordered that the said reversion in fee should be also sold, with the approbation of the master, wherein all proper parties were to join, and the money arising by such sale was to be applied in satisfaction of such of the testator's debts as should remain unsatisfied, in like [127] manner as was before directed touching the rents and profits of the real estate; and in case there should be any surplus of money, arising by sale of any of the said estates, remaining after payment of the said testator's debts, then the consideration how the same should be applied was reserved till after the Master had made his report.

Several proceedings were had in consequence of the said decree, and divers reports made by the Master; and all the funds liable to the payment of the said Samuel Edwards's debts were duly applied, as far as the same would extend, except the said reversionary interest, and a small balance remaining in the hands of the accountant general of the Court of Chancery, and a small copyhold estate held of the manor of Doddinghurst Hall in Essex; but a large part of the debts of the said Samuel Edwards, and particularly the debts due to the respondents in the several rights after mentioned, remained unsatisfied.

Since pronouncing the decree, the respondent the Duke of Leeds's late wife died, having duly made her will, and appointed the Duke sole executor and residuary legatee; and soon after her death, he proved the same will, and took upon himself the execution thereof.

Sir John Evelyn died in the life-time of the Francis Earl Godolphin; and the said Francis Earl Godolphin, who was the surviving executor of Henrietta late Duchess of Marlborough, also died, having duly made his will, and thereof appointed the respondent Francis Lord Godolphin sole executor and residuary legatee; and soon after his death, the said respondent duly proved his said will, and took upon himself the execution thereof.

Mary Countess of Abingdon also died, having made her will, and thereof appointed Francis Annesley, esq. and George Speke, esq. executors, and Nicholas Gould, esq. residuary legatee; and the said Francis Annesley died without having proved the said will; and the said George Speke renounced the execution thereof; and thereupon letters of administration, with the said will annexed, were granted unto the said Nicholas Gould, the residuary legatee.

Nicholas Gould afterwards died intestate; and letters of administration, as well of his effects, as of the effects of the said Mary Countess of Abingdon, with her will

annexed, left unadministered by the said Nicholas Gould, were granted unto Hussey, the widow of the said Nicholas Gould, who afterwards intermarried with James Buller, jun. esq. since also deceased; and the said Hussey Buller also died intestate: and letters of administration, as well of the effects of the said Mary Countess of Abingdon, with her will annexed, left unadministered by the said Nicholas Gould and Hussey Buller, as also of the effects of the said Nicholas Gould, left unadministered by the said Hussey his late wife, have been granted to the respondent George Gould.

Ellen Godolphin also died, having made her will, and thereof appointed Robert Hoblyn, esquire, sole executor, who duly proved the same; and the said Robert Hoblyn afterwards died, having made his [128] will, and thereof appointed the respondent Mary Quicke, then Mary Hoblyn, his wife, sole executrix, who duly proved the same, and took upon herself the execution thereof.

Godolphin Edwards, who was the surviving executor of the said Samuel Edwards, the testator, is since also dead without issue male, leaving the appellant Elizabeth, late Elizabeth Manlove, widow, his only daughter, heir at law and sole executrix; and she is also heir at law of the said Samuel Edwards the testator.

The reversion mentioned in the decree of the 27th of October 1740, came into possession, and was applicable to satisfy the demands of the respondents upon the estate of the said Samuel Edwards.

The said Thomas Edwards is dead, and the said John Langley survived him; by means whereof, the said John Langley is now become the surviving trustee of the real estate of the said Samuel Edwards. The said Mary Wingfield is dead, having made her will, and thereof appointed the said Ann Coney sole executrix, who duly proved the same, and afterwards died, having made her will, and thereof appointed John Ashby, esq. and Ann Probert, the wife of the Reverend Francis Probert, executors, who duly proved the same.

The said Frances Bowdler died also intestate, and letters of administration to her were granted unto John Bowdler. The said Edward Lloyd Gwyllym is also dead intestate; and letters of administration of his effects, unadministered by Ann Matthews, have been granted to Catherine Wardle, widow.

The said Sarah Davies is dead, having made her will; and letters of administration, with the said will annexed, of her estate and effects, were granted to the appellant Elizabeth Pughe, by her then name of Elizabeth Manlove.

Richard Davies is dead, having made his will, and thereof appointed his wife Catherine Davies sole executrix, who duly proved the same; and the said Catherine Davies afterwards intermarried with Thomas Brigstock, esq. since deceased; and since the death of the said Thomas Brigstock, the said Catherine Brigstock also died, having made her will, and thereof appointed Beaumont Topott sole executor, who duly proved the same, and took upon himself the execution thereof.

The respondents, on the 22d of October 1773, filed their bill of revivor and supplement, in the Court of Chancery, against the appellants, and Robert More, Thomas Mulso, and John Pyle, and others; which bill was afterwards amended by order, bearing date the 19th of February 1774, stating therein to the effect before set forth; and that, by the several events aforesaid, the several causes had become abated, and that the respondents had a right to have the same revived; and that the appellants and their trustees, Sir Richard Corbett, Robert More, Thomas Mulso, and John Pyle, as also Samuel Edwards, the devisee named in the will of the said Samuel Edwards, deceased, claimed to be entitled to some right or interest in the reversion of the said real estate late belonging to the [129] said Samuel Edwards, deceased, or some charge prior to such reversion, paramount the respondent's demands thereon, as specialty creditors of the said Samuel Edwards; and the respondents, by their said bill, prayed that the said suit and proceedings might be revived, and be in the same plight and condition as they were before the abatement thereof; and that the respondents might have the benefit of the former proceedings.

All the defendants appeared, and put in their answers to the said bill; and particularly the appellants, and also the said Sir Richard Corbett, Thomas Mulso, and John Pyle, by their answers, did admit the several facts stated in the said bill of revivor, and amongst other things said, They believed, that, by indentures of lease and release, the release dated the 23d April 1724, and made between the said Samuel

Edwards and Elizabeth his then wife, and the said Godolphin Edwards, of the first part; George Walcott, Humphry Walcott, and Henry Edwards, esquires, of the second part; the said Richard Corbett and George Welde, esquire, since deceased, and the said Robert More, of the third part; Sarah More, widow, and Elizabeth More, spinster, sole daughter of the said Sarah More, of the fourth part; reciting, that a marriage was intended between the said Godolphin Edwards and the said Elizabeth More; in consideration of the said marriage, and of £5000 paid by the said Sarah More to the said Samuel Edwards, and for other considerations, the said Samuel Edwards, and Elizabeth his wife, did grant, release, and convey unto the said George Walcott, Humphry Walcott, and Henry Edwards, and their heirs, all that the manor of Frodgeley, otherwise Frodesley, in the county of Salop, and divers other lands and hereditaments therein mentioned, to hold the same after the solemnization of the said marriage, as to the said manor of Frodgeley, and other premises therein mentioned, to the use of the said Godolphin Edwards for life, with remainder to the use of the said George Walcott, Humphry Walcott, and Henry Edwards, and their heirs, during his life, in trust, to preserve contingent remainders; with remainder to the use of the said Elizabeth Moore, his intended wife, for her life, for her jointure, and after her decease, then to such uses as after mentioned: And as to the said premises, whereof no use was before limited, to the use of the said Godolphin Edwards for life, with remainder to the use of the above-named trustees, and their heirs, during his life, in trust, to support contingent remainders, with remainder as to the said premises not limited in jointure, and as to the said manor and premises limited in jointure as aforesaid, from and after the determination of such jointure, to the said Sir Richard Corbett, George Welde, and Robert More, their executors, administrators, and assigns, for the term of 500 years, with remainder to the use of the first and other sons of the said Godolphin Edwards, on the body of the said Elizabeth More, his intended wife, to be begotten in tail male, with remainder to the use of the said Sir Richard Corbett, George Welde, and Robert More, their executors, administrators, and assigns, for the term of 600 years, upon trust, in case the said Godolphin Edwards should happen to die [130] without issue male of his body, on the body of the said Elizabeth More, his intended wife, to be begotten, or that the issue male between them to be begotten, should happen to die without issue male, and that there should be issue one or more daughters, that the said Sir Richard Corbett, George Welde, and Robert More, their executors, administrators, and assigns, should, by sale or mortgage of the said estate, and term of 600 years of and in the said manor and premises, raise such sums of money, for the portion of such daughters, as therein mentioned, viz. if but one such daughter, £5000, and if two or more such daughters, then £8000 to be divided amongst them.

Issue being joined in the cause, witnesses were examined, and the same came on to be heard before the Lord Chancellor Bathurst, on the 25th day of June 1776; when his Lordship was pleased to declare, That the appellant Elizabeth Pughe was entitled to her portion of £5000 with interest thereon at four per cent. from the death of her father; and that it should be referred to the Master, to whom the former cause stood referred, to compute such interest; and that the real estate in question should be sold, with the approbation of the said Master, to the best purchaser or purchasers that could be got for the same; and that out of the money arising by such sale, the principal of the appellant's portion of £5000 should be paid to the trustees named in the settlement made on the marriage of the appellants, on the trusts and for the purposes therein mentioned; and that what should be reported due for interest thereof, should be paid to the appellant Lewis Pughe, in right of his said wife. And his Lordship, amongst other things, was pleased to order, That the former decree should be carried into execution, and the residue of the money arising by the said sale applied according to the directions thereof.

At the time of hearing the cause, the respondents apprehended, that the appellant Elizabeth Pughe was entitled to the whole of the £5000 to be raised out of the said Frodgeley estate, and did not know, till after the pronouncing the decree, that the said Godolphin Edwards had, in his life-time, given to her any sum of money in part payment thereof, the appellants having always carefully concealed the same from the respondents, in order to defraud them, by receiving the said £5000 out of

the estate, when it had been paid before by the said Godolphin Edwards; and in their answer to the respondent's bill, they set forth imperfectly, and in part only, the provision of the settlement made on their marriage, which related to the said sum of £5000.

In the indenture of 23d April 1724, there is contained (amongst other things) a proviso, "That in case the sum of money appointed to be raised for the portion or portions of such daughter or daughters, should be by the said Sir Richard Corbett, George Welde, and Robert More, their executors, administrators, or assigns, levied and raised, or should be, by such person or persons as should for the time being be next in reversion or remainder of the premises, expectant upon the determination of the said term [131] of 600 years, paid; or in case all and every the said daughter and daughters should be preferred in marriage in the life-time of the said Godolphin Edwards, and be advanced with portions in money, or in lands of inheritance, equal in value to the said portions thereby provided; or in case the said Godolphin Edwards should give or leave to them such money or lands as should not be equal in value to their portions, then and in such case the said Sir Richard Corbett, George Welde, and Robert More, their executors, administrators, or assigns, should, by and out of the said manors, lands, hereditaments, and premises, to them limited for the term of 600 years as aforesaid, raise and levy so much money as should make up the money, or value of the lands that should be so given, advanced, or left, by the said Godolphin Edwards, with or to such his daughter or daughters, full as much as the said portion thereby provided should amount unto; and that then, and in any of the said cases, and at all times from thenceforth, the said term of 600 years, or so much thereof as should remain unsold and undisposed of, should cease, determine, and be utterly void."

That after pronouncing the decree of the 25th June 1776, the respondents discovered that Godolphin Edwards was in his life-time possessed of a very considerable sum of money in the joint stock of East India annuities, and of a very considerable personal estate; and that on the 21st of October 1772, he had transferred to the appellant Elizabeth his daughter, then Elizabeth Manlove, £5300 East India annuities, in part payment of the said £5000 provided for her portion by the said indenture of the 23d April 1724, the same, at the then price of East India annuities, being worth £4571 5s. or thereabouts.

The said Godolphin Edwards died the 5th of November 1772, possessed of a very considerable estate, having made his will, and thereof appointed his daughter, the appellant Elizabeth, sole executrix and residuary legatee, whereby she became entitled to a very considerable sum of money.

The respondents also discovered, since the pronouncing the decree of the 25th of June 1776, that previous to the marriage of the appellants, the appellant Elizabeth Pughe, then Elizabeth Manlove, did, on the 9th of July 1773, transfer the said £5300 East India annuities to the said Thomas Mulso and John Pyle, trustees named in the settlement made on her marriage.

The respondents having made such discoveries, they filed their bill of review in the Court of Chancery, on the 23d of January 1777, against the appellants, and the said Thomas Mulso and John Pyle their trustees; thereby stating to the effect before set forth, and alledging that the said £5300 East India annuities, so given by the said Godolphin Edwards in his life-time to the said appellant Elizabeth, and his personal estate so given to her by his will, ought to be deemed a full payment and satisfaction of the said £5000 provided for her portion by the indenture of the 23d April 1724, and that she was not then entitled to have the same, or any part [132] thereof, raised and paid to her out of the real estate of the said Samuel Edwards; but that the respondents being entirely ignorant of the said portion having been so paid and discharged by the said Godolphin Edwards, could not shew the same to his Lordship at the Time of pronouncing the decree; and therefore the respondents apprehended they were aggrieved by the decree, and were entitled to have the same reviewed.

To this bill of review all the defendants appeared, and put in their answers thereto, and particularly the appellants, on the 7th May 1777, put in their answer; and thereby admitted the decree of the 25th June 1776, and most of the facts before stated; and "believed that the respondents, at the time of hearing the cause, did apprehend



that the appellant Elizabeth was entitled to the whole £5000 to be raised out of the Frodgeley estate, and did not then know that the said Godolphin Edwards had in his life-time given her any sum of money, in part payment thereof: Admitted that the whole of the settlement made on their marriage was not set forth in their answer to the bill of revivor, but as much thereof was set forth as they were advised it was necessary for them to set forth: Admitted that in the indenture of the 23d April 1724, there was contained (amongst other things) a proviso to the effect set forth in the bill of review: Admitted the transfer of the East India annuities by Godolphin Edwards, but did not know or believe that such transfer was intended by way of part payment of the said £5000; but on the contrary, the appellant Elizabeth believed that such transfer was intended by way of gift or present to her exclusively; and that said Godolphin Edwards never mentioned to the said appellant, or gave her to understand that such transfer was made in part payment of said £5000, which she verily believed he would have done, in case he had so intended: And she admitted that she had possessed herself of the personal estate of her said father Godolphin Edwards, not specifically bequeathed by his will. And the said appellants by their said answer admitted the transfer made of the £5300 to the said Thomas Mulso and John Pyle, on the 9th July 1773, previous to their intermarriage; and believed that the matters in the said bill of review were not discovered since the making of the decree, but that they were known to the respondents' solicitor before making thereof; and insisted specially for the reasons therein mentioned, that the said £5300 East India annuities, and the surplus of the said personal estate, ought not to be deemed full payment and satisfaction of the said £5000; and that the respondents were not entitled to any relief in respect thereof under their bill; and that the said decree ought not to be reviewed or reversed."

The cause, upon the said bill of review, came on to be heard on Wednesday the 10th of December 1777, before the then Lord Chancellor Bathurst; when his Lordship was pleased to order, "That the respondents' bill, so far as it prayed any account of the personal estate of the testator Godolphin Edwards, should be dismissed; [133] and his Lordship declared, that the £5300 East India annuities, transferred by the said Godolphin Edwards in his life-time to the appellant Elizabeth, then Elizabeth Manlove, widow, his daughter, was to be considered as having been transferred by him to her in part satisfaction of the sum of £5000 which she was entitled to under the marriage settlement of the 23d of April 1724; and the Master was ordered to enquire what was the value of the said £5300 East India annuities at the time of such transfer thereof, according to the then market price of East India annuities, and what the Master should find to be the value of the said £5300 East India annuities at that time, should be deducted out of the sum of £5000. And it was ordered, that the former decree, dated the 25th of June 1776, so far as the same declared that the appellant Elizabeth was entitled to her portion of £5000, with interest thereon at £4 per cent. per ann. from the death of her father, and directed the Master to compute such interest; and that out of the money arising by sale of the estate in question, the principal of the appellant's portion of £5000 should be paid to the trustees named in the settlement made on the marriage of the appellants, on the trusts and for the purposes therein mentioned; and directed, that what should be reported due for interest as aforesaid, should be paid to the appellant Lewis Pughe, in right of his wife, should be varied; and instead thereof, his Lordship did order, that so much only of the residue of the said sum of £5000, after deducting thereout what the Master should find to be the value of the said £5300 East India annuities, at the time of the transfer thereof as aforesaid, should be paid out of the money arising by the said sale, to the trustees named in the marriage settlement of the appellants, on the trusts and for the purposes therein mentioned; and they were to declare the trust thereof accordingly; and the Master was to compute interest on such residue of the said sum of £5000, from the time of the death of the said Godolphin Edwards, and that such interest should be paid to the appellant Lewis Pughe, in right of his wife, out of the money arising by such sale; and all parties were to be paid their costs of that suit, to be taxed by the Master, in like manner as costs were directed to be paid by the former decree; and the deposit was ordered to be paid back to the respondents."

The appellants conceiving themselves to be aggrieved by these two decrees, the former for having directed the interest of the appellant Elizabeth's portion of £5000,

to be computed from the death of Godolphin Edwards her father only, and the latter for having declared the £5300 East India annuities to be considered as a satisfaction in part of the said portion of £5000, and given directions touching the same accordingly, appealed therefrom. And on their behalf it was insisted (A Wedderburn, C. Ambler, R. Hollist), that, with respect to the time of raising the portion, it is a general rule, that if a reversionary term is limited to trustees to raise portions at a certain time, when that time comes the portions must be raised, unless, in the declaration [134] of the trust of the term, the intention is apparently otherwise: and though there may be some modern cases to the contrary, they were determined upon particular circumstances attending those cases which were such as either do not occur, or ought not to have weight, in the determination of this case: That upon the death of the mother all the contingencies in the declaration of the trust of the term, previous to the raising the portion of the appellant Elizabeth Pughe, had happened. Namely—Failure of issue male of Godolphin Edwards and Elizabeth his wife; and attainment of the age of 18, by the appellant Elizabeth.

With respect to the £5300 East India annuities being to be considered as a partial satisfaction of the appellant Elizabeth's portion of £5000 under the settlement: It was submitted to be the true construction of the deed, that nothing should be taken as or towards satisfaction of the £5000 but what was advanced, given, or left by way of portion. This seemed to be the obvious sense of the proviso, which consisted of two parts:—First, The giving portions in money or lands equal to the portions provided by the settlement. The second, the giving or leaving money or land not equal to the portions provided by the settlement.—A different construction was harsh and unnatural, and manifestly contrary to the intention of Godolphin Edwards, who retrenched his expences for many years before his death, in order to make an additional provision for his only daughter, and not with a view to increase the fund to pay the extravagant debts of his father: That the £5300 East India annuities were not advanced by Godolphin Edwards on the marriage of the appellant Elizabeth, or at any other time by way of portion, but were transferred to her as a gift after the death of her first husband, long after the portion under the settlement became payable, and not in contemplation of her second marriage, which did not happen till after her father's death; and it was manifestly not the intention of Godolphin Edwards that the East India annuities should go towards satisfaction of the portion: That if any construction of the proviso, contrary to what was given of it above, should prevail, Godolphin Edwards was at liberty to give his property to any person in the world but his daughter, and could not give her a shilling to be of benefit to her: which in any case was an harsh and unnatural construction of the proviso, and would be particularly so in this case, where no son of the marriage could be benefited by such a construction, the portion in question being a portion for the only daughter of the marriage, in the event which had happened of there being no son, and there being no such proviso to affect the portions provided for younger children, in a case where there would be a son to take the inheritance under the limitation in the settlement: That such a construction put upon the proviso was still more harsh, in respect that the fortune of Elizabeth the wife of Godolphin Edwards, and late mother of the appellant Elizabeth, which was £5000, was received by the said Samuel Edwards for his own use; and the lands, settled upon the marriage of Godolphin Edwards, were not of more value [135] than the £5000, and the several sums agreed, upon the marriage of Samuel Edwards, to be laid out in land, and settled to the uses of his marriage settlement, under which Godolphin Edwards was tenant in tail; so that nothing passed from Samuel Edwards upon the marriage of Godolphin, but his giving up his life interest in part of the premises, for which he had much more than an equivalent by the receipt of the £5000, and yet the ultimate limitation is fee, which ought to have been settled upon Godolphin, was settled on Samuel; so that, by such improper limitation, the appellant was deprived of the inheritance which would otherwise, and ought to have descended upon her, as heir of her late father: That the proviso confined the gift to money or lands; what the appellant had from her father was a transfer of East India annuities, which was neither money nor lands, and such a proviso ought to be construed strictly. It has been laid down, that a term of years, or goods, should not go in satisfaction of a portion, where the satisfaction prescribed was money: And under the above circumstances of hardship, it was

submitted, that the appellant was entitled to the most favourable construction that could be put upon the words of the proviso.

On the other side it was contended (J. Mansfield, L. Kenyon), That as to the first question, if interest upon the £5000 should be computed from the time of the death of the appellant Elizabeth's mother, which happened so long ago as 1753, and not from the 5th of November 1772, the time of the death of the said Godolphin Edwards, as contended for by the appellants, the difference would amount to £3000 and upwards; which would greatly diminish the fund for payment of creditors for large sums, which they had been kept out of for upwards of forty years. That it appeared by the settlement of 1724, that the fortune of the appellant Elizabeth did not become payable till the death of her father Godolphin Edwards; or if it did, the said Godolphin Edwards, as tenant for life, and in actual possession of the rents and profits of the premises chargeable with the payment of the principal sum of £5000 ought to have kept down the interest thereof, and not have enhanced his personal estate therewith; which personal estate he had by his will given to the appellant Elizabeth, as his sole executrix and residuary legatee; and she ought not to be permitted to receive the double benefit of the accumulated rents, and the arrear of interest, in prejudice to creditors for such large sums, who had been so long kept out of their money, and who, at length, would not receive above ten shillings in the pound for their whole debts. Besides, the respondents had been in possession of an absolute decree for sale of the reversion of the premises, dated so long ago as Michaelmas term 1740; by which decree, the respondents were advised, the said Godolphin Edwards, and all claiming under him, were bound.

On the question of satisfaction it was urged, That the bill of review filed by the respondents was to extend the equity claimed by the original bill; and by the decree of 1740, the reversion of [136] the estate under the settlement of 1724 was declared liable to the debts of Samuel Edwards the father, subject to the term of 600 years, for raising £5000 for an only daughter. And Godolphin Edwards having made a transfer of £5300 East India annuities to the appellant Elizabeth, his daughter, and also having appointed her sole executrix and residuary legatee in his will, the provision made by the father for his daughter, out of his own property, ought to be considered as monies given and left by him for her advancement in life, under the true meaning of the proviso contained in the settlement of 1724, and go in satisfaction of the £5000 provided for her portion by the same settlement. That it did not appear to have been the intention of Samuel Edwards, the father, to charge the estates in question with any sums of money as a provision for such daughter, in case his son should be capable, by other means, of making a competent provision for her; and therefore, although the appellant Elizabeth's father had intended the provision made for her as an absolute gift, yet his intention must be controuled, as far as respected the 600 years term, by the proviso in the settlement creating that term; for Samuel Edwards, the father, as owner of the inheritance, had a right to subject that term, and the provision to be raised under it, to such conditions as he pleased. That it is usual to insert such a proviso, as in the deed of 1724, in settlements, in order to prevent the inheritance being loaded, without an absolute necessity; which necessity was in a great measure removed by the transfer so made by Godolphin Edwards to the appellant Elizabeth; and, however natural it may be for a parent to wish to make the fortune of the child as large as in his power, yet, in a case circumstanced as this, the terms upon which the provision was carved out for the daughter, by the settlement, must govern the powers and right of the parties.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, That the same should be dismissed, and the decrees therein complained of, affirmed (M.S. Jour. *sub anno* 1780, p. 333.)

[137]

## POWER.

CASE 1.—JOHN FANE, & Ux.,—*Appellants*; DUKE OF DEVONSHIRE, and others,—*Respondents* [17th January 1718].

[Mews' Dig. x. 1344.]

A general power to raise portions for daughters, may be restrained and qualified by a *particular* proviso.

DECREE of Ld. Cowper, C. AFFIRMED.

Although there is no direct proof that a man is *non compos* or delirious, yet if the deed be executed *in extremis* (or in certain other cases specified), it cannot be supposed he had a mind adequate to the business he was about; and might more easily be imposed upon. See Treat. Eq. lib. 1. c. 2. § 3. citing this case.—See also *Filmer v. Gott*, (*ante*, vol. iv. p. 230. ca. 17. of title Fraud.)

Mr. Fonblanque, in his note on the above passage in the Treatise of Equity, observes, "that in *Jones v. Graves*, 2. P. Wms. 270. some stress was laid by Ld. Commissioner Jekyll upon the circumstances of a deed not being revocable as a will; and therefore liable to be set aside if gained from a weak man by misrepresentation, and without any valuable consideration.—But (he adds) it appears, from the case of *Fane v. D. of Devonshire*, that though a deed obtained *in extremis*, and by imposition, do contain a clause of revocation, the principles upon which Courts of Equity proceed, will equally attach and entitle the party prejudiced to be relieved against it." This seems the most material point of the case; and accordingly, it ought to have been classed under title Fraud, but it was discovered too late to alter Mr. Brown's arrangement.

Viner, vol. 16. p. 477: A. 13. ca. 3; 2 Eq. ca. ab. 660. ca. 4. MSS. Tab.

In the year 1683, William Earl of Devonshire, having one son named William (then Lord Cavendish) who had three sons then living, viz. William (the respondent the Duke of Devonshire) Lord Henry Cavendish (the appellant Mary's father) and the respondent Lord James Cavendish; and the said Earl intending to make provision for his said grandsons Lord Henry and Lord James, he, by indentures of lease and release, dated the 10th and 11th of July 1683, in consideration of the natural love and affection which he bore to them, conveyed the manors of Evington, Bishop's-Fee, Leicester-Abbey, and other lands and hereditaments in the county of Leicester, together with the manors of Latimers and Chesham, and other lands in the counties of Bucks and Hertford, and also the manor of Claxby in the county of Lincoln; (valued in the whole at about £2600 per ann.) unto Edward Cook and Robert Rose, and their heirs, to the use of the said Earl for life, without impeachment of waste; then to the Earl of Exeter and other trustees, for 60 years, on the trusts therein after declared; and after the determination of that term, to Lord Henry Cavendish for life; remainder to his first and other sons in tail male; remainder to trustees for 500 years, on the trusts therein after declared; remainder, as to the premises in the counties of Lincoln, Bucks and Hertford, to the respondent Lord James Cavendish for life; remainder to his first and other sons in tail male; and the remainder, as to the premises in Leicestershire, on failure of issue male of Lord Henry, to the [138] respondent the Duke for life; remainder to his first and other sons in tail male, with divers remainders over.

The 60 years term was declared to be in trust, for raising several yearly sums for the maintenance of Lord Henry at several ages; viz. £250 per ann. till he was 14; £400 per ann. till 18; £600 per ann. till 24; and £1200 per ann. during the life of his father; and to pay the surplus rents and profits to his father William, then Lord Cavendish, for so many years of the term as he should live: But, if Lord Henry should marry with the consent of his father, mother, grandmother, James, then duke of Ormond, and the Earls of Exeter and Aylesbury, or the survivor of them, then the 60 years term was to cease.

The trust of the 500 years term was declared to be, for raising such portions for the daughters of Lord Henry (in case of no male issue) as the Earl should by will direct; and for want of such direction, £12,000 if one daughter; £18,000 if two; and £24,000 if three or more; and maintenance, in the mean time, of £300 per ann. if but one daughter; if two, £180 per ann. a-piece; and, if three or more, £150 per ann. a-piece. And also, for raising out of the premises in the county of Leicester, £5000 for the respondent Lord James; to be paid him within one year after his father's death: And after the said portions and maintenances should be raised, or if Lord Henry should have no issue female, or they should die before her or their portions should become payable; then the 500 years term, as to the premises in the counties of Lincoln, Bucks, and Hertford, or so much thereof as should be unsold, should cease.

In which indenture were contained the following provisoes, and a power of revocation to the said Earl.

1st. A proviso for the Earl, to appoint a jointure for any wife of Lord Henry; and also to limit any part of the premises to any of Lord Henry's children, for life or in tail, or any rent-charge issuing out of the same.

2d. A power to Lord Henry, after his grandfather's death, to make his wife a jointure, not exceeding one moiety of the yearly value of the premises: And another power to Lord Henry, to limit or appoint unto any of his children for life, or in tail male, or in tail general, as he should think proper, any part of the premises, not exceeding one third part of the yearly value of the whole; or to allot any rent-charge issuing out of the same, not exceeding £600 per ann.

3d. A power to Lord Henry, after the death of his grandfather, to lease, limit, or appoint any part of the premises to trustees, for any number of years, for raising any sum or sums of money, not exceeding £8000, for any of his daughters or younger sons, with maintenance not exceeding one moiety of the interest thereof.

4th. Then follow certain provisoes, for the respondent Lord James, when he should come into possession of any part of the premises, to make a jointure, limit lands, and appoint portions and maintenance for younger children.

[139] On the 28th of November 1684, the Earl of Devonshire died, without revoking any of the uses, trusts, or powers of the said settlement; but, having by his will given to Lord Henry, when he should attain his age of 21, £5000 to be laid out in land, or in building a house at Leicester Abbey.

In 1696, Lord Henry, with the consent of the Duke his father, and the other surviving persons named in the deed of July 1683, entered into a treaty of marriage with Mrs. Rhoda Cartwright; and the sum of £16,000, her marriage-portion, being paid to the Duke, he surrendered the 60 years term to Lord Henry, who was thereby let into the possession of the whole estate: And Lord Henry thereupon appointed the manor of Evington, and divers lands in the county of Leicester, of the value of £1300 per ann. as a jointure for the Lady, being half the value of the whole estate. And the Duke made a further settlement of an estate in Kent, of about £400 per ann. on the Lady, as an increase of her jointure; and charged the same estate with £4000 for an only daughter, in case there should be no issue male of that marriage. The Duke also deposited £2000, part of the said £16,000, in the hands of Mr. Cartwright, the Lady's brother, to be laid out in lands; which, when purchased, were to be settled, so as to make good the Kentish estate, during the jointure, full £400 per ann. in case there should be any deficiency; and, subject to that charge, these new-purchased lands were to go to the Lord Henry in fee.

The jointure being thus fixed, Lord Henry proceeded to make provision for younger children; and, by indenture tripartite, dated the 18th of July 1696, between himself of the first part, Mrs. Cartwright and her son and the Lady Rhoda of the second part, and Amcotts Broughton and William Ball, esqrs. of the third part; (reciting the deed of July 1683, the surrender of the 60 years term, and the appointment of the jointure) Lord Henry covenanted with Broughton and Ball, to execute the powers reserved to him by the deed of 1683, for raising portions and provisions for children of that marriage; and, in particular, that if he had no issue male, and only one daughter by his said intended wife, and should afterwards marry, and have issue by such second marriage, he would grant or appoint such part of the estate as should be of the clear yearly value of £800 (public taxes excepted) unto trustees for

a term of 500 years, commencing from his death; upon trust to raise £8000 for the portion of one only daughter, to be paid at her age of 21, or marriage, with £200 per ann. maintenance, in the mean time: And likewise, to limit lands of £200 per ann. to such only daughter in tail. In which indenture tripartite it was expressly declared, *That in case of failure of issue male, and there should be but one daughter of that marriage; such daughter should not have or receive, either by the deed of 1683, or the settlement of the Kentish estate, or by the said indenture tripartite, any more than £16,000 for her portion in the whole.*

The marriage soon afterwards took effect, and Lord Henry had issue only one daughter, the appellant Mary; but being suddenly [140] taken ill, when she was about six months old, and before he had made any appointment, pursuant to the deed of 18th of July 1696; two deeds were prepared, both dated the 7th of May 1700, and brought to him on the 10th of the same month, about two hours before his death, and then executed.

By one of these deeds, he demised the capital messuage and manor of Latimers, and all other his estates in the counties of Bucks and Hertford, to Broughton and Ball for 500 years; in trust to raise £8000 towards the portion of the appellant Mary his daughter, payable at 21, or marriage; and £200 per ann. for her maintenance in the mean time: And it was thereby declared, that such £8000 should not be deemed any part of the £4000 intended to be raised out of the Kentish estate, but be taken as an *additional* portion.

By the other deed, Lord Henry granted the manor of Claxby, and all the Lincolnshire estate (about £200 per ann.) unto the appellant Mary, and the heirs of her body; with a proviso that the said grant should not take effect till Lord Henry's death, and his daughter should attain 21, or marriage.

Both these deeds were mentioned to be made *in pursuance of agreements*; and that for raising the £8000 is particularly mentioned to be made, *in pursuance of an agreement in this behalf made before marriage*: and both are made subject to revocation by Lord Henry in his life-time, who was just expiring at the time of executing them; and *died in two hours after.*

In March 1708, the appellant Mary, by her mother and *prochein amy*, exhibited her bill in the Court of Chancery against the respondents, for raising the £300 and £200 per ann. maintenance, the £12,000 by the deed of 1683, the £4000 by the Kentish settlement, and the £8000 out of the Bucks and Hertfordshire estates; and to have the whole Lincolnshire estate.

In July 1709, the respondent Lord James exhibited his cross bill against the appellant Mary, and others; to have the two deeds of the 7th of May 1700, set aside; and to reduce her demands in money and lands to £16,000 portion, and £300 per ann. maintenance.

Pending these suits the appellants intermarried, and the original suit, which thereby abated, being afterwards revived; both causes came on to be heard before the Lord Chancellor Cowper, on the 11th of November 1717, when his Lordship declared, "That the plaintiffs Fane and his wife had failed in their equity, as to their demand of the Lincolnshire estate, and the £8000 and £200 per ann. maintenance, charged on the Bucks and Hertfordshire estates; it appearing that the two deeds of the 7th of May 1700, were executed by Lord Henry, when his life was despaired of, and but two hours before his death: And, that although there was no proof that he was *non compos*, or delirious at the time of executing the same; yet his Lordship conceived, that Lord Henry could not have a mind adequate to the business he was about, or be capable of reflecting upon the powers granted [141] or reserved to him, and so might the more easily be imposed upon: That this was evident from the two deeds of 1700, being mistaken, and likewise from the errors and misrepresentations apparent therein; and that therefore, the plaintiffs Fane and his wife, ought not to be relieved as to the Lincolnshire estate, or as to the £8000 or the £200 per ann.; and the rather, for that if it had stood on the deed of 1683, the Court would have looked upon the powers therein, of appointing the £8000 and £200 per ann. maintenance, and any part of the premises comprised in that settlement, not exceeding in the whole one third part thereof; as a latitude only to provide for daughters or younger sons, in case Lord Henry should have had issue male." Therefore his Lordship declared, "That no more than £12,000 and £300 per ann. for maintenance,

without any deduction for taxes, and the £4000 provided by the settlement of the Kentish estate, with interest at £5 per cent. from the time the same became payable, ought to be raised: And decreed the same to be raised according to the manner, and by the measure in the several deeds provided." And, as to the plaintiff's other demands, it was ordered, that their bill should stand dismissed.

From this decree, the plaintiffs Fane and his wife appealed; and on their behalf it was urged (T. Powis, W. Hamilton), that the powers granted to Lord Henry by the deed of 1683, for limiting a third of the settled estate, and charging it with £8000 and £200 per ann. maintenance, were conceived in the most general words possible; being to provide for any child or children, and the heirs of his, her, and their bodies respectively, to denote daughters as well as sons; and there could be no doubt, but that the appellant Mary was within that description; and consequently, that Lord Henry had a good right, by the deed of 1683, to make such provisions for her, as he had done by the two deeds of 1700. Nor would it alter the case, that there was, by the deed of 1683, a provision of £12,000 fixed for one only daughter; for that was only in consequence of a power reserved to the Earl of Devonshire himself, the maker of that settlement, of providing for daughters as he should think fit; and in case of no such provision made by him, then such only daughter to have £12,000. But as these two powers were in different persons, and for different sums, the one could never be looked upon as any restraint on the other, or to come in lieu of the other; especially, as those powers were granted to Lord Henry by two clauses in the deed, posterior to the power reserved to the Earl himself. That since the powers were granted to Lord Henry in such *general* terms, they could not be restrained to a provision for younger children only, in case of issue male: The deed ought therefore to be taken as it stood, and there was no such restriction in it. That if Earl William had appointed any sum, though ever so small, for the daughter of Lord Henry, (as by virtue of his power he might have done) in such case the £12,000 would not then have arisen to such daughter; and it would seem strange, that in such case, her father, by virtue of his power, might not have added to it, in case she had [142] been so meanly provided for; and the grandfather omitting to allot any lesser sum, could make no difference in the respective powers, as they were at first created. That it ought to be considered, that all that was claimed by the appellants, was not very much more than what would have fallen on the estate by express provision, if Lord Henry had happened to have had three daughters; in which case, £24,000 must have been raised, besides maintenance. That it could not be denied, but Earl William might, by virtue of his power, have made an allotment of any sum of money to any child or children of his grandson the Lord Henry, whether sons or daughters, as he had thought fit; and might also have appointed any part of the lands to the same child or children, for life, or in tail, or any rent or rents issuing out of the same, at his own free will and pleasure; and it would hardly be denied, but that Lord James, by virtue of the power given to him, might do the same, provided the sum allotted did not exceed £6000, and that the lands allotted did not exceed one third part of the clear yearly value of the whole: And it would seem strange, that the same words should empower Earl William, the grandfather, and Lord James, the grandson, but should not empower Lord Henry also, to do the same thing. That when words are positive, they must not be rejected or departed from; especially when the parties to the deed are dead, who knew their own reasons for inserting them: It is therefore a rule, and a very just one, *In dubio ista est sententia legis, quam verba ostendunt*. That as Lord Henry had a power by the deed of 1683, to make such provisions for the appellant Mary, his only daughter, so he never divested himself of that power, or restrained himself from the execution of it; for the deed of the 18th of July 1696, was so far from restraining Lord Henry from executing these powers, that it was calculated only with a view to oblige him to execute them, in the event of the several cases therein mentioned; viz. in case Lord Henry should have survived Lady Rhoda, and married another wife, and have had issue by her; but which case did not happen; which shews it was then the opinion of all the parties to that deed, that Lord Henry had these powers in him; and though it was thereby agreed, that one only daughter should have but £16,000, yet that was only in the event of Lord Henry's having issue by a subsequent marriage; but had it been more general, yet that could never be looked upon to tie up Lord Henry from giving more; for though he would not covenant, or put himself under a necessity of

raising more than £16,000 in that case, but would be left at his liberty beyond that sum; yet this did not tie up his hands, but he might dispense with that which was introduced in his own favour, as he actually had done by executing these powers, and giving his daughter a greater fortune by the deeds of 1700. Nor were the respondents, or any under whom they claimed, so much as parties or privy to that deed. And as to Lord Henry's not being of sufficient capacity or understanding, or that he was any way imposed upon in the execution of the deeds of 1700, there was not only no proof [143] of that nature, but there was the strongest positive proof to the contrary; viz. That he was of good understanding, and perfectly knew what he did, and was therefore adequate to the business he was about, and had all his senses when the two deeds were executed, as well as at any other time. Nor was there the least surmise, and far less any proof, that Lord Henry was any way imposed upon in the execution of these deeds, in favour of his only child; for it was proved, that none but his nearest relations were then about him: And if there was any mistake in the recitals of either of those deeds, it must have been made by the person who drew them; for there was nothing apparent to induce any belief, that Lord Henry was in the least degree biassed or imposed upon by means of any mistaken recital; and as these deeds were executed by him in the presence of his father and mother, and several other of his noble relations, and the Duchess his mother, with three other unexceptionable persons, were witnesses to them, it could not be thought that they would have permitted them to have been executed to the prejudice of the two other sons, if either Lord Henry had been weak in his understanding, or imposed upon: And though they were executed not long before his death, yet the directions for preparing them were given some considerable time before, by Lord Henry himself; who did then declare, that he intended to make an addition to the appellant Mary's portion and maintenance, and was resolved to do it in a large and beneficial manner, as he said he had power to do; and the deeds were afterwards brought and distinctly read over, and declared by Lord Henry to be according to his intentions, and then by him executed and attested as aforesaid.

On the other side it was contended (T. Lutwyche, R. Raymond), that it was manifest from the deed of 1683, that the Earl thereby intended a provision for the respondent the Lord James, in case of Lord Henry's death without issue male; the consideration mentioned, being his affection to Lord James, as well as Lord Henry; and also in such case, to preserve the Leicestershire estate, to go with the honour and dignity of his family. That the provision made for daughters portions, in default of issue male of Lord Henry, was clearly and fully expressed; a term created chiefly for that purpose, and the sums fixed and ascertained, such as the estate would well bear, and yet answer his Lordship's kind intentions to the heir of his family, and the Lord James; and where there was an express and ample provision made, it was conceived reason or equity would not interpret any doubtful expressions, to increase such provision without a reasonable cause, much less against the reason and nature of the case. That there was no express or direct provision for daughters or younger sons, in case of issue male, as is usual in family settlements: but, as there were powers enabling the possessor of the estate to make such provision if he should so please, these powers ought to be expounded as provisions for that purpose; and ought not to be applied to such matters as were directly provided for before; viz. provisions for daughters, if Lord Henry should have [144] no sons; especially when it was considered, that if the powers insisted on, were designed to advance the portion appointed for an only daughter, or for daughters only, then *all were so*; and in such case, it was entirely in the power of the possessor, to defeat the provision made for the respondent the Lord James, and all the other ends of the settlement.\* That it was very plain

|   |         |   |   |
|---|---------|---|---|
| * For, there was to be raised for daughters, if three or more, . . .  | £24,000 | 0 | 0 |
| There was also to be raised for Lord James, . . .   | 5,000   | 0 | 0 |
| There could (according to such construction) be raised, by a charge on what part of the estate the possessor pleased, . . .   | 8,000   | 0 | 0 |
| There could be granted out to any child, one third part of the whole estate, which being computed at £2600 per ann. the third part would be £866 13s. 4d. per ann. and that at 20 years purchase would amount to, . . . | 17,333  | 0 | 0 |



by Lord Henry's own deed of covenants, of the 18th of July 1696, it was intended to prevent the mischief of a misconstruction of the deed of 1683, by declaring expressly, that *one only daughter of that marriage, should have no more than £16,000 in the whole*: So that if the powers of the deed of 1683, were as extensive as the appellants insisted on, they were effectually restrained in Lord Henry, by his own deed of July 1696. That the provisions made by Lord Henry's marriage-settlement, being to add £4000 to the £12,000 for an *only* daughter, to make her portion £16,000, that it might be adequate to the fortune brought into the family by her mother, was a fair, equal, and usual provision: But to add £8000 in money, £200 per ann. maintenance, and £200 per ann. in lands (besides two thirds of Lord Henry's personal estate, which the Lady was entitled to, there not appearing to be any will of Lord Henry) and the inheritance of lands to be purchased with the £2000 deposited by the late Duke, would be stripping an estate to make *one great portion*, which in the nature of the thing could never be intended; and therefore, when these extraordinary provisions were made *in extremis*, it was impossible that Lord Henry could have a due consideration of them; especially when they were said to be *in pursuance of the marriage-agreement*; which marriage-agreement was really *contrary* to it, so that there appeared to be a manifest imposition on the face of the deeds themselves.

After hearing counsel on this appeal, the question was put, "Whether that part of the decree, declaring that the plaintiffs had failed as to the demands of the estate of Claxby in Lincoln-[145]-shire, should be reversed?" which being resolved in the negative; the question was then put, "Whether the rest of the said decree should be reversed?" Which being also resolved in the negative; it was ORDERED and ADJUDGED, that the appeal should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 21. p. 48.)

CASE 2.—ELIZABETH DUCHESS DOWAGER OF HAMILTON, and others,—*Appellants*; CHARLES MORDAUNT, Esq., and others,—*Respondents* [9th March 1726].

[Mews' Dig. x., 1649 *sub nom.* Orby v. Mohun.]

Tenant for life, with power to make leases of all lands anciently demised, reserving the ancient rents, or more, and of other lands, reserving the most and best improved rents that could be got, makes a lease of part of the premises usually demised, reserving *the old accustomed rents*; and a lease of other part not usually demised, reserving *such sum of money as should amount to the best and most improved yearly rent*. Both these leases were held to be void as against the remainder man; the first, as not being warranted by the power; and the other, for the uncertainty of it.

DECREE of Somers, Lord Keeper, AFFIRMED.

The reports in Viner are incorrect; and that in vol. 19. is a mere *dictum* of Holt, who differed from the Lord Keeper and Lord Trevor.

2 Vern. 531. 542. 1 Eq. ab. 343. ca. 5. Preced. in Chan. 257. 3 Chan. Rep. 56; 102. 2 Freeman's Rep. 291. Viner, vol. 16. p. 473. ca. 5; vol. 19. p. 137. ca. 11. Gilb. Rep. 45. [by the name of Orby v. Mohun, (Ld. or Lady).]

Previous to the marriage of Charles Lord Brandon, eldest son of Charles Earl of Macclesfield, with Ann Mason, the daughter of Richard Mason, by indentures of lease and release dated the 23d and 24th of April, 1683, the Earl and Lord Brandon

|   |         |   |   |
|---|---------|---|---|
| So that the whole which could be charged on, and granted out of the estate (including Lord James's £5000) was, by the appellant's construction, | £54,333 | 0 | 0 |
| And the whole estate at 20 years purchase, which at the time of making the settlement, was a full price for it, was worth but .                 | 52,000  | 0 | 0 |

So that what, it was pretended, might have been given out of the estate, as above, was £2333 more than the same was worth; and consequently, the respondent Lord James, might have been deprived of any benefit by his estate in reversion; which could not reasonably be supposed to have been intended by the Earl, his grandfather,
 2,333 | 0 | 0 |

his son, conveyed to Sir Henry Hobart and the said Richard Mason and their heirs, divers manors and estates in the counties of Chester and Lancaster, in order to make them tenants of the freehold, that common recoveries might be thereof suffered; and which, when suffered, were thereby declared to be to the use of the Earl for 99 years, if he should so long live, subject to a rent-charge of £1000 per ann. to Lord Brandon and the said Ann, in manner therein mentioned; remainder to trustees to preserve the contingent remainders; then to trustees for 300 years, to raise and pay any sum not exceeding £1200 to such persons as the Earl should appoint; remainder to Lord Brandon for 99 years, if he should so long live; remainder to trustees to preserve the contingent remainders; remainder to the first and every other son of Lord Brandon, successively in tail male; remainder to Fitton Gerard, second son of the Earl, for 99 years, if he should so long live; remainder to trustees to preserve the contingent remainders; remainder to the first and other sons of Fitton, successively in tail male; remainder to every other son of the Earl, in tail male successively; remainder to the Earl, his heirs and assigns.

[146] And in this settlement, a power was reserved to the Earl, Lord Brandon, and the said Fitton, that as and when every of them should come into and be in possession of the premises, by virtue of the above limitations; it should be lawful for them, from time to time, during their lives, by indentures under their respective hands and seals, to lease all and every or any part thereof, to any person or persons, for any term or number of years, not exceeding 21 years, or for one, two, or three lives, or for any term or number of years, determinable on the death of one, two, or three persons, in possession, but not in reversion, remainder, or expectancy; so as upon every such lease of such parts of the premises, as had been anciently and customarily demised, whereof fines had been usually taken, the old usual and accustomable yearly rent or rents, or more, should be yearly reserved and made payable, during the continuance thereof respectively; and so as upon every lease of such part of the premises as had not been usually let, and for which there had not been any fine or fines formerly taken, there should be reserved and made payable, during the continuance of the same respectively, the most and best improved yearly rent that could be reasonably had or obtained for the same; and so as no such leases should be made dishonourable of waste; and so as the lessee and lessees to whom the same should be made, should respectively seal and deliver counterparts thereof. And it was by the same indenture further declared, that till the suffering the said recoveries, the said Hobart and Mason, and their heirs, should stand and be seised of the said manors and premises intended to be therein comprised, in trust for such person and persons, and for such estate and estates, as and to whom the use of the same premises were before mentioned and declared concerning the same.

The marriage soon afterwards took effect, but no recoveries were ever suffered of the premises, pursuant to the covenant.

The Earl of Macclesfield died in January 1692, leaving issue two sons, viz. the said Charles Lord Brandon, and Fitton Gerard, and three daughters, viz. the appellant Lady Charlotte Orby, Elizabeth Lady Gerard, mother of the appellant the Duchess of Hamilton, and Lady Ann Elrington, mother of the appellants John and Gerard Elrington.

Upon Earl Charles the father's death, the said manors and premises came to his eldest son Charles, then Earl of Macclesfield, who took possession and enjoyed the same during his life; and became also entitled to the reversion in fee thereof, as being heir of his father, to whom the reversion was limited by the settlement. And in 1698, his marriage with the said Ann Mason was dissolved by act of parliament; and the children of that marriage were declared illegitimate.

Earl Charles the son, by his will, dated the 2d of July 1701, devised all the said manors and premises, and the reversion and remainder thereof, in case he should die without issue, to Charles Lord Mohun and his heirs, whom he appointed sole executor of his [147] will: And in November following, the testator died without issue; whereupon, and by virtue of his said will, the reversion in fee of the said manors and premises expectant upon the death of Fitton, then Earl of Macclesfield, became vested in Lord Mohun; and Earl Fitton became entitled to the same for the term of 99 years, determinable on his death; and he entered into the possession thereof accordingly.

By indenture of lease, dated the 21st of December 1702, Earl Fitton, after reciting his power of leasing, demised to Sir Charles Orby and Thomas, afterwards Sir Thomas Orby, all the messuages, tenements, and farms, in Gawsorth, Bosely, Siddington, Aldford, Whisterfield, and Wimblestow, in the county of Chester; and all other the messuages, cottages, lands, tenements, and hereditaments whatsoever, comprised in the said settlement, which had been usually letten and fines taken for the same; and all other lands which were within the compass and intent of the said power, and every part thereof; to hold for the term of 99 years, if the said Sir Thomas Orby and Ferdinando Fairfax, and the appellant Elizabeth Collett (then Elizabeth Ashton) or any of them should so long live, so as the said lessees should seal and deliver a counterpart of such lease; yielding and paying therefore, during the said term, at or upon the days and times in that behalf used and accustomed, the several and respective old accustomed rents reserved and payable for the said several messuages, tenements, and farms thereby leased, according to the intent and meaning of the said proviso.

And by another indenture bearing date the same day, it was declared, that the said lease was made in trust to pay £200 per ann. to the appellants Elizabeth Collett and Henrietta Symes, and to pay the residue of the rents and profits in thirds; one third to the appellant the Duchess of Hamilton, one third to Sir Thomas Orby, and the remaining third between Elizabeth Orby, daughter of the said Sir Thomas, and who afterwards intermarried with the respondent Robert Hunter, and the appellants John and Gerard Elrington and Robert Elrington, deceased.

By another lease dated the 22d of the same December 1702, Earl Fitton demised to the said Sir Thomas Orby, the capital messuages, tenements, and farms, in the counties of Chester and Lancaster, for which fines had not been usually taken, and of which there was then no lease for years, or for any life in being; to hold for 99 years, if the appellant the Duchess of Hamilton, and the said Sir Thomas Orby and the Lord Mohun, or any of them, should so long live; yielding yearly, during the said term, such sum and sums of money as should amount to the most and best improved yearly rent that could be reasonably had and obtained for the same.

In the same month Earl Fitton died without issue; upon whose death, the Lord Mohun brought ejectments against the lessees for recovery of the premises: Whereupon in Trinity term 1704, Sir Thomas Orby and the appellant the Duchess, together with Elizabeth Orby the daughter, and the appellants John and Gerard Elring-[148]-ton, Elizabeth Collett, and Henrietta Symes, exhibited their bill in Chancery against the Lord Mohun, Sir John Hobart, and others, to have the said two leases established, and the lessees quieted in possession of the premises thereby demised to them, and for an injunction to stay Lord Mohun's proceedings at law on his ejectments.

To this bill the defendants answered; and in December following, Lord Mohun exhibited his cross bill to set aside the two leases, and that Sir John Hobart might convey the fee simple and inheritance of the said manors and premises to the Lord Mohun and his heirs, and in the mean time be declared his trustee; and that the lessees might account with Lord Mohun for the rents and profits of the premises received by them, since Earl Fitton's death; and deliver up to him all the deeds and writings relating thereto.

On the 28th and 29th of January, and 1st of February 1705, both causes came on to be heard before the Lord Keeper Cowper, assisted by the Lord Chief Justice Holt, and the Lord Chief Justice Trevor; who having heard the solemn arguments of counsel on each side, did, on a subsequent day; viz. the 15th of April 1706, deliver their opinions *seriatim*; and then the Lord Keeper, with the concurring opinion of the Lord Chief Justice Trevor, *inter alia*, decreed, that as to the two leases made by Earl Fitton, dated the 21st and 22d of December 1702, the same were not good as against the Lord Mohun, the remainder-man in the settlement; and therefore ordered, that the plaintiffs bill in the first cause, as to the relief thereby sought in respect of those leases, should stand dismissed. And in the cross cause, Sir John Hobart was decreed, so soon as he should come of age, to convey the fee simple and inheritance of all the said premises to the Lord Mohun and his heirs; and that Lord Mohun and his heirs, should be at liberty to make use of Sir John Hobart's name, for recovering possession of the same premises; and all the deeds, evidences, and writings belonging to the premises in question, which the plaintiffs in the original cause had, or could come by, were forth-

with to be delivered to the Lord Mohun; and the injunction formerly granted as to the said premises was dissolved.

This decree was afterwards signed and inrolled, and Lord Mohun recovered possession of the premises, and Sir John Hobart, on his coming of age, conveyed the legal estate thereof to him, or as he directed; and from the time of pronouncing the decree to the bringing of the present appeal, being upwards of 20 years, there had not been one step taken in the cause, but the justice of the decree and proceedings had been entirely acquiesced under.

Charles Lord Mohun afterwards died without issue, having by will devised all the said manors and premises to his wife Elizabeth Lady Mohun, and her heirs.

Afterwards, in the year 1716, and previous to the marriage of Lady Mohun with the respondent Charles Mordaunt, and in consideration of that marriage, by indentures of lease and release dated the 22d and 23d of April 1717, Lady Mohun conveyed to trustees and their heirs, all the said manors and premises, to the use of the [149] respondents the Duke of Argyle and Earl Ilay for 1000 years, upon the trusts after mentioned; remainder to the Lady Mohun for life; remainder to such person, and for such estate, and subject to such charges, as she solely should, by any writing under her hand and seal, attested by three witnesses, direct or appoint. And the trust term was declared to be for raising £3000 for payment of debts; and also for raising £40,000 for the marriage portions of Elizabeth and Ann, the two children of Lady Mohun, and £10,000 for the respondent Charles Mordaunt, to be raised and paid *pari passu*.

The Lady Mohun by her deed poll dated the 30th of December 1724, directed and appointed that the said manors and premises, subject to the several trusts of the said term of 1000 years, should, from and immediately after her decease, be and remain to the use of trustees and their heirs, upon trust, that they should as soon as conveniently might be after her death, sell the same, and thereout pay the several sums therein mentioned, amounting in the whole to £8000 and upwards, to the several persons in the said deed named; and she directed the residue of the monies arising from the sale, to be paid to the respondent Charles Mordaunt, for his own use.

The respondent Sir Robert Rich and William Stanhope intermarried with the said Elizabeth and Ann, the Lady Mohun's two daughters, and thereby became entitled to the £20,000 a-piece so charged on the estate for the marriage portions of the said Elizabeth and Ann; and in consideration thereof, they made suitable settlements on the said Elizabeth and Ann, and their issue, so that they became purchasers for a valuable consideration of the said £40,000 so charged on the said estate.

In May 1725, the Lady Mohun died; and some time afterwards the respondent Charles Mordaunt filed his bill in the Court of Chancery, to have the trusts of the said deeds executed, and the trust estates sold for the purposes aforesaid; and that cause coming on to be heard, a sale was decreed accordingly to the best purchaser, to be approved by a Master, in order to pay the debts, portions, and other charges affecting the premises.

After all these transactions, and above 20 years acquiescence under the decree of the 15th of April 1706, the present appeal was brought, in order to reverse that decree; and on behalf of the appellants, it was said (P. Yorke, T. Lutwyche), to have been objected at the hearing, against the validity of the lease of the 21st of December 1702. I. That it ought to have mentioned the particular rent reserved. II. That the ancient and accustomed rent was thereby reserved, as well for lands not anciently leased, as for those that were; and that therefore, it was contrary to the meaning of the power.

As to the first objection, it was argued, that the specifying a certain sum in the reservation of a lease is clearly not necessary, if the particular rent intended may be known by proper reference: *Certum est quod certum reddi potest*, is an undoubted maxim both in law and reason. What those ancient rents were, was a matter [150] of fact capable of being known, and without difficulty, by those who had the writings of the estate, and had been fully ascertained by the plaintiffs in the original cause. That the reservation was in the same terms with the power, and consequently was pursuant to it. That the plain meaning of the restriction in the power, was to secure the ancient rents to the remainder-man: If he had these, he had all that was

intended him, and there could be no doubt but he would be entitled to them by this reservation; but there was no appearance in the settlement of any intention in the parties, to have those rents ascertained in any particular manner. That it would hardly be doubted, that such a reservation of rent by the owner of the fee would be good, which it could not be if it had not such a certainty as the law requires; and it did not appear that there was any design in the maker of the settlement, to exact a greater degree of certainty in this respect, than what was required by law. That the intention and endeavours of Earl Fitton to execute this power in the fullest manner in favour of the heirs at law, was manifest; and the defect, if it was any, ought to be supplied by a Court of Equity; especially, if the same was occasioned by the agents of Lord Mohun, in neglecting to shew Earl Fitton the proper evidences to ascertain this rent; for it seemed contrary to conscience, that Lord Mohun should gain by his own wrong, especially when he himself was a stranger and volunteer, and would deprive the heirs at law (notwithstanding he had got all the residue of Earl Charles's estate, to the amount of near £150,000) of that small interest in their father's and grandfather's estate, which was given them in lieu of the whole, which ought naturally to have descended to them.

As to the other objection, it was argued, that the demise in the words of it was several, and to put this construction upon them, would be to make them joint, contrary to the plain words and intention of the lessor. That the reservation of the several and respective ancient rents for the several and respective messuages, etc. could not mean any thing but such rent for each tenement, as was anciently reserved for the same, and it would be difficult to use plainer and stronger words to import the meaning. That the words *yielding therefore*, must be understood *reddendo singula singulis*, and which method of interpretation, the law prescribes in many instances, not so strong as this; so that as to those parts of the estate demised, if there was any which had no ancient rent, no rent was reserved by this reservation, and consequently as to those the power was not executed.—As to the length of time since the decree, and the several subsequent transactions stated by the respondents, it was said to be not uncommon for decrees to be reversed after a great length of time, and that this objection ought not to be imputed to the appellants, who had been feme covert, or infants, or abroad in his Majesty's service, since the making of the decree. As to the pretended incumbrances, if there were any, the appellants were wholly strangers to them, nor could they in any wise vary or affect their right; and particularly, as all, or [151] the greatest part of these incumbrances, appeared to be many years subsequent to the appellants claim under Earl Fitton: And as to the decree for sale, the appellants were not parties, or privy to it. That their demand went only to those farms which were usually leased upon fines, and happened to be out of lease in December 1702, which was but a small part of the estate, and in this part, the share the appellants claimed, was only what the farms might be worth over and above the usual rent: And even this surplus would only continue to them, during the remainder of a lease determinable upon three lives; one of which was dead; and twenty-four years worn out in the other two, since the lease was made.

On the other side it was insisted (C. Talbot, W. Peere Williams), that as to the lease upon which the rent reserved was mentioned to be the *most improved rent*, this reservation was plainly void for the absolute uncertainty of it; consequently, this lease was not warranted by the power, and was accordingly given up at the hearing, by the appellants own counsel. And as to the other lease, *under the several and respective old and accustomed rents, reserved and payable for the said premises*, this was also void as against Lord Mohun, the remainder-man, and not warranted by the power; because there being many farms, and a great estate within this one lease, some let at the ancient rents, and some not, it would put insuperable difficulties upon the remainder-man, to recover his rent due for the premises comprised in this lease; for that in the action or avowries to be made for the rent, he must be so lucky as to point out what was the old rent, for what and for how much land it was paid, and at what times payable; and if the tenant could prove that a different rent was paid for the land, or that any other land was comprised in the lease, or that the rent was formerly payable at any other day, the remainder-man could not recover, but instead of recovering the rent from the tenant, must from time to time pay him costs. Whereas it was intended, that the remainder-man should have as plain, cer-

tain, and easy a remedy for his rent, as other landlords have, and as the former owners of this great estate anciently had; but upon the lease now in question, it neither appeared what the rent was which the remainder-man was to have, nor for what estate the rent was to be paid, nor when, or on what days it was to grow due the lease giving the remainder-man no manner of light as to these particulars. That the proviso contained in the power of leasing, in directing that the tenant should use a counterpart of every lease, shewed, that the intent of the power was to guard against all the foregoing inconveniencies, by reducing the premises to a certainty: and that there should be a counterpart of every several lease, of every parcel of land which was formerly let separately, and the particular ancient rent reserved with certainty in each lease, and not one lease only, or a counterpart of a lease of the whole estate, without reserving any certain rent. That as these powers of leasing are generally reserved in all settlements, if so loose an exercise of them should be allowed to the tenant for life, it would introduce the greatest difficulties, and put the greatest hardships upon the jointress, sons [152] and other persons claiming in remainder, under such settlements; and by such a construction, the tenants for life, by an uncertain, general, and short lease of the whole estate, which might be a rash and sudden act, and done with very little expence of money, time, or trouble, would be enabled to render the remainders expectant on the determination of such lease, though settled on the highest consideration, to become of little value; because the persons to whom such remainders belonged, would be in a great measure disabled from recovering any rent for the premises. And as the decree appealed from had been so solemnly pronounced, and so long acquiesced in; and as securities had been since made and accepted under it, for debts and marriage portions, by persons not parties to that suit, and who never had any opportunity of defending the same, though they would be very great sufferers if the decree was reversed; it was hoped, that it would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, and hearing the opinion of the Judges upon a question proposed to them, "Whether the power in the settlement of Charles Earl of Macclesfield, to make leases, was well executed;" it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree therein complained of, affirmed. (Jour. vol. 23. p. 64.)

CASE 3.—AYMOR RICH,—*Appellant*; GEORGE BEAUMONT, and others,—*Respondents* [9th February 1727].

[Mews' Dig. x. 1375; xv. 375.]

Where a power is given to a woman to dispose of her estate by will, and she afterwards marries, it seems that the marriage is a suspension of her power; but if she survives the husband, her power revives. *Sed quaere*, for the Lords directed a case for the opinion of the Judges of B. R.

DECREE of Lord Hardwicke C. REVERSED.

In 3 Atk. 707, the principle of this case was thus stated by the Attorney-General (*arguendo* in the case of *Hearle v. Greenbank*); "It is a rule, that where a person has two ways of doing a thing, and it cannot be done one way, it shall be done another; *ut res magis valeat quam pereat*; so that if it cannot be disposed of by way of interest, yet it shall be a good disposition by way of power."

Viner, vol 4. p. 168. ca. 26: vol. 22. p. 277. ca. 47. 2 Eq. ab. 157. ca. 4. 753. ca. 2  
See 3 Atkyns 707.

A treaty of marriage being concluded between the appellant and Grace Bagshaw, the only daughter and heir of William Bagshaw, deceased; and the said Grace being then seised in fee tail of several manors, lands, and hereditaments in the county of Derby, part thereof in possession, and other part in reversion, expectant upon the death of Elizabeth her mother, who, after the death of Mr. Bagshaw, married with Daniel Clarke; and having an intention to suffer a common recovery of her said

estate, and to settle the same in such manner as she should think fit, notwithstanding-[153]-standing her coverture; by indentures of lease and release, dated the 16th and 17th of October 1722, made between Daniel Clarke and Elizabeth his wife and Grace Bagshaw of the first part, William Scrimshire and John Launder of the second part, and the respondents Athorpe, Wadsworth, and Shore, of the third part; the said Daniel Clarke and Elizabeth his wife and Grace Bagshaw, for the barring of all estates tail, remainders, and reversions of and in the manor, messuages, lands, and hereditaments therein mentioned, did grant and release to Scrimshire and Launder, and their heirs, the manor of Great Hucklow, and all and every the messuages, lands, and hereditaments of them the said Daniel Clarke and Elizabeth his wife and Grace Bagshaw, or any of them, in Great Hucklow, Little Hucklow, Flag-Money, Ash, and Tidswell, in the county of Derby, to the intent, that Scrimshire and Launder might be tenants of the freehold of the said premises, for the suffering a common recovery thereof; and which was accordingly suffered in Michaelmas term following. And it was by the said indenture of release covenanted, that the intended recovery should be and enure to and for the uses and purposes, and upon the trusts therein after declared, viz. to the use and intent, that Elizabeth Clarke might have, during her life, an annuity or rent-charge of £200 to be issuing and payable out of the premises by quarterly payments, free from taxes, and with power of distress for non-payment thereof: And, subject to such rent-charge, to the use of the respondents Athorpe, Wadsworth, and Shore, their heirs and assigns, upon trust, to permit and suffer Grace Bagshaw and her assigns, during the term of 99 years, to be accounted from the date of the said indenture, if she should so long live, to receive and take the rents and profits of the said premises, to and for her sole and separate use and benefit; whether she should be sole or married, and exclusive of any husband or husbands she might at any time thereafter marry: And upon further trust, that if Grace Bagshaw should leave issue, either a son or sons, daughter or daughters, or both, that should survive her, or that the issue of such son or sons, daughter or daughters, should survive her; then the trustees and the survivor of them, his heirs and assigns, should, upon request and at the direction of the said Grace Bagshaw, testified under her hand and seal, by any deed in writing, or by her last will and testament in writing, or any instrument purporting to be her last will, signed in the presence of three or more credible witnesses, grant and convey the premises, subject to the said yearly rent-charge, to and amongst such child or children as she should leave, or to the issue of such child or children, if they should die before the mother, to and for such estates and uses, and in such manner and proportion, as by such writing, will, or instrument, should be directed and appointed; and for want of such direction and appointment should grant and convey the said premises to and amongst such child or children of the said Grace Bagshaw, as she should leave at her decease; or, in case of the death of such child or children, before her, then to the issue of such child or children [154] equally to be divided amongst them, to take as tenants in common, and not as joint tenants. And upon further trust, that in case Grace Bagshaw should leave no issue of her body, and that the said Elizabeth Clarke her mother should survive her, then the trustees, and the survivor of them, his heirs and assigns, should upon request and at the charge of the said Elizabeth Clarke, grant and convey the said premises to her and her heirs. And upon further trust, that in case Elizabeth Clarke should not survive the said Grace Bagshaw, then the trustees and the survivor of them, his heirs and assigns, should, upon request and at the charge of the said Grace Bagshaw, grant and convey the premises to her and her heirs; or to such other use or uses, person or persons, and for such estate and estates as she should, by any instrument in writing under her hand and seal, attested by two or more credible witnesses, or by her last will and testament in writing duly executed, or other instrument purporting to be her last will and testament, direct and appoint; and for want of such appointment, then to convey the same to such person and persons, and their heirs, as for the time being should be heirs at law of the said Grace Bagshaw.

And in this indenture of release was contained a proviso, that in case the said Grace Bagshaw should survive the said Elizabeth Clarke, it should and might be lawful to and for her, by deed, indented under her hand and seal, executed in the presence of three or more credible witnesses, or by her last will and testament in

writing duly executed, to revoke, alter, change, determine, and make void all or any the use or uses, estate or estates therein before limited, declared or appointed, of and concerning the said premises; and by the same, or any other deed or will, to create or raise, limit or appoint, any other new use or uses, estate or estates, of and concerning the same, or any part thereof.

Grace Bagshaw, at the time of executing these deeds, declared she was going to be married to the appellant; and that she intended the estate for the advancement of the appellant and his family; and the deeds were accordingly executed with a view and intention of vesting a power in her for that end and purpose.

The marriage was soon afterwards had; and Elizabeth Clarke died in January 1722, in the life-time of her daughter Grace.

The appellant and his wife had issue only one son, named Elkanah; and she having a settled intention to advance the appellant and his family, as she frequently declared, by virtue and in pursuance of the powers reserved to and vested in her by the said settlement, but without having any opportunity of seeing the same: did, on the 29th of September 1724, make, sign, and seal, her last will and testament, attested by three credible witnesses; and thereby gave and devised to her said son all her real estate in lands, tenements, and hereditaments, whether freehold or copyhold, in the county of Derby; and willed, that her said son should enter into full possession of one half of her said real estate, as soon as he should accomplish his age of 21, or day of marriage, which [155] should first happen; and into full possession of the residue thereof, at the death of the appellant his father: And she gave to the appellant all the rents and profits of her said real estate, until such time as her said son should accomplish his age of 21, or day of marriage; the appellant taking care to maintain, educate, and bring up her said son, according to his degree and quality, until such his age or marriage as aforesaid; and from and after the time that her son should attain such his age or marriage, she thereby gave to the appellant only one half of the rents and profits of her said real estate, for and during the term of his natural life: And if her son should happen to die in his minority, not having any lawful issue at the time of his decease, then she devised all her said real estate to the appellant, his heirs and assigns for ever. And she ordered and directed, that her trustees, or such of them as should be living, named in a settlement lately made of her estate in Derbyshire, should convey their said trust estate to such uses, and for such persons as were named in her said will: And she thereby gave all her goods, chattels, and personal estate whatsoever, and also her lead mines and mineral duties to the appellant, and made him sole executor.

On the very same day the testatrix died; and in February following, her son also died, an infant, and without issue.

The appellant apprehending, that by virtue of the said will, or writing purporting to be the last will of his said wife, he was upon the death of his son well entitled in equity, to the fee simple and inheritance of the premises, and to have a conveyance of the legal estate thereof made to him and his heirs by the trustees; in Hilary term, 1724, exhibited his bill in Chancery against the respondents George Beaumont, Gertrude, Jane, Elizabeth, and Sarah Grammar, as the heirs at law of his late wife and against the trustees; praying, that the trustees might convey the legal estate in the premises to the appellant and his heirs.

The defendants having put in their answers, and witnesses being examined on both sides; the cause came to a hearing before the Lord Chancellor King, on the 11th of February 1726; when his Lordship was pleased to dismiss the appellant's bill against the trustees with costs, and as to the other defendants the heirs at law, without costs; his Lordship declaring, that if the appellant had any title to the premises in question, his remedy was proper at law, and not in equity.

The appellant therefore appealed from the decree; and on his behalf it was argued (P. Yorke, T. Lutwyche), that in case his late wife happened to survive Elizabeth Clarke her mother, then the trustees of the settlement, pursuant to the trusts therein declared by a separate and distinct clause, were, upon her request and at her option, either to convey the premises to herself and her heirs, in her life-time, or to such other person or persons, and for such estate and estates, as she should by any instrument in writing, under her hand and seal, attested by two or more witnesses, or by her last will in writing duly executed, or other instrument purporting to be her last will [156]



and testament, direct and appoint. That by the intent of the general proviso in the close of the settlement, an absolute power was also reserved to the appellant's wife, on the death of her mother, to revoke and alter the former trusts, and to substitute new ones in their place, by her last will and testament duly executed, and to declare for whose benefit such new trusts should enure. That she having survived her mother, which was the only contingency expressed in either of the said clauses, and having by her will, or an instrument purporting to be her will, duly executed subsequent to her mother's death, limited and appointed the premises, and the equitable estate therein, to the appellant and his heirs, upon the contingency therein mentioned, and which had since happened; the appellant ought to enjoy the benefit of such appointment, and was entitled to have a conveyance of the legal estate from the trustees accordingly. That the appellant's wife by her said will or instrument, directed her trustees to convey their trust estate to such uses, and for such persons as were named therein; whereby she expressly declared her intention to be, that the legal estate should remain in the trustees, and directed it to be conveyed by them to such *cestui que* trusts as she had nominated by her will; and the only proper remedy to obtain such conveyance, was in a Court of Equity. But if this will, or instrument, should be construed to anure as a revocation of the legal estate out of the trustees, rather than as a declaration of the trusts of that estate; the same by such construction would be made to anure contrary to the express words thereof, and contrary to the manifest intention of the party therein declared. That the settlement plainly appeared to have been executed by the appellant's late wife, with a view and intention of putting the disposition of her estate in her own power, so that she might thereby have an opportunity of advancing the appellant and his family. That her constant declarations to this purpose, and the solemn execution of her will with this view, fully explained and confirmed it to have been her intention. And that this being the case of a will, a trust, and a power arising upon a trust, all which have usually received in Courts of Equity a liberal sense and construction, the same ought here to be taken liberally, in favour of their intended operation; and no construction ought to be admitted, which would manifestly overturn and disappoint the declared intention of the party.

On behalf of the respondents it was contended (C. Talbot, N. Fazakerly), that there were two distinct cases provided for by the settlement; the first, if Grace Bagshaw should die leaving any child or children, or issue of any child or children, who should die in her life-time: In which event, her power of appointing was confined wholly to such child or children as she should leave, or to the issue of such as should die before her; and the limitation in default of an appointment, was, in like manner, confined to her child or children, or to their issue. The next case provided for was, that of Grace Bagshaw's dying without issue surviving her; which was subdivided upon the different contingencies of her mother's surviving [157] her, or of her surviving her mother; and to this the power of revocation was immediately subjoined. Now Grace having left a son who survived her, it was apprehended that neither branch of this division, or the power of revocation, ever did, or was intended to take place. But if the power existed, it was not well executed; for when a power is reserved to revoke by a last will duly executed, it must mean a legal will; one that is to be made under those circumstances, and with such qualifications as the law requires; but a feme covert's will of lands is by law absolutely void. That there was no necessity of understanding the will mentioned in the power, in any sense different from the legal one, so as to mean any declaration of her last will and intent, though during coverture; because she was unmarried at the time of creating the power, and might then have executed it according to law; her marriage was a suspension only of the power during coverture, and upon surviving her husband, if that contingency had happened, she might again have executed it. If the will was a good revocation, the trusts limited to the trustees were revoked; and consequently, their legal estate was taken away and vested in the appellant, and then there was no foundation for his applying to a Court of Equity to have a conveyance from the trustees. But whether the revocation in point of law was good or not, was a question merely at law, where the appellant might have the full benefit of his right, if he had any; and if there was any legal defect in the execution of the power, a Court of Equity would never make it good in favour of a volunteer, against a disinterested heir. And therefore it was

hoped, that the order of dismission would be affirmed, and the appeal dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of dismission therein complained of, should be reversed: And it was further ORDERED, that the Court of Chancery should direct a case to be stated between the parties, and to be sent to the Judges of the Court of King's Bench, for their opinion on the following points; viz. "Whether the will, or instrument purporting to be the will of Grace Rich, formerly Grace Bagshaw, the appellant's late wife, dated the 29th of September 1724, be a good appointment of the estates therein contained: And whether the trusts therein limited be uses executed, or trusts:" And that on the return of the opinion of the Judges of the said Court of King's Bench to the Court of Chancery, that Court should proceed to make such further order thereupon as should be just.\* (Jour. vol. 23. p. 180.)

[158] CASE 4.—Countess Dowager of ROSCOMMON,—*Appellant*; THOMAS FOWKE, Esq.,—*Respondent* (*Et à contra*) [3d April 1745].

[Mews' Dig. x. 1428, 1435.]

A power of revocation is reserved to A. *by any writing* under his hand and seal, and of appointing new uses, *by the same or any other deed*: A. by his will, without taking any notice of the power, devises the estate to B. Held that this was a good execution of the power.

DECREE of the Irish Chancery VARIED.

Sir Henry Ingoldsby, Bart. grandfather of the appellant and of Elizabeth, late wife of the respondent Thomas Fowke, being seised in fee of several castles, manors, and estates in the counties of East Meath and Clare, and of several houses in the city of Limerick in Ireland; and having issue two sons, William his eldest, and Charles his younger son; by indentures of lease and release, dated the 2d and 3d of July 1694, in consideration of a marriage then lately had between the said William Ingoldsby and Theophila his wife, and in pursuance of articles, dated the 24th of October 1691, made previous to that marriage, and for other considerations in the settlement mentioned; Sir Henry granted and conveyed all the before mentioned estates in East Meath and Clare, by their particular denominations, and all other his estates in those counties, or elsewhere in the kingdom of Ireland, to Sir Berkley Lucy and Colonel Ingoldsby, and their heirs, to the uses following:

As to the estates in the county of East Meath, to trustees for a term of 60 years, if William Ingoldsby and Theophila should so long live, to secure an annuity of £150 per ann. to Theophila for her separate use; remainder to William Ingoldsby for life; remainder to trustees to preserve contingent remainders; remainder to Theophila for life; remainder to the first and other sons of William and Theophila in tail male; remainder to trustees for a term of 500 years, to raise portions for daughters of that marriage; remainder to the first and every other son of William by any other wife in tail male; remainder to Charles Ingoldsby for life; remainder to trustees to preserve contingent remainders; remainder to the first and every

\* It seems rather singular (says Mr. Brown) that the House should, upon this occasion, direct a case for the opinion of the Court of King's Bench; instead of ordering the Judges to attend, and calling for their opinion in the usual way. And in 3 Atkyns, p. 707. Lord Chancellor Hardwicke said, "that this was the only instance of a case made by the direction of the House of Lords, for the opinion of the Judges." But it is still more extraordinary (adds Mr. Brown), that after such a case was directed, no steps should have been taken on either side to have it argued. For, after a very laborious search, he was not able to discover a single trace of any further proceedings in the cause; except an order of the Court of Chancery, directing the case to be settled by the Master, in case the parties differed in stating it.

other son of Charles in tail male; remainder to Sir Henry Ingoldsby, and the heirs of his body; and after other remainders, which never took effect, remainder to Sir Henry Ingoldsby in fee.

As to the estates in the county of Clare and city of Limerick (except the lands of Clanderilaw and several other lands, particularly described and excepted) to the use of Sir Henry Ingoldsby for life; remainder, as to part, to Dame Ann his wife for life; remainder of the whole to William Ingoldsby for life; remainder to trustees to preserve the contingent remainders; remainder to the first and other sons of William and Theophila in tail male; remainder to trustees for 400 years, to raise portions for daughters; remainder to the first and every other son of William Ingoldsby by [159] any other wife; with like remainders over to Charles and his issue male, as were limited of the East Meath estate; with remainder to Sir Henry Ingoldsby in fee.

And as to the lands of Clanderilaw, Derialicky, Derigyhee, and the other lands in the county of Clare, excepted out of the precedent limitation, to the use of Sir Henry for life; remainder to Charles Ingoldsby for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to Sir Henry and the heirs of his body, with several other remainders over, which never took effect; remainder to Sir Henry Ingoldsby in fee.

Fines and recoveries were afterwards levied and suffered of all the before mentioned estates, in pursuance of a covenant in this settlement.

Sir Henry Ingoldsby and his wife died in 1701, and Charles, his second son, died in 1703, in the life-time of William Ingoldsby (then Sir William) leaving one son Henry, who died without issue in 1719, and one daughter, the appellant Lady Roscommon.

Sir William Ingoldsby had issue by Theophila, his wife, only one daughter, Elizabeth; who afterwards, with the consent of Sir William, intermarried with the respondent Thomas Fowke, and was, by virtue of the settlement, entitled to a portion of £3000, which was afterwards paid by Sir William to the respondent.

Sir William Ingoldsby, after the death of his wife without issue male, and of his brother Charles and Henry his son, without issue male, being, as heir of the body of Sir Henry Ingoldsby, tenant in tail general of all the before mentioned estates, by virtue of the several limitations in the settlement; by indentures of lease and release, dated the 20th and 21st of October 1719, conveyed all the estates in East Meath and Clare, and in the city of Limerick (except Gortafeen which was not then in his possession) to Thomas Barry, to make him tenant to the precipe, that recoveries might be suffered of those estates, which recoveries were thereby declared to be to the use of Sir William and his heirs.

In Easter term 1720, recoveries were accordingly suffered of the East Meath and Clare estates; but the houses in Limerick being of small value, no recovery was suffered of them.

The remainders in the settlement of 1694, of the Clare and East Meath estates, being barred by these recoveries, and Sir William thereby becoming seised in fee simple; in Easter term 1724, he, together with the respondent Fowke and Elizabeth his wife, levied a fine *sur consueude de droit*, etc. to James Medlicott, of the lands in Girley and Curragh Town in the county of Meath; and in Hilary term 1725, in consideration of £1100 another fine was levied by them of several other parts of the estate in the county of Meath, to Thomas Jones, esq. and other parts of the estate in the county of Clare were granted in fee farm by Sir William, reserving certain rents.

In April 1726, Sir William Ingoldsby died; and upon his death, the fee simple and inheritance of the lands in the counties of East [160] Meath and Clare, included in the recoveries in 1720, and the rents of such of them as had been afterwards granted in fee farm by Sir William, descended to Elizabeth, the respondent's late wife, as his only child and heir; and she became entitled to an estate tail in the other premises, not included in these recoveries, under the limitations in the settlement of 1694. And being so seised, by indenture quadrupartite, dated the 6th of June 1726, and made between the respondent and Elizabeth his wife of the first part, the Most Noble James Duke of Chandos and Sir Berkley Lucy of the second part, Richard Pierson and Robert Allen, esqrs. of the third part, and James Howison of the city of Dublin, esq. of the fourth part; the respondent covenanted and agreed with Howi-

son, that he and his wife would, before the end of Michaelmas term then next ensuing, levy fines *sur consueance de droit*, etc. with proclamations of all the lands in the counties of Meath and Clare, and the houses in Limerick, and the fee farm rents of such of the lands as had been granted by Sir William, and all other the castles, manors, messuages, towns, lands, tenements, fee farm rents, and hereditaments whatsoever, which descended or came to Elizabeth, the respondent's wife, by the death of Sir William or Sir Henry Ingoldsby, or in which she or the respondent in her right, or any other in trust for her, had any estate in the counties of East Meath or Clare, or in the city of Limerick or elsewhere in the kingdom of Ireland, to the several uses following; viz.

As to all the estates in the county of Clare and city of Limerick (except Gortafeen) and also all the premises called Girley, or Newton-Girley, or Curragh Town, in the county of Meath, to the use of the respondent for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the use of Elizabeth, the respondent's wife, for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the duke of Chandos and Sir Berkley Lucy for 500 years, to raise £3000 portions for younger children of the respondent and Elizabeth; remainder to the first and other sons of the respondent and Elizabeth in tail male; remainder to their daughters in tail general; and for default of such issue, remainder to Elizabeth Fowke and her heirs.

And as to all the premises in the county of Meath (except the before mentioned premises in Girley and Newton-Girley, and Curragh Town) and also the lands of Gortafeen, and all the other estates intended to be comprised in the said fines, of which no use was before limited; to the use of Pierson and Allen and their heirs upon trust, by sale or mortgage, to raise such sums of money as the respondent and Elizabeth his wife, or the survivor of them, should, by any writing under their hands and seals, or under the hand and seal of the survivor of them, attested by two or more credible witnesses, direct or appoint; and after raising and payment of such sums and their charges, to convey the residue of the premises unsold, and the equity of redemption of such as should be mortgaged, to the respondent for life, without impeachment of waste; [161] and after his decease, to the use of such person and persons, and for such estate and estates, and chargeable with such sum or sums as the said Elizabeth should, by any writing under her hand and seal, attested by two or more credible witnesses (notwithstanding her coverture, and as if she were sole and unmarried) direct, limit, or appoint; and for want of such direction, limitation, or appointment, to convey the same to her, and her heirs and assigns for ever. And in this indenture was contained a proviso in the words following: "Provided always, and these presents are upon this condition, nevertheless, that if there shall be no issue by the said Thomas Fowke on the body of the said Elizabeth his wife begotten, or being such, all of them shall die in the life-time of the said Elizabeth; that then and in such case, it shall and may be lawful to and for the said Elizabeth, *by any writing* under her hand and seal, attested by two or more credible witnesses (notwithstanding her coverture, and as if she were sole and unmarried) to revoke, alter, change, or make void all or any the use or uses, estate and estates, trusts, limitations, declarations, and agreements in these presents contained (except the estate for life herein before limited or intended to be limited to the said Thomas Fowke, without impeachment of waste, and except such estates as shall be sold or mortgaged by the said Richard Pierson and Robert Allen, for raising money as aforesaid, and except such fee farm grants and leases for years, as shall be made by virtue of the power herein before mentioned): And *by the same or any other deed*, (notwithstanding her coverture, and as if she were sole and unmarried) to grant, limit, and appoint the same premises, or any part or parcel thereof, to any person or persons whatsoever, for such use and uses, estate and estates, either in fee simple, fee tail, or for life or lives, or for any term or number of years, determinable on any life or lives, or any term or number of years certain, and charged and chargeable with such annual sum and sums of money, and in such manner and form, as the said Elizabeth shall think fit, direct or appoint; any thing herein before contained to the contrary notwithstanding."

In Michaelmas term 1726, fines with proclamations were duly levied by the

respondent and his wife to James Howison, of all the before mentioned estates in the counties of Meath and Clare.

Some of the estates were sold by the trustees, and others mortgaged, in pursuance of the aforesaid trust, with the concurrence of the respondent and his wife, for the payment of Sir William Ingoldsby's debts, and for other purposes; but the lands conveyed to the trustees by the deed of 1726, not being sufficient to discharge all the debts and incumbrances affecting the estates, and the respondent not having any issue by Elizabeth his wife, living; by indentures of lease and release, dated the 5th and 7th of July 1729, the release being quadrupartite, and made between the respondent and Elizabeth his wife and Robert Allen of the first part, the Duke of Chandos and Sir Berkley Lucy of the second part, John Fowke, esq. of the third part, and Thomas Meagher, esq. of the [162] fourth part; reciting the settlement of the 6th of June 1726, and some other subsequent deeds, whereby the interest of Richard Pierson, the trustee, had been assigned to John Fowke; and reciting, that part of the premises, vested by the settlement in 1726 in Robert Allen and Richard Pierson, had been sold, and that other parts had been mortgaged; and that the money arising by such sale and mortgages had been applied in satisfaction of just debts and incumbrances, but that the same was insufficient for the payment and discharge of all the debts and incumbrances affecting all the estates in the former settlement; and that it was therefore necessary, for the discharge of Sir William Ingoldsby's debts, and other debts, that a further part of the estates should be vested in trustees, to be sold for payment thereof; and that it was most convenient, that the residue of the East Meath estate should be sold for those purposes: Therefore the respondent and Elizabeth his wife and Robert Allen conveyed to John Fowke and his heirs, all the castles, manors, and estates whatsoever, in the county of East Meath, which remained unsold, upon trust by sale or mortgage, to raise from time to time such sums of money as the respondent and Elizabeth his wife, or the survivor of them, should, by any writing or writings under their hands and seals, or under the hand and seal of the survivor of them, attested by two or more witnesses, direct or appoint; to be applied as they, or the survivor of them, should direct; and after payment of such sums and their charges, upon trust, to convey the residue of the premises remaining unsold, and the equity of redemption of such as should be mortgaged, to the use of the respondent for life, without impeachment of waste; and after his decease, to the use of such person and persons, and for such estate and estates, and charged and chargeable with any annual or other sums of money, in such manner as the said Elizabeth Fowke should, by any writing under her hand and seal, attested by two or more credible witnesses (notwithstanding her coverture, and as if she was sole and unmarried) direct, limit, or appoint; and for want of such appointment, to Elizabeth Fowke, her heirs and assigns for ever. And the Duke of Chandos and Sir Berkley Lucy likewise assigned the term of 500 years, of the before mentioned estates in the county of Meath, vested in them by the settlement of June 1726, to Thomas Meagher, upon trust to attend the inheritance: And there was a proviso in this deed, that nothing therein contained should extend to alter the uses in the settlement of 1726, limited of the lands of Gortafeen, or of the premises in the county of Clare or city of Limerick; but that the same, being then of the yearly value of £778 5s. should stand charged with, and be subject to the raising the £3000 portions, and such other trusts as the said term of 500 years stood thereby limited: And also another proviso, that until the premises in the county of Meath should be sold, the respondent and his wife, during their lives, and every other person who should be entitled to the same by the former settlement of 1726, should receive the rents and profits thereof. And a power was given to the respondent and [163] his wife, and the survivor of them, by deed in writing, to lease the estates in the county of Clare and city of Limerick, to any persons, in fee farm, or for lives or years, as they should think fit, reserving the best improved rent.

The respondent's wife not having any children living, duly made her last will in writing (or writing in nature of a will) under her hand and seal, and in the presence of three credible witnesses, who attested the same in her presence, dated the 13th of January 1734; and thereby, without taking notice of the power in the settlement of 1726, she devised all her estates which descended to her by the death of Sir William Ingoldsby, or Sir Henry Ingoldsby, and in which she, or the respondent in her right, or any other person in trust for her, then had any estate, in the counties

of Clare, or East Meath, and city of Limerick, or elsewhere in the kingdom of Ireland, (subject to the legacies therein bequeathed) to the respondent and his heirs.

Soon after making this will, viz. in July 1735, the respondent's wife died; and the respondent continued in possession of all the estates in the counties of Meath and Clare, and of the houses in the city of Limerick, which remained unsold, and were included in the original settlement of 1694; except the lands called Gortafeen, (which never were in the possession of the family, and for which an ejectment was brought by the respondent and Elizabeth his wife, but no judgment was ever obtained therein), and except the lands of Clanderilaw, Derialicky, and Derigyhee, and the other lands included in the last limitation in the settlement of 1694.

In July 1736, the appellant filed her bill in the Court of Chancery in Ireland, against the respondent and against John Fowke, Robert Allen, and Thomas Meagher: setting forth the before mentioned settlements, and the fines levied by the respondent and his wife, and that she was in seisin and perception of the rents, being £104 per ann. of the lands of Clanderilaw, and the other excepted lands in the county of Clare; and insisted, that as heir general of Sir Henry and Sir William Ingoldsby, and of Elizabeth the respondent's late wife, she was entitled to the reversion of the premises in the counties of Meath and Clare, and city of Limerick, after the death of the respondent, and to the immediate seisin of Gortafeen; but could not sue for the same, having none of the title deeds, nor a knowledge of any of the settlements, but from the inrolment of the original settlement and memorials of other deeds in the respondent's custody; and charged, that the respondent had made leases of part of the premises, and intended to sell or incumber the other estates; and therefore prayed, that the respondent might set forth a list of the deeds in his hands relating to the premises, and the contents thereof, and Sir William's title to Gortafeen and his debts, and any other deeds or fines, except those stated by the bill, which were levied or executed by the respondent and his wife; and a list of the lands sold and leased, and the sums received thereby, and whether he executed any leases in reversion, or accepted of any surrenders, and what fines he received on leases.

[164] To this bill the respondent put in an answer and plea; and to so much of the bill as required the respondent to set forth the deeds and writings relating to the said estates, or any part thereof, in his custody or power, except the deeds set forth in the answer; or that prayed a discovery of the debts of Sir William Ingoldsby, or of the estates which were leased, mortgaged, or sold by the respondent and his wife, or by him since her death, or of the monies raised thereby, or how the same were applied, or whether the respondent and his wife had executed any deeds, or levied any fines, except those before mentioned, or whether he had made any leases of the premises, or accepted fines on granting such new leases; and in bar of the relief prayed by the bill, the respondent pleaded the settlement in 1694, and the other deeds and fines before mentioned, and the will of Elizabeth his late wife; and insisted, that by the common recoveries suffered by Sir William Ingoldsby, he became seized in fee of the premises therein contained; and that the remainders in tail created by the settlement in 1694, were barred and destroyed; that the inheritance of the premises descended to Elizabeth his wife; and that she, by joining with him in levying the fines in 1726, and executing the before mentioned deed of the 6th of June 1726, to declare the uses of those fines, and by virtue of the power of revocation therein contained, was well enabled to execute the deeds of the 6th and 7th of June 1729, and to make her said will; and that by virtue thereof, he was well entitled to the inheritance of those estates; and that the appellant was barred of all right or claim thereto.

This plea came on to be argued upon the 24th of May 1737; when it was ordered, that the benefit of it should be reserved till the hearing, with liberty for the appellant to except to the answer.

On the 20th of November 1741, the cause was heard; and on the 11th of December following, it was ordered, that a state of the case should be drawn up and sent to the Court of Common Pleas, for the opinion of that Court; "Whether the will or writing purporting to be the will of Elizabeth Fowke, bearing date the 13th day of January 1734, be a due execution of the power in the deed of the 6th day of June 1726, or not?" And further directions were reserved, till after the Court should have certified their opinion.

In pursuance of this order, a case was accordingly stated; and the said Court of Common Pleas, after hearing the matter spoken to by counsel on both sides, were pleased to give their opinion in writing, in the words following; "We are of opinion, that the will, or writing purporting to be the will of Elizabeth Fowke, bearing date the 13th day of January 1734, is a due execution of the power in the deed of the 6th of June 1726." Henry Singleton, George Gore, Robert Lindsay.

Upon the return of this certificate, the cause came on again to be heard for further directions, upon the 3d of February 1742, and was adjourned till the 7th; when it was (amongst other things) ordered and decreed, that the respondent should bring in and deposit [165] with the Usher of the Court, all the deeds, papers, and writings which were in his hands, power, or custody, at the time of filing the bill, or since, relating to the lands of Curragh Town in the county of Meath, Gortafeen in the county of Clare, and the houses and lands in the city of Limerick, subject to the further order of the Court; and that no person should have inspection of the said deeds, papers, and writings, without the order of the Court. And it was further declared and decreed, that the appellant was entitled unto, and should have and recover the lands of Gortafeen, and the reversion of the houses and lands in the city of Limerick, after the death of the respondent; and that all temporary bars, as to the said houses and lands, should be set aside: And it was further ordered and adjudged, that the plea put in by the respondent, should be allowed; and that the bill, as to all the lands mentioned in the plea (except the lands of Gortafeen and the premises in Limerick) should be dismissed; and his Lordship was pleased to reserve the consideration of the appellant's applying to the Court, to set aside all temporary bars as to the lands of Curragh Town. And it was further ordered, that it should be referred to the Master, to take an account of what debts affected the estate of Sir William Ingoldsby, at the time of his death, and what part thereof had been paid, and by whom, and also what were the debts affecting the same since his decease, the amount of such debts, and by whom contracted, with other directions usual as to matters of account; and further directions were reserved till after the report.

From this decree the Countess appealed; insisting (D. Ryder, W. Murray), that in case the former power of revocation continued, notwithstanding the subsequent deed of July 1729, Elizabeth Fowke had not properly executed that power by her will; for according to the words and intent of the power reserved to her by the deed of June 1726, it ought to have been executed by deed, and not by will; and therefore the reversion of the estates in Clare descended to the appellant. That two powers were reserved to Elizabeth by the deed of 1726, one to revoke the uses of the estates in Clare, by *deed*; the other, to limit such parts of the estates in East Meath as remained unsold, by *any writing*: Now she had made a will without reciting any power, and thereby gave all her estate to her husband; which might be a proper execution of the latter power, but not of the former. It was reasonable therefore to suppose, that she only intended to do what she regularly had done: And upon this supposition, she had provided for her husband in an ample manner for his life, and even given him some part of the estate in fee; but had permitted the reversion of other part, to descend to the heir at law of the family: And this seemed to be a reasonable and equitable disposition. That as the lands of Gortafeen were not in the fines, nor was Elizabeth ever in possession, the Court had declared the appellant to be entitled thereto in possession; and therefore the deeds and writings thereof, ought to have been decreed to be delivered to her. That as the houses in Limerick were not in the fines, they were declared by the decree to belong to the appellant [66] in reversion; and the deeds and writings ought not only to have been directed to be brought into Court; but the appellant ought to have been permitted to peruse and take copies of them: And for the same reason, she was entitled to the same decree as to the lands of Derialicky and Derigyhee. And as the lands of Curragh Town were not comprised in the fines levied by Elizabeth Fowke, they could not be affected by the deeds which she had executed; and therefore it was conceived, that all temporary bars as to these lands ought to have been removed; and that the appellant ought to have been at liberty to have inspected and taken copies of the deeds and writings relating thereto.

As to the objections taken to the decree by the cross appeal, that the deeds and writings ought not to have been directed to be produced; and that no account ought

to be taken of Sir William Ingoldsby's debts, or of the money raised by sale of his estate; the appellant insisted, that in these particulars the decree was right. For as to the first objection, it was already answered and must depend upon the right to the estates; and as to the second, Sir William died seised in fee of the several lands claimed by the appellant; and therefore such lands were legal assets as to his specialty creditors. If therefore the appellant was entitled to any of these lands, an account of Sir William's debts, and of what sums had been raised for the payment thereof, was absolutely necessary to be taken; in order that it might appear, how far the lands claimed by the appellant were liable to the payment of those debts.

In opposition to the grounds of the original appeal, it was argued (J. Brown, T. Clarke), on the part of the respondent, that he was entitled to the absolute inheritance of all those estates, which descended to Elizabeth his late wife from Sir William Ingoldsby, and were included in the settlement and fines of 1726. For by the power which she reserved to herself in that settlement, she was enabled by *any writing* under her hand and seal, attested by two or more credible witnesses, to revoke and change all the former uses therein limited; *and by the same* [writing] *or any other deed*, to appoint new uses: And her will (or the writing in nature of her will) was a good execution of this power of revocation and appointment; it being a writing under her hand and seal, attested by three credible witnesses; and substantially as well as literally answering the description, and comprising all the requisites of the power. That to confine the execution of the power as if designed to be *by deed only*, by reason of the latter words in the proviso [*by the same or any other deed*]; and to infer from thence, that *the writing* expressly mentioned in the former part of the power, and referred to even in this latter branch of it, must be *only* such a writing as is in point of law a *deed*; would be to make a construction of the power directly contrary to the former part, which enabled her to revoke the old uses *by any writing*; as well as to the latter part of it, which enabled her to appoint new uses *by the same* [writing]; and would be to defeat and take away the operation of clear and plain [167] words by implication and inference only: And this too in a case, where the most liberal construction in favour of the execution of the power is always made; this being a power reserved by the owner of the inheritance, and therefore to be considered as part of the original dominion, or right of disposal which a tenant in fee simple has by law over his estate.

And in support of the cross appeal it was contended, that the only part of the estate which by the decree the appellant was declared to be entitled to, was the lands at Gortafeen, and the houses in Limerick, of very small value; the decision of the right to the lands at Curragh Town, being reserved by the decree for the future consideration of the Court; and the deeds and writings which the decree directed to be brought into court, as relating to these three small parcels of the estate, concerned also the title of the other estates, which were the property of the respondent; and with respect to which, the appellant's bill was dismissed. And it would be extremely inconvenient and prejudicial to the respondent, to have all his deeds continued in the hands of the Court, and to be deprived even of an opportunity of inspection, without the particular order of the Court. Whereas, on the other hand, the appellant could suffer no injury by these deeds continuing in the respondent's custody; since the original settlement of 1694, was inrolled, and the fines and recoveries which made out her title were upon record; and all the subsequent settlements, in which any of those lands mentioned in the decree were included, derived no title to the appellant; but on the contrary, proved and verified the respondent's title against her. That the account directed by the decree, and the other directions relating thereto, could not any way concern the appellant, since the estates which she was decreed to be entitled to, viz. Gortafeen and the houses in Limerick, were not included in the recovery suffered by Sir William Ingoldsby in 1720, and therefore the old intail of those estates was still subsisting; and consequently, they could not be charged or affected with his debts, or any since contracted by the respondent or his late wife. And that the other directions of the decree in favour of the appellant were improper, without having other parties before the Court; nor did the appellant by her bill, pray any decree for immediate possession, or set up a title to any of the estates, but only in reversion after the death of the respondent.

After hearing counsel on this appeal, and hearing the Judges present, on certain



points of law to them proposed \* ; it was OR-[168]-DERED and ADJUDGED, that in the direction contained in the decree for bringing in deeds, papers, and writings, after the words ["city of Limerick,"] these words should be inserted ["and the lands of Girley, Derialicky, and Derigyhee"]; and that after the words, ["Court, and that"] these words should be omitted, viz. ["no person or persons do have inspection, or copies of the said deeds, papers, or writings, without the order of this Court"] and that instead thereof, these words ["any of the parties be at liberty to inspect the same, and take copies thereof, or of such parts thereof as they shall think fit, at their own expence"] should be inserted: And it was further ORDERED, that such part of the said decree as related to the accounts thereby directed, should be reversed; and that the same in all other respects not now varied, should be affirmed. (Jour. vol. 26. p. 476.)

CASE 5.—JOHN COMMONS, and another,—*Plaintiffs*; JOHN MARSHALL, Esq.,—*Defendant* (in Error) [24th February 1774].

[Mews' Dig. x. 1643. See *In re Crommelin*, 1851, 1 Ir. C.L. 182.]

J. S. by marriage articles, covenants to settle his estate to certain uses, reserving to himself a power of making leases for 31 years, or three lives. He grants a lease to A. for three lives, or 31 years, *which shall last longest*. Held, that this lease was supportable as a good execution of the power.

JUDGMENT of the Irish Exchequer AFFIRMED.

Nicholas, Lord Viscount Netterville, father of the present Lord, being seised in fee of the manor and lands of Dowth, Newtown, otherwise Ballyboy, part of Proudfoot town, (of which the lands in question were part), situate in the county of Meath, and of the lands of Ballymore and several other lands in the county of Westmeath, and of several lands in the county of Dublin, by articles dated the 16th of March 1731, made previous to his marriage with Catherine Burton, in consideration of £9000, her marriage portion, covenanted to convey and settle the said lands of Ballymore, and several other lands in the county of Westmeath, the mansion house and demesne of Dowth, then in his lordship's actual possession, containing 319 acres, that part of Proudfoot town then held by Anthony Walsh, the town and lands of Ballyboy, then in the possession of Con. O'Neil, and others, and several other lands in the counties of Meath and Dublin, to the use of himself for life *sans* waste, and with full power to commit waste (except by cutting down ornamental trees), and also with full power of making leases of all or any part of the said premises, for any term not exceeding 31 years, or three lives, to commence in possession at the best improved rent that could be had for the same; remainder to trustees to support contingent remainders; and (subject to a jointure of [169] £600 a year to Catherine for life) remainder to the first and other sons of the marriage in tail male; remainder to his own right heirs. These articles were duly registered in the public register's office in Dublin.

Lord Netterville, by lease, dated the 30th of March 1734, in consideration of a fine of £100 demised to Anthony Walsh, the lands of Proudfoot town, and several other parcels of his estate, not included in the above settlement, therein described as part of the lordship of Dowth, containing 99 acres and 2 roods; to hold to Walsh, for 31 years from the 1st of May then next, at the yearly rent of £43 5s. And by another

\* These points do not appear upon the Journal; but in a memorandum on the back of the printed case, it is said, that the following questions were put to the Judges, viz. "Whether the power of revocation contained in the indenture of 1726, was executed, extinguished, or altered, by the indenture of July 1729, as to the lands and premises in the county of Clare? And if not, Whether the writing executed by Mrs. Elizabeth Fowke, in nature of a will, was a good execution of the said power?" And that the Judges present answered, that no extinguishment, or alteration of the power was made by the indenture of 1729, and that the writing executed by Mrs. Fowke was a good execution of the said power.

lease, dated the 14th of July 1735, in consideration of another fine of £100, his Lordship demised to the said Anthony Walsh, several other parts of the lordship of Dowth, which were part of the settled estate, containing 102 acres and 4 roods, for 31 years, from the 1st of May then last, at the yearly rent of 10s. by the acre. And by a third lease, dated the 15th of September 1735, his Lordship again demised to Walsh, all the lands comprised in the first lease, and also 3 acres of bog, for 31 years, from the 1st of May then last, at the yearly rent of £53 5s. being £10 more than the rent reserved by the first lease.

Under these leases, Anthony Walsh held the lands thereby respectively demised, till his death, which happened in 1736, or 1737; having by his will appointed Sarah Walsh his widow, his brother Colonel George Walsh, and William Marshall, executors. But Sarah alone proved the will, and enjoyed the lands.

Lord Netterville was before his marriage indebted to the amount of £5000, which was agreed by the articles to be paid out of the lady's fortune, but not being able to procure present payment of the fortune, he ran farther into debt, to the amount of £11,000 in the whole; and therefore to raise money for payment of his debts, his Lordship, in 1739, obtained an act of parliament in Ireland, whereby (after reciting the marriage articles, and the amount of the lady's portion) the lordship and lands of Ballymore, and several others in the county of Westmeath, were vested in Robert Burton, Peter Daly, James Hussey, and Charles Burton, esqs. (now Sir Charles Burton, bart. one of the lessors of the plaintiff, as being the surviving trustee) and the survivor and their heirs, in trust, to sell so much thereof as would pay the £11,000, the amount of his Lordship's debts: And in lieu thereof, his Lordship's unsettled lands in the county of Meath, and £5000, part of Lady Netterville's fortune, were vested in the trustees, to the same uses as the lands then to be sold were by the marriage articles to have been settled; and by the act, all that part of the manor, town, and lands of Dowth, then in the possession of John Farrall, and of the executors of Anthony Walsh, the town and lands of Newtown, the town and lands of Ballyboy, and part of Dowth in the Possession of Patrick Evers, together with all that part thereof in the possession of James Kelly, with the mills, weirs, and fishery thereof, and that part of the town and lands of Dowth in the possession of Nicholas Hilcock, all situate in the barony of Slane and county of Meath, and several other lands [170] in the counties of Meath and Dublin, were vested in the trustees and their heirs, to the uses in the marriage articles, and became thereby completely settled.

Several years afterwards, Sarah Walsh, knowing Lord Netterville's necessities, applied to him for a new lease of all the lands comprised in the former leases, offering him a fine for such a new lease; and after the treaty had gone on for some time, she agreed to give a fine of £52 and some wethers, which his Lordship agreed to accept, and she accordingly paid the fine, and gave the wethers; and the former leases being surrendered, his Lordship executed to her a lease, dated the 4th of August 1750, set forth in a special verdict hereafter stated, in which no fine was mentioned; but the habendum was, "To her heirs, executors, administrators, and assigns, from the 1st Day of May last, for and during the natural life and lives of Ralph Walsh, youngest son of the said Anthony Walsh and Sarah Walsh, Jane Walsh, youngest daughter of the said Anthony and Sarah Walsh, and Alice Marshall, eldest daughter of John Marshall, of Roch Marshall, in the county of Lowth, gentleman, and the longest liver of them, or for the term, time, and space of 31 years, to commence from the 1st day of May last, which shall last longest, from thenceforth next ensuing fully to be complete and ended."

On the 10th of March 1750, Nicholas Lord Netterville died, leaving issue, by Catherine his Lady, the present John Lord Viscount Netterville (one of the lessors of the plaintiff) his only son, then an infant of about five years old, to whom his uncle Benjamin Burton was appointed guardian.

In May 1760, Sarah Walsh the lessee died, being survived by all the three nominees, or *cestui que vies* in the lease.

On the 8th of June 1766, the present Lord Viscount Netterville attained his age of 21.

The lands comprised in the several different leases to Anthony Walsh, were let at a great under value, and the rent reserved by the latter lease made to Sarah Walsh was even £4 2s. 9d. yearly less than the rents reserved by the former leases. But the

principal objection taken to this latter lease, and that on which alone the question arose was, that it did not pursue the particular power in the articles, which restrained and limited the duration of the term to be leased, to the period of three lives, or a term of 31 years, in the alternative, at the option of the lessor; whereas the term granted to Sarah Walsh was for three lives, or 31 years, in the disjunctive, neither certain for the one or the other, but which should last longest.

Upon this ground, Lord Netterville, as a purchaser under the articles and act of parliament, in Hilary Term 1767, brought an ejectment in the Court of Exchequer in Ireland, upon the double demise of himself, as tenant in tail under the articles, and of Sir Charles Burton, as the surviving trustee in the act of parliament, to avoid the lease and recover the lands therein; to which defence being made by John Marshall, esq. the husband of a daughter of [171] Sarah Walsh, and whose eldest daughter Alice was one of the lives named in the lease, and the general issue having been pleaded, the cause came on to trial on the 23d of March 1767, at the assizes held at Trim, for the county of Meath, when the following special verdict was found, viz.

"That Nicholas, late Lord Viscount Netterville, on and before the 4th day of August, in the year of our Lord 1750, was duly and legally seised for his life of all the said lands and premises in the plaintiff's said declaration mentioned, and had also, on and before the said 4th day of August in the year of our Lord 1750, duly and legally a power of making leases of all or any part of the said lands and premises, for any term or time not exceeding 31 years, or three lives, to commence in possession, and at the best improved rent, that could be had for the same. That the said John Lord Viscount Netterville, who is one of the lessors of the plaintiff in this cause, on and before the said 4th day of August in the said year 1750, had a remainder in tail in all the said lands and premises in the plaintiff's said declaration mentioned, duly and legally limited to him and the heirs male of his body, to commence immediately after the death of the said Nicholas, late Lord Viscount Netterville, who was his father. That the said estates and power were duly and legally created by a certain deed, which the said Nicholas, late Lord Viscount Netterville, executed on the 16th day of March in the year of our Lord 1731, and by a certain act of parliament which was made in this kingdom, in the 13th year of the reign of his late Majesty King George II. That the said Nicholas, lord Viscount Netterville, being seised of the said lands and premises for his life as aforesaid, with such power to make leases thereof as aforesaid, on the said 4th day of August in the year of our Lord 1750, executed a certain indenture, by which he demised, or took upon him to demise the said lands and premises to Sarah Walsh late of Ardath, in the county of Lowth, widow, for the lives of Ralph Walsh, Jane Walsh, and Alice Marshall, and the longest liver of them, or for 31 years from the 1st of May then last past, *which should last longest*, at the annual rent of £104, and the quit-rent in proportion to the number of acres, payable half yearly; by virtue of which said indenture, the said Sarah Walsh entered into and became seised or possessed of the same premises as the law requires, and continued so seised or possessed as the law requires, until the 1st day of May 1760, on which day she died. That the said Ralph Walsh, Jane Walsh, and Alice Marshall, the lives named in the said indenture, are all now in being; that the said Nicholas Lord Viscount Netterville, on the 20th of March in the year 1750, died seised of the said lands and premises as the law requires, and that immediately on his death the said John Lord Viscount Netterville, (one of the lessors of the plaintiff) by virtue of his said remainder of and in the said lands and premises, became seised of the said lands and premises to him, and to the heirs male of his body, as the law requires, and continued so seised of the said lands and premises [172] as the law requires, until the 19th day of November 1766. And being so seised of the said lands and premises as the law requires, granted and demised the said lands and premises, on the said 19th of November 1766, unto the said plaintiff John Commons, for the term and space of 21 years, commencing from the said 19th of November in the said year 1766, and from thence fully to be compleat and ended. By virtue of which said demise, the said John Commons, on the 20th of November in the said year of our Lord 1766, entered into and became possessed of the said lands and premises as the law requires, and continued so possessed until the 21st day of November in the year of our Lord 1766, on which day the defendant, John Marshall, expelled the plaintiff out of the said lands and premises, as the plaintiff has set forth in his said declaration. And if upon the whole matter, etc."

The plaintiff being advised that the lease was void, and could not be supported by the power, declined any advantage from the under value of the land, which occasioned the silence in the special verdict as to this point: And there was no evidence of any fine or advance paid by the defendant, to render it otherwise than a lease at rack rent.

This special verdict having been returned into the Court of Exchequer, was several times argued before the Barons of that Court; who, after long consideration (the Court then consisting of the Lord Chief Baron Foster, Mr. Baron Scott, and Mr. Baron Smythe) on the 13th of February 1769, gave judgment for the defendant. From which judgment, the plaintiff, on the 2d of May following, brought a writ of error into the Exchequer Chamber in Ireland, where the cause was several times argued before the Lord Chancellor of Ireland, assisted by Lord Annaly, Lord Chief Justice of the King's Bench, the constituent members of that Court; when, after long deliberation, Lord Annaly fully delivered his opinion for reversing the judgment, but the Lord Chancellor being of a different opinion, affirmed it; and so judgment was again entered up for the defendant.

To reverse this judgment, Lord Netterville brought a writ of error in parliament, and on his behalf it was argued (A. Wedderburn, A. Forrester), that the late Lord Netterville's power of leasing, given him by his marriage articles in 1731, and by the act 13 George II. was in the disjunctive, that he might lease for any term not exceeding 31 years or three lives, *to commence in possession*: So that his, and his lessee's option, *at the time of making the lease*, must decide which of the two periods should determine it. Powers of this and a similar kind, were said below to be favourably construed part of the ancient dominion: So indeed they are, but with this restriction, that what was manifestly intended to be done in *execution of the power*, shall be good, notwithstanding any informality or defect in such act; but an act done *beyond* the power must be void. The lease in question was made under the power, for three lives, or for the term of 31 years, to commence from the 1st of May, which should last longest; so that instead of leasing expressly for one or [173] other of the terms given by the power, Lord Netterville leased for one or other, as chance should direct, in manifest opposition to his power. Nor could this excess be made good by construing, as was done below, the word *or* into *and*, and so making it to be a certain lease for lives, with a remainder of 31 years; for the words *which shall last longest*, shew that both were not intended to pass, but one only; and which it should be, was to depend upon the event mentioned, and could not therefore *commence in possession*, at the making of the lease, as expressly required by the power. Nor was it at all similar to a lease made for 40 years, the lessor having power to lease but for 20, where the excess only shall be rejected, and the lease be good for 20 years; for there was an estate certain in its nature originally created, viz. a chattel interest; but here was neither freehold or chattel, till determined by a future event. No part of a deed must be rejected, which has a sensible meaning, or tends to denote the intent of the parties. The words therefore in this lease, *which shall last longest*, must not be rejected, as endeavoured by the defendant, because they manifestly proved the intent of the parties to give and take no absolutely certain interest, but an indefinite one, whose nature depends on a future event. Now this kind of interest is unknown to the common law, and productive of many inconveniencies. To this moment the uncertainty existed. For upon the death of Sarah Walsh the lessee, how was the plaintiff to avow for his rent? As on a lease for lives, or a lease for years? And was the lessee's interest upon her death, if intestate, to go to her heir as a descendible freehold, or to her administrator, or next of kin, as a chattel? Such a species of property the law will not endure.

But further: The plaintiff the remainder-man, and who was a purchaser for the most valuable of considerations, had a clear right to exact a strict performance of the condition annexed to his father's power of leasing. Here the power was to lease for three lives, or 31 years, so that the remainder-man was to have his land either at the determination of the lives, or effluxion of the years, according as the lease was made for the one or the other. But as the present lease was framed, he must wait the end of both, and consequently was deprived of the benefit intended him by the power. This was an excess of power to his manifest prejudice, and to the advantage of the lessee, who at the determination of one of the terms, had a right to continue his lease to the determination of the other; and so stave off the remainder-man's re-

covering his land. But this was most certainly never intended, and proved an excess in the exercise of the power, which courts of justice, who carefully look to the strict observance of every condition in the remainder-man's favour, will not countenance. Besides, the verdict did not give the remotest hint of Sarah Walsh's ignorance of the nature of Lord Netterville's power; the articles which gave it him were duly registered, and afterwards incorporated into and executed by the act of parliament, which was full notice of their import to the whole kingdom. The lessee therefore took the lease at her peril, whether within, or exceeding her lessor's power.

[174] On the other side it was said (E. Thurlow, J. Dunning), that powers reserved in family settlements, being considered as reservations of so much of the absolute dominion, the execution of them, like that of conveyances from men seised in fee simple, is to be construed most strongly against the grantor, and most beneficially for the grantee; and especially, where the grantee is a purchaser for a valuable consideration, which was the case of the present lessee. Of all powers, that of leasing is the most favoured, for obvious reasons of public policy. It would be a great discouragement to agriculture, if men, who have laid out their substance on the faith of their leases, in the cultivation of their farms, were to be deprived of those leases, on nice and critical objections to the form of them. The hardship would be greater, where the objections are drawn from the terms of a power, of which the tenant is very unlikely to have any knowledge, it being notorious, that in the case of families of any consideration in this country, their tenants take, without enquiry, such leases as their landlords propose to grant, confiding that they have the power they assume. If the objection in the present case should prevail, it was thought a material argument at the bar in Ireland, and much relied upon by the Bench in both Courts, in favour of the defendant, that the precedent would destroy great part of the leasehold property in that kingdom, particularly in the Northern parts of it. In cases like this, it was apprehended, that all that the remainder-man could reasonably expect, was that the estate, when it came to him, should not be charged beyond what was the intention of the settler, to allow those who stood before him in the settlement to charge it. Nor would it be so by the lease in question; if it was construed, as it had been by the unanimous opinion of the Court of Exchequer in the first instance, and of the Court of Exchequer-Chamber in the second, as being a good lease for three lives, and no longer. As to the objection, that the lease in question being for three lives or 31 years, was void for uncertainty, it was said, that *or* has in many cases been construed *and*, and will always be so, where the intention requires it. But it was not contended, that the power, though it would authorize *either*, would warrant *both*; it was however submitted, that courts of law having, in modern times, adopted the same rules of construction as obtain in courts of equity, in the construction of powers, and of the instruments by which they are executed, will, where they have been exceeded, correct the excess, and support the execution, so far as it is warranted by the power. The lease in question, so far as it was a lease for three lives, was clearly warranted by the power; and this was apparently the primary object of the parties. Besides this, they had a second object in view, which was to secure the estate to the lessee for 31 years, in case the lease for lives should determine sooner: But this, whether it was considered as concurrent, or contingent, was not warranted by the power. It was possibly intended, though inaccurately expressed, to operate as a covenant or engagement on the part of the lessor, that the tenant, though his lives should drop, should hold the premises for 31 years, at the rent and under the covenants expressed in [175] the lease. The transaction being fair, it was hoped would be supported as far as it could be, without prejudice to the remainder-man; but his interest would not be prejudiced by a lease for three lives, and justice to the tenant required it, since *that* and *more* was apparently intended her.

After hearing counsel on this writ of error, the Judges present were directed to deliver their opinions upon the following question; viz. "Whether the lease stated in the special verdict to have been granted by Nicholas, late Lord Netterville, to Sarah Walsh, can be supported as a good execution of the power stated in the special verdict; or whether such lease be absolutely void?" And the Judges having given it as their unanimous opinion, that the lease might be supported as a good execution of the power; it was thereupon ORDERED and ADJUDGED, that the judgment should be affirmed, and the record remitted. (MS. Journ. *sub anno* 1774. p. 149.)

CASE 6.—ELIZABETH Countess Dowager of CAVAN,—*Plaintiff* (in Error): DOE on dem. W. PULTENEY, Esq. afterwards Sir W. PULTENEY, Bart.,—*Defendant* (in Error) [7th May 1795].

[Mews' Dig. x. 1637. See *Cavan (Lady) v. Pulteney*, 2 Ves. jun. 544: 3 Ves. 384.]

The lease of a tenant for life, with power of leasing under certain conditions, must be in strict conformity to those conditions; and if it vary from them, in the interest demised, or the rent reserved, it cannot be supported against the remainder-man.

The decision on this case was governed by that of *Darlington* (E.) v. *Pulteney*, Cowp. 260. in which it was determined, that "a common-law power to appoint by *deed*, executed in the presence of two witnesses, is *ill* executed by a *will*, duly attested to pass real estate: otherwise if the power had been to appoint by *any writing or instrument*, or other general term."—The certificate, signed by Lord Mansfield and the Judges of the Court of K. B. in that case, to the Court of Chancery, from whence the case was sent, stated their opinions, "that the power given by the deed [2d January 1753, stated in the following report], to lead the uses of the recovery, was not duly executed by the will of the Earl of Bath [dated 21st May 1763, and also stated in this report]: and consequently that only the reversion in fee of the premises comprised in the said recovery passed by the will."

In the report of the present case, in 5 Term Rep. 567. the above determination in Cowper, was considered as conclusive on the point of Lord Bath's will; and consequently the power of leasing came to be construed under the will of Sir William Pulteney, made in April 1685, and the act of parliament, 5 Geo. 1: under which the lease in question was clearly void. Lord Kenyon expressed much regret at the necessity he was under of making a decision, which he feared might only be the beginning of much litigation; and declared, "that he had anxiously looked through the verdict for some circumstance of confirmation of the lease, but could find none."

The JUDGMENT of the Court of King's Bench AFFIRMED.—Which is also to be considered as an affirmation of the judgment in *Darlington* (E.) v. *Pulteney*.—See *post*, the reasons adduced by the counsel for the defendant in error.

5 Term. Rep. K. B. 567.

This writ of error was brought upon a judgment given in the Court of King's Bench in an action of trespass and ejectment there brought by original writ on the demise of the defendant in [176] error against the plaintiff in error: The declaration is of Trinity Term 1791, and it states,

That William Pulteney, esquire, on the 7th day of July 1791, at the parish of Saint James, Westminster, demised to the said John Doe three messuages, three stables, three coach-houses, three curtilages, and three gardens, with the appurtenances, in the parish of Saint James, Westminster, in the county of Middlesex, to hold to the said John Doe and his assigns, from the 6th day of July in the year above mentioned, for the term of seven years; by virtue of which said demise the said John Doe entered into the said tenements, and was possessed thereof until the said Elizabeth Countess Dowager of Cavan, on the said 7th day of July, ejected the said John Doe out of his said farm first above mentioned, and other wrongs, etc.

To this declaration the plaintiff in error having caused herself to be made defendant as landlady of the premises mentioned in the declaration, pleaded the general issue.

The cause was tried at the sittings after Michaelmas Term 1791, when the jury found a special verdict. The record is in the following words:

"As yet the Term of Saint Michael, in the 32d year of the reign of King George the Third.

"Witness, Lloyd Lord Kenyon.  
"Roll, 1773. Mansfield and Way.

"Middlesex, to wit.—John Doe puts in his place Abel Jenkins his attorney, against Elizabeth Countess Dowager of Cavan, in a plea of trespass and ejectment.

"Middlesex, to wit.—The said Elizabeth Countess Dowager of Cavan puts in her place John Lancaster her attorney, at the suit of the said John, in the plea aforesaid.

"Middlesex, to wit.—Elizabeth Countess Dowager of Cavan was attached to answer John Doe in a plea, wherefore with force and arms she entered into three messuages, three stables, three coach-houses, three curtilages, and three gardens, with the appurtenances, in the parish of Saint James, within the liberty of Westminster in the county of Middlesex aforesaid, which William Pulteney, esq. demised to the said John for a term which is not expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said John, and against the peace of our Sovereign Lord the King; and whereupon the said John, by Abel Jenkins his attorney, complains, That whereas the said William Pulteney, on the 7th Day of July, in the 31st year of the reign of his said Majesty, at the parish aforesaid in the county aforesaid, had demised to the said John, the said tenements with the appurtenances, to have and to hold the said tenements with the appurtenances to the said John and his assigns, from the 6th day of July then last past, to the full end and term of seven years then next following, and fully to be complete and ended; by virtue of which said demise, the said John entered into the said tenements with the appurtenances, [177] and was possessed thereof; and the said John being so possessed thereof, the said Elizabeth Countess Dowager of Cavan, afterwards, that is to say, on the said 7th day of July, in the said thirty-first year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenements with the appurtenances, which the said William Pulteney demised to the said John, in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said John out of his said farm, and other wrongs and so forth, to the grievous damage and so forth, and against the peace and so forth; whereupon the said John says he is injured and hath damage to the value of twenty pounds, and thereupon he brings this suit, and so forth.

"And the said Elizabeth Countess Dowager of Cavan, by John Lancaster, her attorney, comes and defends the force and injury, when, etc. and saith that she is not guilty of the trespass and ejectment in manner and form as the said John Doe hath above complained against her, and of this she puts herself upon the country, etc.; and the said John Doe doth the like: Therefore it is commanded to the sheriff, that he cause to come before our Lord the King in fifteen days of Saint Martin, wheresoever he shall then be in England, twelve, etc. by whom, etc. and who neither, etc. to recognize, etc. because as well, etc.

"Afterwards the process was continued between the parties aforesaid of the plea aforesaid, by the jury aforesaid being respited between them before our Lord the King, to eight days of Saint Hilary, wheresoever, etc. unless the King's right trusty and well-beloved Lloyd Lord Kenyon, his Majesty's Chief Justice, assigned to hold pleas before the King himself, should first come, on Tuesday the 29th day of November, at Westminster-hall, in the said county of Middlesex, according to the form of the statute in such case made and provided for default of the jurors, because none of them did appear. At which day, before our said Lord the King at Westminster, come the said John Doe and the said Elizabeth Countess Dowager of Cavan by their attorneys aforesaid; and the said Chief Justice before whom the said issue was tried, sent hither his record, had in these words; (to wit),

"Afterwards, that is to say, on the day and at the place lastly within contained, before the Right Honourable Lloyd Lord Kenyon, the Chief Justice within written, Roger Kenyon, gentleman, being associated unto the said Chief Justice, by force of the statute in that case made and provided, came as well the within-named John Doe by his attorney within named, as the within-named Elizabeth by her attorney also within named, and the jurors of the jury whereof mention is within made, being called, come, who being elected, tried, and sworn to declare the truth of the matters within contained, upon their oath, say, that Sir William Pulteney, knt. on the 30th Day of April 1685, was seised in his demesne as of fee of and in the premises in question, with the appurtenances, amongst other pre-[178]-mises, and being so seised hereof, he the said Sir William Pulteney made his last will and testament in writing, fully executed as the law requires for passing real estates, bearing date on the said 10th day of April in the said year of our Lord 1685, and thereby devised the premises

in the said declaration mentioned to his wife for life; remainder to his son William Pulteney for life; remainder to his grandson William Pulteney, son of his said son William, afterwards Earl of Bath, for life; remainder to trustees to support contingent remainders; remainder to the first and other sons of his said grandson William successively in tail male; remainder to the second and other sons of the said testator's son William successively in tail male; remainder to the said testator's son John for life; remainder to the said testator's grandson Daniel for life; remainder to trustees to support contingent remainders; remainder to the first and other sons of the said Daniel successively in tail male; with remainder to the said testator's grandson Henry for life; with remainder to trustees during his life to support contingent remainders; with several remainders over long since spent; remainder to the said testator and the heirs of his body; remainder to the said testator's said sons William, John, Charles, and Thomas successively in tail general; remainder to Henry Guy, esq. and his heirs for ever.

"And the jurors aforesaid, upon their oath aforesaid, further say, That the said Sir William Pulteney, in and by another part of his said will, directed that it might and should be lawful to and for his son William, or any other of his sons or grandsons respectively, or his or their issue male respectively, who should be actually seized of the freehold of the premises, or any part thereof, or which thereafter should be settled upon him or them respectively, by virtue of the said Sir William Pulteney's will, at their respective ages of twenty-one years, from time to time to make any lease or leases whatsoever, of all or any part of the premises therein mentioned, or of any other lands, houses, tenements, or hereditaments, which should be thereafter purchased and settled as in the said will in that behalf is mentioned, for any number of years not exceeding forty years, *in possession and not in reversion, so as upon every such lease and leases there should be a yearly rent reserved of three parts in four parts, to be divided according to the full improved value*, to continue due and payable during the said lease or leases, to such lessor and lessors, during their lives respectively, and afterwards to such person or persons to whom the next immediate remainder or remainders should come respectively, and so that such lease and leases were not punishable of waste, as by the said will, produced in evidence to the jurors aforesaid amongst other things, appears.

"And the jurors aforesaid, on their oath aforesaid, further say, That the said Sir William Pulteney afterwards, on or about the 7th day of September in the year of our Lord 1691, departed this life so seized of the premises in question, amongst other premises, without having revoked or in any respect altered his [179] said will; and that after the death of the said Sir William Pulteney, William Pulteney his son became and was seized, under and by virtue of the said will of Sir William Pulteney his father, in his demesne as of freehold, for and during the term of his natural life, of and in the premises in question, with the appurtenances (amongst other premises).

"And the jurors aforesaid, upon their oath aforesaid, further say, That while he the said William Pulteney, son of the said Sir William Pulteney, was seized as last aforesaid, that is to say, on or about the 2d day of February in the year of our Lord 1710, the said Henry Guy died, having first made his last will and testament, duly executed as the law requires and directs for passing real estates, and having thereby given and devised to John Taylor and Arthur Lake, their executors and administrators, all his messuages and hereditaments in Stoke Newington, for ninety-nine years, if three persons therein named should so long live, upon certain trusts therein mentioned; and having devised the remainder, reversion, and inheritance of all his said messuages and hereditaments after the said term of ninety-nine years, unto William Pulteney, the grandson of the said Sir William Pulteney, for life; remainder to a trustee therein named during his life, to preserve contingent remainders; remainder to the first and other sons of the said William Pulteney the grandson in tail male: remainder to Harry Pulteney his brother, for life, with remainder to the trustee to preserve contingent remainders; remainder to his first and other sons in tail male: remainder to Daniel Pulteney, for life; remainder to the trustee to preserve contingent remainders; remainder to the said William Pulteney, the son of the said Sir William Pulteney, his heirs and assigns; and having given and devised his said remainder in the premises in question, with the appurtenances, along with other premises, unto the said William Pulteney the grandson, for life, with such remainders



over as were thereby limited and appointed, and are above set forth, of the testator's messuages and hereditaments in Stoke Newington aforesaid; and that the said William Pulteney the son afterwards, that is to say, in or about the year of our Lord 1715, died, leaving at his death lawful issue of his body, two sons and no more, that is to say, William Pulteney the grandson, who was afterwards Earl of Bath, and the said Harry Pulteney, who was afterwards General Pulteney.

"And the jurors aforesaid, on their oath aforesaid, further say, That after the death of the said William Pulteney the son of the said Sir William Pulteney, the said William Pulteney (afterwards Earl of Bath) the eldest son of the said William Pulteney so deceased, became and was seised, under and by virtue of the said last will and testament of the said Sir William Pulteney, in his demesne as of freehold, for and during the term of his natural life, of and in the premises in question, amongst other premises, and also became and was seised in his demesne as of fee, of and in the ultimate remainder in fee of and in the premises in [180] question, amongst other premises, as heir to his father the said William Pulteney so deceased, under and by virtue of the said last will and testament of the said Henry Guy.

"And the jurors aforesaid, upon their oath aforesaid, further say, that by a certain act of parliament made and passed in the fifth year of the reign of his late majesty King George the first, intituled, *an act to enable William Pulteney, esquire, and the persons in remainder after him, to make leases of the houses and ground therein mentioned, and to rectify some mistakes in two leases from King Charles the second to Sir William Pulteney, and from King William the third to John Pulteney, esquire*, reciting (amongst other things) the devise by the said Sir William Pulteney of the houses and lands, with the appurtenances, in the counties of Middlesex and Salop, to Dame Grace Pulteney for her life, with the several remainders and limitations over which herein-before are particularly mentioned and set forth, and further reciting, amongst other things, the devise by the said Sir William Pulteney of the premises in question, with the appurtenances, amongst other premises, to his son William Pulteney, with the several remainders and limitations over which herein-before are particularly mentioned and set forth; and further reciting, amongst other things, the power of leasing given by the said Sir William Pulteney, in and by his said last will and testament, to his son William, and to his other sons and grandsons, and his and their issue male respectively, who should be actually seised of the premises in question, with the appurtenances, (amongst other premises,) which said power of leasing is herein-before particularly set forth; and further reciting, amongst other things, that the premises in question, amongst other premises, were much decayed and wanted to be rebuilt, and might and could be much improved in their yearly value, by making and granting building leases thereof, but no persons would undertake to rebuild the said decayed houses and buildings, or take building leases of the premises in question, amongst other premises, to erect new buildings thereon, for so short a term as 40 years; it was at the humble suit and petition of the said William Pulteney, and the several other persons in the said act in that behalf named, enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in that present parliament assembled, and by the authority of the same, that it should and might be lawful to and for the said William Pulteney, son of the said William Pulteney the elder, deceased, during his life, and after the death of the said William Pulteney the son, to and for his issue male respectively, and to and for the said Harry Pulteney, and the several other persons in that act in that behalf particularly named, and his and their issue male respectively, who should be actually seised of the freehold of the premises in question, with the appurtenances, amongst other premises, by virtue of the said Sir William Pulteney's said will, at their respective ages of twenty-one years, [181] from time to time, by indenture or indentures, to make any lease or leases of the same, or any part or parcel, parts or parcels thereof, for any term or number of years, *not exceeding 61 years, in possession and not in reversion or remainder*, reserving for the first year in every such lease, such rent as the lessor should think fit, *and so as upon such lease and leases there should be reserved during the residue and remainder of the term and terms of years to be thereby leased, after the first year thereof, not less than three parts in four parts, equally to be divided, of the best and highest yearly rent that at the time of making such lease could or might be reasonably had or gotten for the premises*

*thereby leased*, and so as no such lease should be made without impeachment of waste, and so as in every such lease there should be contained a proviso or condition of re-entry for nonpayment of the rent or rents therein to be reserved, and so as the respective lessees did seal and deliver counterparts of such leases respectively, as by the said act produced and shewn in evidence to the jurors aforesaid, amongst other things appears.

"And the jurors aforesaid, upon their oath aforesaid, further say, That the said act, from the time of making and passing the same hitherto, always hath been and still is in full force and effect, and not in the least altered, annulled, or repealed.

"And the jurors aforesaid, upon their oath aforesaid, further say, That the said William Pulteney, (afterwards Earl of Bath,) being so seised as last aforesaid, and being of the age of twenty-one years and more, by a certain indenture tripartite of lease, bearing date the 23d day of August in the year of our Lord 1731, and made between the said last mentioned William Pulteney of the first part, and John Mist and Thomas Phillips of the second part, and Benjamin Timbrell of the third part, in consideration of £63 paid by the said Benjamin Timbrell to the said William Pulteney, and of the yearly rent of £10 2s. 6d., being three parts in four of the highest rent that could be therefore reasonably had, and of the covenants therein contained on the part of the said Benjamin Timbrell, and of the charges the said Benjamin Timbrell, John Mist, and Thomas Phillips, or some of them, were at in building on the premises thereby intended to be leased, in performance of articles therein mentioned, and by virtue of the leasing power to the said William Pulteney belonging, and in pursuance thereof, and in conformity thereto, demised to the said Benjamin Timbrell, his executors, administrators, and assigns, by the direction of the said John Mist and Thomas Phillips, the premises in question, with the appurtenances, being part of the ground agreed by the said articles to be leased, to hold to the said Benjamin Timbrell, his executors, administrators, and assigns, from the feast of Saint John the Baptist then last past, for and during and unto the full end and term of sixty years, at the yearly rent of ten pounds two shillings and sixpence, to be paid quarterly to the said William Pulteney during his life, and after his death to the person or persons to whom the reversion or re-[182]-mainder of the said premises should for the time being belong. And the said Benjamin Timbrell did thereby covenant to and with the said William Pulteney, that he the said Benjamin Timbrell, his executors, administrators, and assigns, should and would, amongst other things, at his or their own proper costs and charges, completely finish and make fit for habitation the messuage then built or building on the said premises, in all things according to the said articles of agreement, and at all times during the said term of sixty years thereby leased, as often as need should require, should and would well and sufficiently maintain, uphold, repair, amend, pave, cleanse, empty, and keep the said thereby leased premises, and the messuages or tenements, and all other the erections and buildings built, or that should be built, in or upon the same, and all the glass windows, posts, pales, rails, pavements, sewers, gutters, sinks, drains, wydraughts, and appurtenances, belonging or which should belong to the said leased premises, with all manner of needful and necessary reparations, cleansings, and amendments whatsoever; and at the end of the said term, or other sooner determination thereof which should first happen, the said leased premises, with the appurtenances, so repaired as aforesaid, should and would peaceably leave, surrender, and yield up unto the said William Pulteney, or the person or persons to whom the reversion or remainder of the said leased premises for the time being should belong as aforesaid, together with all and every the erections and improvements thereof or thereupon in the mean time to be made, and that he the said Benjamin Timbrell, his executors, administrators, or assigns, should and would pay and allow to the said William Pulteney, his executors or administrators, or to such other person or persons as he or they should appoint, a reasonable share and proportion for and towards the making and repairing and amending the sewers along and against the front of the said premises, and of all party walls, party gutters, and drains belonging or which should belong to the thereby leased premises, or any part thereof, with any other tenants of the said William Pulteney, and of the person or persons to whom the reversion or remainder of the said premises for the time being should belong as aforesaid; and that he the said Benjamin Timbrell, his executors, administrators, and assigns, should and would pave his and their proportion to the

middle of the street, in a regular manner, with purbeck squares or good sizeable pebbles, and a foot-way four feet wide at the least, before the front of the said messuage, with broad purbeck stones, bounded by a purbeck step next the street, six inches high at the least, and with good posts of oak: And it was thereby agreed, that the said yearly rent of ten pounds two shillings and sixpence, thereby reserved, was and should be accepted and taken, go and be as part of the yearly ground rent, agreed by the abovementioned articles of agreement to be reserved for the whole ground thereby agreed to be leased, as by the counterpart of the said indenture, duly sealed and deli-[183]-vered by the said John Mist, Thomas Phillips, and Benjamin Timbrell, and produced and shewn in evidence to the jurors aforesaid, more fully appears.

“And the jurors aforesaid, upon their oath aforesaid, further say, That by a certain indenture of five parts, bearing date the second day of January in the year of our Lord one thousand seven hundred and fifty-three, made between the said William Pulteney last named, by the name and description of the Right Honourable William Earl of Bath, one of the Lords of his Majesty's Most Honourable Privy Council, and the Right Honourable Anne Maria Countess of Bath, his wife, of the first part; the Right Honourable William Pulteney, esq., commonly called Lord Viscount Pulteney, only son and heir apparent of the said William Earl of Bath, and who was then at the age of twenty-one years, of the second part; and the Reverend Thomas Newton, doctor in divinity, of the third part; Alexander Reynolds, gentleman, of the fourth part; and Sir John Rushout, baronet, and Sir Thomas Bootle, knight, of the fifth part; the said Earl of Bath and the said William Lord Viscount Pulteney, for the barring, docking, and destroying, of all estates tail, remainders, and reversions, theretofore created and limited of the said premises in question, amongst other premises, and for providing for the said Anne Maria Countess of Bath, for her life, the annual sum of one thousand five hundred pounds for her jointure, and for certain valuable considerations in the said indenture mentioned, granted, bargained, and sold, unto the said Thomas Newton and his heirs, the premises in question, amongst other premises, to hold the same unto the said Thomas Newton and his heirs and assigns, to the only use and behoof of the said Thomas Newton, his heirs and assigns for ever; to the intent that he the said Thomas Newton might become perfect tenant of the freehold of the premises in question, amongst other premises, to the end that two or more good and perfect common recoveries might thereof be suffered, perfected, and executed, wherein the said Alexander Reynolds should be demandant, and the said Thomas Newton tenant, and wherein the said tenant should vouch to warranty the said William Earl of Bath and the said Anne Maria his wife, and they the said William Earl of Bath and Anne Maria his wife should vouch to warranty the said William Pulteney, commonly called Lord Viscount Pulteney, who should vouch over the common vouches, which said common recoveries should be and enure to the uses following; that is to say, to the use of the said Earl of Bath for life; remainder (after certain other uses for the Benefit of the said Anne Maria Countess of Bath, long since expired) *to the use of such person or persons, and for such estate or estates, and in such manner, and upon such trusts, and subject to such provisos, powers, and agreements, and for such intents and purposes as the said William Earl of Bath, and William Lord Viscount Pulteney, by any their deed or deeds, either with or without power of revocation, to be by both of them sealed and delivered in [184] the presence of two or more credible witnesses, should from time to time jointly grant, direct, limit, or appoint; and in case of the death of either of them the said William Earl of Bath and William Lord Viscount Pulteney, then as the survivor of them, by any deed or deeds to be executed as aforesaid, should, from time to time, alone grant, direct, limit, or appoint; and in default of such grant, direction, limitation, or appointment, as aforesaid, or until such grant, direction, limitation, or appointment, should be made and executed by them both, if living, or in case of the death of either of them, by the survivor of them as aforesaid, to and for such respective uses, intents, and purposes, and upon such respective trusts, and subject unto such provisos, powers, and agreements, as the said premises in question, amongst other premises, immediately before the sealing and delivering of those presents, were or stood limited or subject unto, except such jointure or jointures as at any time theretofore had been limited or appointed unto or for the said Anne Maria Countess of Bath, all which such former jointure or jointures were thereby declared and agreed*

to be null and void, and to or for no other use, intent, or purpose whatsoever, as by the said last-mentioned indenture, shewn and produced in evidence to the jurors aforesaid, fully appears.

"And the jurors aforesaid, upon their oath aforesaid, further say, That the said last-mentioned indenture was duly sealed and delivered by the said William Earl of Bath, Anne Maria Countess of Bath his wife, William Lord Viscount Pulteney, and Thomas Newton, and was duly inrolled in the High Court of Chancery within six months, according to the form of the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, further say, That afterwards, that is to say, in the term of Saint Hilary, in the year of our Lord one thousand seven hundred and fifty-three, one common recovery, with treble voucher, was duly had, suffered, perfected, and executed in the court of our Lord the King of the Bench at Westminster, of the premises in question, with the appurtenances, amongst other premises, by virtue of, and in pursuance of, and in conformity to the said indenture lastly in part recited, as by the exemplification thereof, produced and shewn in evidence to the jurors aforesaid, fully appears.

"And the jurors aforesaid, upon their oath aforesaid, further say, That the said William Lord Viscount Pulteney afterwards, to wit, in or about the month of April, in the year of our Lord one thousand seven hundred and sixty-three, died without ever being married, leaving the said William Earl of Bath his father, him surviving.

"And the jurors aforesaid, upon their oath aforesaid, further say, That on the 21st day of May in the year of our Lord 1763, the said William Earl of Bath signed, sealed, published, and declared a certain instrument in writing, bearing date the same day and year last aforesaid, as and for his last will and testament, [185] and thereby gave and devised the premises in question, with the appurtenances, amongst other premises unto his said brother the Honourable Harry Pulteney, esq. lieutenant general of his Majesty's forces, his heirs and assigns for ever, as by the said instrument, produced and shewn in evidence to the jurors aforesaid, fully appears. And the jurors aforesaid, upon their oath aforesaid, further say, That the said instrument was so signed, sealed, published, and declared by the said William Earl of Bath, in the presence of three credible witnesses, and attested and subscribed by the said witnesses in the presence of the said William Earl of Bath, and was duly executed as the law requires and directs wills to be executed for passing real estates.

"And the jurors aforesaid, on their oath aforesaid, further say, That the said William Earl of Bath, afterwards, in the month of July in the year of our Lord 1764, died seised of the premises in question, amongst other premises, without having revoked or in any other manner altered the said instrument as to the said premises in the said deed mentioned.

"And the jurors aforesaid, upon their oath aforesaid, further say, That the said William Earl of Bath left no issue of his body lawfully begotten.

"And the jurors aforesaid, upon their oath aforesaid, further say, That afterwards, and before the 30th day of April in the year of our Lord 1765, the premises in question, with the appurtenances, so demised by the said William Pulteney afterwards Earl of Bath, to Benjamin Timbrell, as aforesaid, by divers mesne assignments thereof for the said term, came to and were legally vested in colonel Richard Lambart, who was thereupon possessed of the premises in question, with the appurtenances, for all the residue and remainder of the term of years then to come and unexpired therein.

"And the jurors aforesaid, upon their oath aforesaid, further say, That the said Harry Pulteney, upon the death of the said William Pulteney, Earl of Bath, his brother, became seised as the law requires of and in the said premises in question, amongst other premises, and that by a certain indenture, bearing date on or about the 30th day of April in the year of our Lord 1765, and made between the Honourable Harry Pulteney, esq. general of his majesty's forces, of the one part, and Colonel Richard Lambart, of the other part, reciting, that by indenture tripartite of lease bearing date on or about the 23d day of August, which was in the year of our Lord 1731, the Right Honourable William late Earl of Bath, since deceased, by his then name and addition of William Pulteney, of the parish of Saint George, Hanover, in the county of Middlesex, esq. did lease, set, and to farm let, unto Benjamin Timbrell, of the parish of Saint George, in the said County of Middlesex, carpenter, a certain piece or parcel of ground, part of a field theretofore called Stone Conduit

Close, and a message or tenement erected thereon, thereafter particularly mentioned, and in-[186]-tended to be thereby demised, situate on the west side of Sackville-street, in the parish of Saint James, Westminster, aforesaid, to hold to the said Benjamin Timbrell, his executors, administrators, and assigns, from the feast day of the nativity of Saint John the Baptist then last past, before the day of the date of the said in part recited indenture, for and during the term of 60 years, at and under the yearly rent of £10 2s. 6d. of lawful money of Great Britain, payable as therein mentioned; and reciting that the premises in question, with the appurtenances, comprized in the said lease, were by divers mesne assignments become vested in the said Richard Lambart, for the remainder of the said term then yet to come and unexpired in the said lease, and that the said Harry Pulteney was then seized of the freehold and inheritance of the said premises in question, and that the said Richard Lambart had applied to the said Harry Pulteney, and had agreed to take a further lease of the said premises in question, on the terms and conditions therein and hereinafter mentioned; it was by the said indenture witnessed, that in consideration of £135 of lawful money of Great Britain, to him the said Harry Pulteney well and truly paid by the said Richard Lambart, at the sealing and delivering of those presents, the receipt whereof is thereby acknowledged, and also in consideration of the yearly rents, covenants, and agreements therein reserved and contained on the part and behalf of the said Richard Lambart, his executors, administrators, and assigns, to be paid, done, and performed, he the said Harry Pulteney did demise, set, and to farm let, unto the said Richard Lambart, his executors, administrators, and assigns, the premises in question, with the appurtenances, *to hold the same unto the said Richard Lambart, his executors, administrators, and assigns, from and after the end and expiration or other sooner determination of the said term of 60 years, so granted by the said William Pulteney, who was afterwards Earl of Bath, to the said Benjamin Timbrell as aforesaid, which should first happen, for and during and unto the full end and term of 34 years from thence next ensuing, and fully to be complete and ended; yielding and paying therefore, yearly and every year, during the said term of 34 years thereby demised, or intended so to be, unto the said Harry Pulteney, his heirs and assigns, the yearly rent or sum of £10 2s. 6d. of lawful money of Great Britain, at and upon the four most usual feasts or days of payment of rent in the year, the first payment thereof to begin and be made on such of the said feast days as should happen next after the commencement of the said term of 34 years thereby demised; provided amongst other things, that if the said rent of £10 2s. 6d. or any part thereof, should be in arrear to the said Harry Pulteney, his heirs or assigns, for 20 days after any of the said days of payment, that the said Harry Pulteney, his heirs or assigns, might re-enter and determine the demise: And the said Richard Lambart did thereby, amongst other things, covenant to pay the said rent of £10 2s. 6d. clear of all de-[187]-ductions, except the land tax, to the said Harry Pulteney, his heirs and assigns, at all times after the commencement of the said term of 34 years, and during the said term; and that he the said Richard Lambart, his executors, administrators, and assigns, or some of them, should and would immediately insure the said thereby demised premises, and all such erections and buildings as were then erected and built thereupon, in some or one of the public offices of insurance from losses by fire, and keep and continue the same so insured from thenceforth until the determination of the said term of 34 years thereby demised; and also should and would from time to time, and at all times thereafter, until the determination of the said demise, insure and keep insured all such other erections and buildings as should thereafter be erected and built in or upon the said premises, or any part thereof, in some one or other of the public offices of insurances as aforesaid, immediately after the erection or building of the same; and that he the said Richard Lambart, his executors, administrators, or assigns, should from time to time, as well before as after the commencement of the said term of 34 years, and during that term, well and sufficiently repair the premises, and the same so repaired at the end and expiration, or other sooner determination of the said term of 34 years, should and would peaceably and quietly surrender and yield up to the said Harry Pulteney, his heirs or assigns; and that he the said Richard Lambart, his executors, administrators, or assigns, should and would from time to time, and at all times thereafter, as well before as after the commencement of the said term thereby demised, and during the continuance thereof, pay and allow to the said Harry Pulteney, his heirs or*

assigns, a reasonable share or proportion, for and towards the making, repairing, and amending the sewers along and against the front of the said premises, and of all party walls, party gutters, and drains, belonging or which should belong thereto, or to any part thereof, with any other tenants of the said Harry Pulteney, or of his heirs or assigns. And the said Harry Pulteney did by the said indenture, for himself, his heirs, executors, administrators, and assigns, covenant with the said Richard Lambart, his executors, administrators, and assigns, that he the said Richard Lambart, his executors, administrators, or assigns, or some or one of them, paying, observing, and performing the rents, covenants, provisos, conditions, and agreements in those presents reserved and contained, on his and their parts, should and might peaceably and quietly have, hold, occupy, possess, and enjoy the said premises, with their appurtenances, for and during all the said term of 34 years thereby leased, without any let, suit, trouble, interruption, or disturbance of or by the said Harry Pulteney, his heirs, executors, administrators, or assigns, or any other person or persons lawfully claiming or to claim by, from, or under him, them, or any of them, or by or through his, their, or any of their acts, means, default, or procurement.

[188] "And the jurors aforesaid, upon their oath aforesaid, further say, That a counterpart of the same lease was duly sealed and delivered by the said Richard Lambart.

"And the jurors aforesaid further say, That on the 6th day of July 1791, the premises in question, with the appurtenances, were reasonably worth the yearly rent or sum of £112 of lawful money of Great Britain, clear of land tax, and under the covenants on the lessee's part for repairing, insuring from fire, and paying all other customary rates and taxes, or the yearly rent or sum of £120 including land tax, and under the said usual covenants on the lessee's part; and that in the year 1765 the premises in question were reasonably worth the yearly rent or sum of £85 clear of land tax, and of repairs, insurances, and the said customary rates.

"And the jurors aforesaid further say, That the said Harry Pulteney afterwards, that is to say, in or about the year of our Lord 1767, died, and that he the said Harry Pulteney never was married; and that upon the death of the said Harry Pulteney, the heirs male of the body of Sir William Pulteney knight, became and were extinct.

"And the jurors aforesaid, upon their oath aforesaid, further say, That upon the death of the said Harry Pulteney, Mrs. Frances Pulteney, now deceased, the late wife of the lessor of the plaintiff, being the only surviving daughter and heir of Daniel Pulteney, who was the only surviving son and heir of John Pulteney, who was the second son of the said Sir William Pulteney, knight, became and was the next heir of the body of the said Sir William Pulteney, knight, and claimed title to the premises in question, with the appurtenances, amongst other premises, under the last will and testament of the said Sir William Pulteney before in part set forth.

"And the jurors aforesaid, upon their oath aforesaid, further say, That in or about the year of our Lord 1760, the said late Frances Pulteney intermarried with the lessor of the plaintiff William Pulteney, then called or known by the name of William Johnstone.

"And the jurors aforesaid, upon their oath aforesaid, further say, That William Pulteney, esq. the lessor of the plaintiff, on the 14th day of March in the year of our Lord 1767, by virtue of his Majesty's royal warrant in that behalf, took upon himself the surname of Pulteney, and by that name has ever since been called and known.

"And the jurors aforesaid, upon their oath aforesaid, further say, That in or about the year of our Lord 1767, Henrietta Laura Pulteney, the daughter of the lessor of the plaintiff, lawfully begotten on the body of the said late Frances Pulteney, was born, and is still living.

"And the jurors aforesaid, upon their oath aforesaid, further say, That after the death of the said Harry Pulteney, the said William Pulteney the lessor of the plaintiff, and the said Frances [189] during her life, in right of the said Frances, received the aforesaid rent of £10 2s. 6d.

"And the jurors aforesaid, on their oath aforesaid, further say, That the said Elizabeth, and Henry Lord Paget, were the executrix and executors of the last will and testament of the said Richard Lambart; and that she the said Elizabeth alone proved the said will; and that she the said Elizabeth, until the 5th of July in the year of our Lord 1791, as such executrix, held the premises in question under and by virtue of the said several leases above mentioned, or one of them.

" And the jurors aforesaid, on their oath aforesaid, further say, That the said late Frances Pulteney, the wife of the said William Pulteney, the lessor of the plaintiff, in or about the year of our Lord 1782, died; and that the said William Pulteney her husband, the lessor of the plaintiff, after the death of his said wife Frances Pulteney, as tenant by the curtesy of England, received the aforesaid rent of £10 2s. 6d. of the premises in question, with the appurtenances, from the said Elizabeth.

" And the jurors aforesaid, upon their oath aforesaid, further say, That the said William Pulteney the lessor of the plaintiff, on the 6th day of July in the year of our Lord 1791, entered into and upon the said premises, with the appurtenances, in the said declaration mentioned; and afterwards, to wit, on the 7th day of July in the year aforesaid, demised to the same John Doe the now plaintiff, the said premises, with the appurtenances in the said declaration mentioned, to have and to hold the same to the said John Doe the now plaintiff, and his assigns from thenceforth, for and during and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended; and that by virtue of the said demise, the said John Doe the now plaintiff, afterwards, to wit, on the said 7th day of July in the year aforesaid, entered into and upon the said premises, with the appurtenances, in the said declaration mentioned, and was thereof possessed until the said Elizabeth Countess Dowager of Cavan, afterwards, to wit, on the said 7th day of July in the year aforesaid, with force and arms, etc. entered into the said premises, with the appurtenances, in which, etc. in and upon the possession of the said John Doe the now plaintiff thereof, and ejected him the said John Doe the now plaintiff from his said farm, in manner and form as the said John Doe the now plaintiff hath by his said declaration above thereof complained against her the said Elizabeth Countess Dowager of Cavan. But whether, upon the whole matter aforesaid found by the said jurors in manner aforesaid, she the said Elizabeth is guilty of the trespass and ejectment whereof the said John Doe hath within complained against the said Elizabeth in the said premises, with the appurtenances, in the said declaration mentioned, the said jurors are altogether ignorant, and therefore pray the advice of this court, that if, upon the whole matter aforesaid found by the said jurors in manner aforesaid, it [190] shall appear to the said court of our said Lord the King, before the King himself here, that the said Elizabeth is guilty of the trespass and ejectment aforesaid in the said premises, with the appurtenances, in the said declaration within mentioned; then the said jurors declare upon their said oath, that she the said Elizabeth is guilty thereof in manner and form as he the said John Doe hath within therein complained against her, and in such case they assess the damages of the said John Doe on that occasion, besides his costs and charges laid out by him about his suit in this behalf, to one shilling, and for those costs and charges to forty shillings: But if, upon the whole matters aforesaid found by the said jurors, it shall appear to the said Court here, that she the said Elizabeth is not guilty of the trespass and ejectment aforesaid, in the premises aforesaid, with the appurtenances in the said declaration mentioned, then the jurors aforesaid, on their oath aforesaid, declare that she the said Elizabeth is not guilty thereof. But because the Court of the Lord the King now here is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid, to come before our Lord the King, wheresoever, etc. from the day of Easter, in fifteen days; to hear judgment thereupon, for that the Court of our said Lord the King now here is not yet advised thereof. At which day, before our Lord the King at Westminster, come the parties aforesaid, by their attornies, and because the Court of the Lord the King now here is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid, to come before our Lord the King, wheresoever, etc. on the morrow of the Holy Trinity, to hear judgment thereupon, for that the Court of our said Lord the King now here is not yet advised thereof. At which day, before our Lord the King at Westminster, come the parties aforesaid, by their attornies aforesaid, and because the Court of the Lord the King now here is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid, to come before our Lord the King, wheresoever, etc. on the morrow of All Souls, to hear judgment thereupon, for that the Court of our said Lord the King now here is not yet advised thereof. At which day, before our Lord the King at Westminster, come the parties aforesaid, by their attornies aforesaid, and because the Court of the Lord the King now here is not yet advised what judgment to

give of and concerning the premises, a day is therefore given to the parties aforesaid, to come before our Lord the King, wheresoever, etc. in eight days of St. Hilary, to hear judgment thereupon, for that the Court of our said Lord the King now here is not yet advised thereof. At which day, before our Lord the King at Westminster, come the parties aforesaid, by their attornies aforesaid, and because the Court of the Lord the King now here is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid, to come before [191] our Lord the King, wheresoever, etc. in fifteen days of Easter, to hear judgment thereupon, for that the Court of our said Lord the King now here is not yet advised thereof. At which day, before our Lord the King at Westminster, come the parties aforesaid, by their attornies aforesaid, and because the Court of the Lord the King now here is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid, to come before our Lord the King, wheresoever, etc. on the morrow of the Holy Trinity, to hear judgment thereupon, for that the Court of our said Lord the King now here is not yet advised thereof. At which day, before our Lord the King at Westminster, come the parties aforesaid, by their attornies aforesaid, and because the Court of the Lord the King now here is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid, to come before our Lord the King, wheresoever, etc. on the morrow of All Souls, to hear judgment thereupon, for that the Court of our said Lord the King now here is not yet advised thereof. At which day, before our Lord the King at Westminster, come the parties aforesaid, by their attornies aforesaid, and because the Court of the Lord the King now here is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid, to come before our Lord the King, wheresoever, etc. in eight days of Saint Hilary, to hear judgment thereupon, for that the Court of our said Lord the King now here is not yet advised thereof. At which day, before our said Lord the King at Westminster, come the parties aforesaid, by their attornies aforesaid, and because the Court of our Lord the King now here is not yet advised what judgment to give of and concerning the premises, a further day is therefore given to the parties aforesaid, to come before our said Lord the King, wheresoever, etc. from the day of Easter, in fifteen days, to hear judgment thereupon, for that the Court of our Lord the King now here is not yet advised thereof. At which day, before our said Lord the King at Westminster, come the parties aforesaid, by their attornies aforesaid; and hereupon, the premises being seen by the Court here, and fully understood by the Court here, it appears to the said Court here, upon the whole matter aforesaid, found by the said jurors in form aforesaid, that the said Elizabeth Countess Dowager of Cavan is guilty of the trespass and ejectment aforesaid, in the said premises, with the appurtenances, in the said declaration mentioned, whereof the said John Doe hath complained against her: Therefore it is considered, That the said John recover against the said Elizabeth his term aforesaid yet to come of and in the tenements aforesaid, with the appurtenances, and his damages, costs, and charges aforesaid, assessed by the said jury in form aforesaid, and also £131 19s. by the Court of our said Lord the King now here adjudged of increase to the said John by his assent, according to [192] the form of the statute in such case made and provided, which damages, costs, and charges amount in the whole to £134."

The final judgment being signed on the 29th May 1794, the plaintiff in error brought a writ of error in parliament, and has assigned general errors; to this assignment, the defendant in error rejoined, *in nullo est erratum*; and the following were the arguments adduced to support the writ of error (E. Bearcroft, J. Mingay, E. Law, V. Gibbs):—

That the power of appointment in question, which is required to be executed by the late Earl of Bath and Lord Viscount Pulteney, or the survivor of them, by any deed or deeds, either with or without power of revocation, to be by them, or the survivor of them, sealed and delivered in the presence of two or more credible witnesses, was well executed by the instrument in writing which was signed, sealed, and published as the will of the late Earl of Bath, and attested by three witnesses.

To the objection, that an appointment under this power could only be made by deed; and that the instrument in question, though signed and sealed, was not delivered, and therefore was not a deed: It was answered, that as no real distinction



can be taken between an appointment executed by deed, with an express power of revocation, and one executed by a will signed, sealed, and published, which is in its nature revocable; the publication of the latter is equivalent to a delivery of the former, and renders it, within the substantial meaning of the word, as here used, a deed; and consequently General Pulteney, the brother, heir, and devisee, of the Earl of Bath, became seised in fee simple of the premises in question, and of course could make reversionary leases, or leases of any other description.

It was contended, that the opinion of the court of King's Bench in the cause of Lord Darlington against Pulteney, (Cowp. Rep. 268.) ought not to prejudice the plaintiff in error, who was no party to the suit in which that opinion was given. *Her* title, under this execution of the power, being now, for the first time, called in question; and therefore she could not be said to have acquiesced in any former decision upon the subject.

Finally, that the lease granted by General Pulteney on the 30th day of April 1765, was, under the several circumstances stated in the special verdict, a valid and effectual lease as against the defendant in error Mr. Pulteney.\*

On behalf of the defendant in error, it was shortly but strongly stated (T. Erskine, F. Bower), That it did not appear that any direction, limitation, or appointment of the premises in question was ever made by the said William Earl of Bath, and William Lord Viscount Pulteney, or either of them, *by any their deed or deeds*, in pursuance of the powers created or reserved in and by the indenture of bargain and sale, bearing date the second day of January 1753, to lead the uses of the common recovery suffered in Hilary term 1753; and consequently, General Harry Pulteney, at the time of his granting the lease to Colonel Richard Lambart, on the 30th day of April 1765, [193] was tenant in tail only of the premises, under the limitations of the will of Sir William Pulteney, bearing date the 30th day of April 1685, with such powers of leasing as are given to the Persons actually seised of the freehold of the said premises for the time being, by the said will, and such further powers as are given by the act of the 5th of George the first to the persons so seised; and the said lease so granted by the said General Pulteney, to the said Colonel Richard Lambart, bearing date 30th April in the year 1765, was not warranted either under the will of Sir William Pulteney, or the act of parliament; being a lease granted in reversion, and not containing the requisite reservation of three parts in four of the best and highest yearly rent that at the time of making such lease could and might have been reasonably had and gotten for the said premises thereby leased.

Accordingly, it was ORDERED and ADJUDGED, That the judgment given in the Court of King's Bench for the said defendant in error, be affirmed; and that the said record be remitted, etc. (See MS. Journ. *sub anno* 1795.)

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CASE 7.—CHARLES STANDEN, the Younger,—*Appellant*; HENRY GRAY MACNAB, and CAROLINE ELIZABETH, his Wife, (formerly STANDEN), and others,—*Respondents* [26th May 1797].

[Mews' Dig. x. 1443. Followed in *Bradly v. Westcott*, 1807, 13 Ves. 445: *Lempriere v. Valpy*, 1832, 5 Sim. 121.]

Devise by A. of his real estate to be sold, and the produce, with the personal, to his wife for life, with power to her, to appoint a moiety by deed or will, executed in the presence of two witnesses. The estate was not sold: the wife having no other real estate, by will duly executed to pass real estate, gave specific legacies, some described to have been her husband's; and devised "all the rest, residue, and remainder of her estate and effects of what nature or kind so ever, and whether real or personal, and all her plate, linen, china, and other utensils which she should be possessed of or interested in, or entitled to, at her decease," to B. for his own use and benefit, and appointed him executor.

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\* See *Kibbet v. Lee*, Hob. 312. *Ormond (E.'s) Case*, Hob. 348. *Tilley v. Pierce*, Cro. Ja. 376. *Smith and Ashton*, 1 Ch. Cases, 263. 1 Freem. 308. Rep. temp. Finch, 273. and Lord Nottingham's MSS. *The Countess of Roscommon v. Fowke*, (*ante* Ca. 4. of this title), *Sneed v. Sneed*, Ambler 64. Lord Nottingham's MSS. of his Judgment in *Bridges v. Westwood*.

The power, as to the moiety of the real and personal estate, is well executed by the residuary clause.

A wrong description of a legatee will not defeat a legacy given to him by name.

DECRETAL Order of Lord Loughborough C. **AFFIRMED.**

2 Ves. jun. 589 ; as *Standen v. Standen*, et al.

Charles Miller, late of Orchard Street, in the parish of St. James in the city of Bath, in the county of Somerset, esq. deceased, duly made and published his last will and testament, dated the 29th day of January 1776, and thereby bequeathed unto Richard Edwards, esq. the Reverend William Seward, Dr. of Laws (now deceased), and Francis Page, esq. the sum of £200 *upon trust*, that they and the survivors and survivor of them, his executors and administrators, should in their discretion put and place the said respondents, Charles Miller Standen, and Caroline Elizabeth Macnab, by the names and descriptions of Charles Miller Standen, and Caroline Elizabeth Standen, legitimate son and daughter of Charles Standen, [194] therein mentioned to be then residing with a company of strolling players at Storrington in Sussex, apprentices to such proper businesses at such ages and in such manner as they his said trustees and the survivors or survivor of them, and the executors and administrators of such survivor, should see fit and think most advantageous for their benefit: and said testator thereby directed the same sum of £200 should bear interest at £1 per cent. from the end of six months next after his decease, and subject thereto, and to the payment of all his debts, funeral expences, and the expences of proving his will: said testator gave and devised unto said Richard Edwards, William Seward, and Francis Page, all that his farm and estate known by the name of his Farmington estate, in the county of Gloucester, and other his freehold messuages, lands, tenements, and hereditaments, in the said county of Gloucester, or elsewhere in England, with the appurtenances, to hold unto said Richard Edwards, William Seward, and Francis Page, their heirs and assigns, upon trust that they and the survivors and survivor of them, and the heirs and assigns of such survivor should, as soon as conveniently might be after his decease, sell and dispose of all and every or any of the said Farmington estate, messuages, lands, tenements and hereditaments, with their appurtenances, at the best price that could be obtained for the same, and as to his said trustees in their discretion should seem meet; and should place the monies arising by such sale or sales at interest, upon good security or securities, either government or freehold, and entire or in parts, as should be by his said trustees, or the survivors or survivor of them, his executors and administrators, thought most adviseable, and from time to time to call in and replace the same or any part thereof at interest, on such good security or securities as aforesaid, and should pay the interest, produce, and increase arising therefrom, from time to time, unto, or otherwise permit and suffer his wife Elizabeth, and her assigns, to receive and take to and for her and their own use and benefit, during the term of her natural life, and after her decease, upon trust, as to one moiety of all such monies arising by such sale or sales as aforesaid, and the interest, produce, and increase from time to time therefrom arising, to and for the use and benefit of such person and persons by such parts and proportions, and in such manner and form as his said wife, Elizabeth, should by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of two or more credible witnesses, or by her last will and testament, in writing, or by any writing purporting to be her last will and testament, to be by her duly executed, and attested in the presence of the like number of witnesses, give or appoint the same, and for want of such gift or appointment, then in trust for the use and benefit of all the legitimate children of the said Charles Standen, as should be living at the time of the decease of his said wife, equally between them, share and share alike, if more than one, and if but one then of such one child, his or her executors, administrators, or assigns; but if it should happen that there should be no legitimate child of the said Charles Standen [195] living at the time of his said wife's decease, or in case all such children should die before attaining the age of 21 years, or day of marriage, then in trust to and for the said William Seward, one of his said trustees, his executors, administrators, and assigns, absolutely and as to the other moiety of all such money arising by such sale or sales as aforesaid, and the interest, produce, and increase from time to time therefrom arising, upon trust, to and for the use and benefit of the said

respondents, Charles Miller Standen, and Caroline Elizabeth Macnab, by the names and descriptions of Charles Miller Standen, and Caroline Elizabeth Standen, legitimate son and daughter of the said Charles Standen, equally between them share and share alike; but if either of them should die before the age of 21 years, or marriage, then of the other of them attaining such age, or marriage, his or her executors, administrators, or assigns; but if it should happen that both of them the said Charles Miller Standen and Caroline Elizabeth Macnab, should die before their respective attainments of the age of 21 years or marriage, then upon trust, to and for the use and benefit of such of the legitimate children of the said Charles Standen as should be living at the time of the decease of the survivor of them, the said Charles Miller Standen and Caroline Elizabeth Macnab, therein called Charles Miller Standen and Caroline Elizabeth Standen, equally between them share and share alike, if more than one; and if but one, then to such one only, his or her executors, administrators, and assigns; but if it should happen there should be no such legitimate child or children of the said Charles Standen, living at the time of the decease of the survivor of them, the said Charles Miller Standen and Caroline Elizabeth Macnab, or if all such children should die before their respective attainments of the age of 21 years or marriage, then upon trust, for the use and benefit of the said William Seward, his executors, administrators, and assigns, absolutely; and the testator thereby declared it to be his will and meaning that in the mean time, and until such sale and sales could be had and made as aforesaid, the rents, issues, and profits of all the said premises should be and remain, and be paid, applied, received, and taken by, under, and subject to such and the same trusts, in every respect as therein and herein before particularly mentioned and expressed, of and concerning the monies arising from such sale or sales as aforesaid. And the said testator thereby also gave and bequeathed unto the said trustees, said Richard Edwards, William Seward, and Francis Page, all that his leasehold, messuage, or tenement, and premises, in Grosvenor Street, St. George, Hanover Square, London, then in the possession of James Burnett, esq. and also all his stock in the funds, with the rest of his personal estate and effects, not therein before disposed of, subject also to the payment of his debts, legacies, funeral expences, and the expences of proving that his will; to hold the same so subject, with the appurtenances, unto them, the said Richard Edwards, William Seward, and Francis Page, and unto the survivors and survivor of them, his executors and administrators, for and during all such estate, term, right, title and interest, as he should [196] have therein at the time of his decease, upon trust, that they his said trustees, and the survivors and survivor of them, his executors or administrators, should, as soon as might be, convert such part thereof as should not consist of ready money, other than and except his leasehold house in Grosvenor Street, into ready money by sale or sales thereof, and should add the monies arising by such sale or sales, to his monies already in the funds, in their or his names or name, and continue the same therewith, or otherwise sell out his said monies in the funds, as they his said trustees should think fit; and replace the same interest, with his said other monies, so arising by such sale or sales, on such good security or securities, either government or freehold, entire or in parts, at the discretion of his said trustees, and so occasionally as they should, with the approbation of his wife, think fit; and should pay unto or otherwise permit his said wife, Elizabeth, and her assigns, to receive the interest, produce, and increase, from time to time herefrom arising, with the rents and profits of his said leasehold estate in Grosvenor Street, to and for her and their own use and benefit, during her natural life; and after her decease, upon trust, as to the disposition of the said money in the funds, and the monies arising from such sale or sales, of such residue as aforesaid, and said leasehold house in Grosvenor Street, to, for, and upon the same trusts, intents, and purposes, as were therein before declared, and herein-before mentioned, of and concerning the rents and profits of his freehold estates; and the monies arising by the sale or sales thereof, as aforesaid, in such and the same manner as though he repeated the same at large, and appointed his said trustees and his said wife executors of his said will.

The said testator afterwards made a codicil to his said will, bearing even date with the said will, whereby he gave legacies of £50 each to his said trustees.

The said testator died on or about the 7th day of October 1778, without having revoked his said will, or altered the same, except as aforesaid, leaving his widow him

surviving; and the said Richard Edwards, William Seward, and Francis Page, duly proved the said will and codicil.

The said Elizabeth Miller, the widow and relict of the said testator, also made her last will and testament in writing, attested by three witnesses, bearing date the 17th day of July 1780, whereby, after bequeathing certain pecuniary and divers specific legacies to several legatees therein named, she gave and bequeathed all the rest, residue, and remainder of her estate and effects, of what nature or kind soever, and whether real or personal, and all her plate, china, linen, household goods and other utensils which she should be possessed of, interested in, or entitled to, at the time of her decease; subject to and after payment of all her just debts, funeral expences, and the probate of her said will, and the several specific legacies therein before given unto Samuel Howard, of Southampton Street, in the pariah of St. Paul's, Covent Garden, in the county of Middlesex, esq. and appointed him sole executor of her said will.

[197] The said Elizabeth Miller, shortly after making her said will, that is to say, in or about the month of October 1780, departed this life, without having revoked or altered her said will, and the said Samuel Howard thereupon duly proved the said will.

The said Charles Miller Standen and Caroline Elizabeth Macnab, who were two of the children of the said Charles Standen the elder, by Ann Crouch, to whom the said Charles Standen the elder was married, in the month of December 1769, and in the lifetime of the appellant's mother, claiming to be legatees of the said testator, and representing themselves as the only legitimate children of the said Charles Standen, did in the year 1782, by Aaron Graham their next friend, exhibit their original bill of complaint in the High Court of Chancery, against the said Richard Edwards, William Seward, and Francis Page, and against Samuel Howard, the executors of the said testator's widow, and the said Charles Standen the elder, as the heir at law of the said testator, and Samuel Farmer, esq. therein named, with which Samuel Farmer, the said Richard Edwards, William Seward, and Francis Page, had contracted for the sale of the said testator's said freehold estates at Farmington; which bill was afterwards amended, thereby praying, amongst other things, that the said testator's will might be established, and the trusts thereof performed and carried into execution; and that an account might be taken of the personal estate of the said testator, come to the hands of the said executors and trustees, and of his funeral expences and debts, and of the rents and profits of his freehold and copyhold estates, accrued, due, and received by the said trustees, since the death of the said testator's widow; and that the said leasehold messuage or tenement might be sold for the remainder of his term and interest; and that the net money which should arise from the residue of the said testator's personal estate, and from the sale of his said freehold estate and leasehold messuage, and from the rents and profits thereof respectively since the death of the said testator's widow, might be placed out in such of the public stocks or funds, or upon such other security or securities as the said Court should direct, in trust, for the use and benefit of the said complainants, according to the said will, and that the said sum of £200 by the said will bequeathed for placing the said Charles Miller Standen and Caroline Elizabeth Macnab, out apprentices, might be placed out at interest; and that the same might be paid and applied as occasion should require.

The said several defendants to the said bill having appeared, put in their respective answers thereto.

The said Charles Standen the elder, having, after the filing of the said bill, had issue by Susannah Bendell, with whom he intermarried after the death of the said Ann Crouch, a daughter named Harriot Susannah, the said complainants exhibited a supplemental bill against the said Harriot Susannah, as being another legitimate child of the said Charles Standen the elder, praying to have the benefit of the said will against her. And she having put in her answer thereto,

[198] The said cause came on to be heard before the Honourable Lloyd Kenyon, the Master of the Rolls, on the 23d day of June 1786, when accounts of the said testator's personal estate, and of the rents and profits of his said freehold and leasehold estates, and of his funeral expences, debts, and legacies, were directed to be taken; and it was amongst other things ordered that Master Eames, to whom the said cause was referred, should enquire what legitimate children of Charles Standen, named in the said testator's will, were living at the time of the said testator's death; and what legitimate

children of the said Charles Standen were ...  
testator's widow ...  
Standen ...

The said Master ...  
Mary ...  
likewise ...  
paid for ...  
and James ...  
of ...  
too. Mary ...  
defendants ...  
revived ...

The said Master ...  
Ann ...  
said Master ...  
thereof.

The ...  
child of the said Charles ...  
said Master ...

By the affidavit of the said Charles ...  
support of his claim ...  
baptism ...  
Charles Miller Standen ...

The said Master ...  
certifying that he had taken the ...  
claims of the said Charles Miller Standen ...  
both Macaulay ...  
Standen ...  
evidence ...  
death of the said Elizabeth ...  
claim ...  
child of the said Charles Standen ...  
part, it appeared that the said Charles Standen ...  
about the 1st day of August 1788 ...  
Ann Lewis ...  
ages belonging to the said ...  
between the said Charles Standen ...  
living and cohabiting together as husband and wife ...  
only child of the said marriage ...  
elder and Ann his wife ...  
Preston ...  
was baptized there about the 1st day of June following ...  
of baptisms ...  
several affidavits ...  
claim ...  
nd of the several affidavits ...  
aim of the appellant ...  
the said Charles Standen ...  
r, and at the death of Elizabeth ...  
the said Charles Miller Standen ...  
nn Standen, Elizabeth Standen, and Harriot Susannah Standen.

An exception was taken to the said report by the plaintiffs in the said suit, and  
the said Harriot Susannah Standen, as to the allowance of the said claim of the ap-  
ellant, and the disallowance of the claim of the said plaintiffs, and the said Harriot  
Susannah Standen. And the said cause coming on to be heard before the then Lord  
High Chancellor, on the matter of the said exception, on the 17th Day of January  
1789, it was ordered that the parties should proceed to a trial at law in his Majesty's  
Court of King's Bench, at Westminster, on the following issue: viz. whether Charles  
Standen, mentioned in the said report, was the legitimate child of the said Charles  
Standen the elder; and in order to such trial, the appellant was to be plaintiff at

law, and the said plaintiffs in the said suit and the said Harriot Susannah Standen were to be defendants at law.

The said issue came on to be tried in the Court of King's Bench, on the 5th Day of June 1789, when the jury found a verdict for the appellant the plaintiff at law.

A new trial was afterwards applied for and directed, and the said issue was again tried, on the 22d day of February 1791, in the said Court of King's Bench, by a special jury, when a verdict was again found for the appellant. (*N.B.* The counsel for the respondents applied to the Lord Chancellor for, and obtained, an order that the will of the testator might be read on the second trial at law.)

The said cause was afterwards brought on to be heard before the then Lord Chancellor (Thurlow), when his Lordship was pleased to order, that the plaintiff should file a supplemental bill, in order to bring before the Court the said appellant, which was accordingly done. The plaintiffs took out a rule to produce witnesses to prove (as the appellant believes) the intention of the testator, as to the said Caroline Elizabeth Macnab (then Standen) and Charles [200] Miller Standen, being the objects of his bounty; but the said plaintiffs did not examine any witnesses, and then the appellant passed publication after more than the usual time allowed by the Court had elapsed, and by his counsel, upon reading his answer, claimed to be entitled to the whole of the property given by the said testator's will to the legitimate children of the said Charles Standen the elder.

The said William Seward died the 13th Day of January 1790, and the said suit and proceedings having thereby abated, the same were afterwards duly revived against the respondent, Thomas Luntley, the executor and legal personal representative of the said William Seward.

The said Charles Miller Standen departed this life about the 4th Day of September 1792, having first made his will, and thereby appointed the respondent, Frederick Booth, sole executor thereof, who duly proved the same. (*N.B.* C. M. Standen was under the age of 21 when he made his will, and unmarried.)

The said suit being again duly revived, the same came on to be heard before the Right Honourable the Lord High Chancellor, (Loughborough,) on the 10th day of June now last past; when it was referred to the Master to carry on the account directed by the decree in the first cause against the present parties, in like manner as was thereby directed, as to the then parties; and the Defendant, Thomas Luntley, the executor of the late defendant, William Seward, admitting assets of the said William Seward sufficient to answer what the said William Seward received, and submitting to account for what he himself had received of the estate and effects of the said testator: it was ordered that he should pay what should be found due from the said defendant, William Seward; and likewise what should be found due from him on the said account, into the bank, with the privy of the accountant-general of the said court, on the credit of the said causes. And it was ordered that the defendant, Francis Page should transfer the sum of £1000, South Sea annuities, part of the said testator's personal estate, then vested in him, to the account of the said accountant in trust in those causes. And it was further ordered that the said defendant, Francis Page should receive the dividends that had accrued on the said South Sea annuities, and should accrue thereon until such transfer; and pay the same into the bank with the privy of the said accountant general, on the credit of the said causes. And the defendant, Benjamin Newton, by his answer submitting to carry into execution the contract entered into by the late defendant, Richard Edwards and William Seward, and the said Francis Page with the said Samuel Farmer deceased, for the purchase of the estate at Farmington, in the county of Gloucester; it was ordered that the said contract should be specifically performed. And it was further ordered that the said Benjamin Newton should pay the sum of £4000, the consideration money agreed to be paid for the said estate, into the bank, with the privy of the said accountant general, on the credit of the said causes; and that thereupon all proper parties as the Master should direct, should join in conveying the said estate to the said defendant, Benjamin Newton, and his heirs, or as he should appoint; and all deeds and writings in the custody or power of any of the [201] parties, relating to the said estate, should be delivered upon oath to the said Benjamin Newton, or to whom he should direct. And it was referred to the Master to take an account of the rents and profits of the said estate, accrued since the death of the said testator, Charles

Miller, received by the late defendant, William Seward, in his life-time, and by the said defendant, Thomas Luntley, since his death; or either of them, or by any other person or persons by their or any of their order, or for their or any of their use. And the said defendant, Thomas Luntley, admitting assets of the said late defendant, William Seward, it was further ordered that he should pay what should be found due on the balance of the said account of rents and profits, into the bank, with the privity of the accountant general, on the credit of the said causes. And the said Court did declare that the late plaintiff, Charles Miller Standen, and the respondent, Caroline Elizabeth Macnab, were the persons meant and intended by the said testator in his will, by the description of Charles Miller Standen and Caroline Elizabeth Standen, legitimate son and daughter, then residing with a company of players at Storrington in Sussex; and that the respondent, Caroline Elizabeth Macnab, was entitled to a moiety of the legacy of £200, given to her and the said Charles Miller Standen; and that the said defendant, Frederick Booth, as the executor of the said Charles Miller Standen, was entitled to the other moiety of the said legacy; and out of the money then in the bank, in trust, in the cause *Standen and Standen*; and out of the money directed to be paid into the bank, as aforesaid, (when so paid in), it was ordered that what should be taxed for the parties costs, under the directions therein before given, should be paid as therein mentioned. And it was ordered that what should be found due to the several legatees for principal and interest, on their respective legacies, should be paid to them respectively, or to the legal representatives or representative of such of them as were dead. And as to the residue of the said monies, arising from the real and personal estates of the said testator, after the payments therein before directed, it was ordered that the same should be divided into moieties; and the said court did declare that the respondent, Caroline Elizabeth Macnab, having survived her brother, the said Charles Miller Standen, was entitled to one of such moieties; and did declare that the will of the said Elizabeth Miller was a good execution of the power given her, to appoint the other moiety of the said residue; and that under the said will, the respondent, Samuel Howard, was entitled to the other moiety; and it was ordered that such moiety should be paid to the said defendant, Samuel Howard; and as to the first mentioned moiety, it was ordered that the said Master should compute and ascertain how much accrued for rents and interest, in the life time of the said Charles Miller Standen, in respect of his moiety of such moiety; and that such rents and interest should be paid to the said defendant, Frederick Booth, his executor; and that the principal of such moiety, and the remainder of the rents and interest accrued thereon, should be paid to the plaintiff Caroline Elizabeth Standen.

[202] The appellant contended that the said decretal order, of the 10th June 1795. was erroneous in so much thereof as declared the will of the said Elizabeth Miller to be a good execution of the power given her, to appoint a moiety of the clear residue of the monies arising from the real and personal estate of the said testator; and that under the said will the respondent, Samuel Howard, was entitled thereto; the appellant humbly submitting that it ought to have been declared, that the said moiety belonged to him the appellant, as the only legitimate child of the said Charles Standen, that was living at the time of the decease of the said testator's wife; the appellant therefore prayed (R. Graham, A. Onslow), that the said decretal order might be varied in the above respects for the following reasons:

1. The will purports to be a disposition of her own property, not the exercise of a power given over the property of another.
2. Though a reference to the power, or circumstances, indicating a clear intention to exercise it, might give that which purports to be a will the operation of an execution of a power, yet such reference must be distinct and certain, or the circumstances such as to admit of no other construction: in this case no such reference or circumstances appear.

A Case was printed for all the respondents *except* Samuel Howard (whose case does not appear); and those respondents agreed with the appellant in requesting that the said decree should be varied so far as it declared, that the will of the said Elizabeth Miller was a good execution of the power, and that the respondent Howard was entitled thereto: But the said respondents submitted, that it ought not then to be declared, that the said moiety belonged to the appellant, as claimed by him; but that it ought to be remitted to the Court of Chancery, *to decide to whom the said*

*moiety belonged*, under the said devise, to the legitimate children of the said Charles Standen living at the death of the said testator's wife. And the following reasons were urged (R. Hollist) in behalf of the said respondents:

1. *As to varying the decree made in favour of the respondent, Samuel Howard*: Because the testator's widow has not, by her will, in any manner whatever, executed or shewn any intention to execute the power given to her by the said testator's will or taken any notice of the power, but has confined the disposition in her will to her own property.

2. *As to the declaration that the moiety belongs to the said appellant*: Because it was the intention of the testator, that the deceased Charles Miller Standen, and the respondent Caroline Elizabeth Macnab (late Caroline Elizabeth Standen) and any other children of the said Charles Standen, the elder born after them should be considered as the legitimate children of the said Charles Standen the elder; but inasmuch as that point has not as yet been decided by the said Court of Chancery, the said respondents conceive, that it should be first agitated and decided in that court.

But it was ORDERED and ADJUDGED, That the Appeal should be dismissed; and that the decree and orders therein complained of be affirmed. (MS. Jour. *sub anno* 1797.)

[203]

## PROHIBITION.

CASE 1.—RODHAM HOME, Esq.,—*Plaintiff*; RIGHT HONOURABLE CHARLES EARL CAMDEN, and others,—*Defendants* (in Error) [22d June 1795].

[Mews' Dig. xiv. 1793. See *Lindo v. Rodney*, 2 Doug. 613, *n*: *Reg. v. Greenwich County Court Judge* 1888, 60 L.T. 250.]

In March 1781, a war then existing between Great Britain and the Dutch, a squadron of the King's ships, having a detachment of the King's troops on board, was sent to attack a settlement belonging to the enemy (the Cape of Good Hope); and secret instructions were given by his Majesty to the commanders in chief, that the booty which should be gained by the joint operation of the army and navy at the attack of that settlement, should be divided in two shares between the land and sea forces. The attack was not made: but the squadron, while the troops were on board (on July 21), took, as prize, a ship and cargo belonging to the enemy, in an open unfortified bay (Saldanha Bay), at a distance from the Cape. In June 1782, the Navy instituted a suit in the Admiralty Court, claiming the sole interest in the prize, under the Dutch prize act, stat. 21 Geo. 3. c. 15; and a proclamation made pursuant thereto. The Admiralty Court (in September 1782) decreed the ship to be lawful prize; but reserved the question *who were the captors?* on the ground that it might turn out that the army were entitled under the secret instructions; and afterwards (in May 1785) the Court of Admiralty pronounced *for the interest of the army; agreeably to the spirit of his Majesty's instructions*. To this sentence an appeal was lodged in the Court of Appeals, where the sole question was, whether the capture were within the meaning of the prize act, or within the case alluded to in his Majesty's secret instructions: and that Court determined that it was a *joint capture*, by the navy and army, and adjudged it *good and lawful prize to the king*. Two persons (one of whom died, and the other was Pasley, mentioned in the question put by the House of Lords to the Judges) were appointed agents by the naval officers and crews; and, soon after the decree of the Admiralty Court in September 1782, sold the ship and cargo, and distributed part of the produce among such officers and crews: the residue was retained in Pasley's hands. The plaintiff in error sued Pasley for his share of such residue in the Court of C. P., but no judgment was obtained in that action, which remained depending at the time of this appeal to the House of Lords. The Lords Commissioners of Appeal, (the defendants in error), after their sentence, issued a monition to Pasley, requiring him to bring in an account of the sales of the ship and cargo, together with such part of the proceeds as remained in his hands; on which a motion for a writ of prohibition was made by the plaintiff



in error (in Trinity Term 1788) to the Court of C. P. which Court directed him to declare in prohibition; and on demurrer to the declaration, gave judgment (in Michaelmas Term 1790) in his favour. On a writ of error to the Court of K. B. the judgment of the Court of C. P. was reversed. (Mich. T. 1791.) And this JUDGMENT of REVERSAL was AFFIRMED in the House of Lords.

The point determined in the Court of K. B. is thus stated in 4 Term. Rep. K.B. 382. "The Prize Courts and Courts of Lords Commissioners of Appeals, have the sole and *exclusive* jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the prize acts; and if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or propriety of it, even though, perhaps, they would have put a different construction on the prize acts. And the same courts have power to enforce their decrees." In giving the judgment, Lord Kenyon observed, that "it appeared from the sentence of the Court of Appeals, that in the opinion of those who made that decree, other persons were interested besides those by whom the agent was appointed; and that there were some rights in the king, not disposed of by the act of parliament. "If so, why (remarked his Lordship) should not this property be taken out of the possession of the agent, and put under the controul of those who will take care of the in-[204]-terest of *all the parties* concerned?" Mr. J. Ashurst added, "that so far from the Lords Commissioners of Appeal having exceeded their jurisdiction in issuing the monition complained of, it was a necessary consequence of their sentence; for if it were a joint capture, the army were equally entitled (with the navy) to appoint an agent. As the navy are not (said the learned Judge) entitled to the whole, it cannot be contended that their agent ought to be intrusted with all the proceeds of the prize. *But the Prize Court are trustees both for the army and navy*; and it is fit for the interest of all parties, that the proceeds should be brought into that court till the several claims are adjusted." 4 Term. Rep. K. B. 395, 6.

In 2 H. Black. Rep. 533, where the opinion of the Judges, as delivered by Lord Chief Justice Eyre, is detailed at length, the following is stated as the effect of the determination in the House of Lords. "Quaere, Whether the misinterpretation of a statute, by an inferior court, the consideration of which arises incidentally in the course of a proceeding which is confessed to be within its jurisdiction, be a ground for a *prohibition*? Whether it be not rather a matter of appeal? But clearly in such a case a prohibition will not lie, unless it be made appear to the superior court, that the party applying for the prohibition has, in the course of the proceedings in the inferior court, alleged the grounds for a contrary intepretation of the statute on which he applies for the prohibition; and that the inferior court has proceeded notwithstanding such allegation. No right is *vested* by any of the prize acts in the captors of an enemy's ship and cargo in war *before the ultimate adjudication* of the courts of prize. The issuing a monition therefore to the prize agents, by the Court of Commissioners of Appeals in prize causes, to bring in the proceeds of a ship and cargo, which have been sold, after a sentence of condemnation, as lawful prize, but from which sentence there is an appeal, (on a subject distinct from the question, whether prize or not, which is not disputed), is not a ground for a prohibition to that court; for the monition neither interferes with, nor defeats, any *vested rights*." See the first determination of the Court of C. P. 1 H. Black. Rep. 476-525, which will account for the terms of the above statement.

From the above it does not appear that the decision of the House of Lords went altogether so far as that of the Court of K. B. But, in the conclusion of his very clear and able speech on the subject, Lord Chief Justice Eyre observed, that in truth it was *the sentence* of the Commissioners of Prize Appeals, and *not the monition*, which was the real ground of complaint; and the learned Judge thus stated to the house the reasons why every complaint against the sentence must be laid out of the case. "You are (said he) sitting here, in a court of error; but your jurisdiction is now confined to the enquiry, whether the ground stated in this declaration for issuing such a prohibition, as that

which is described in these pleadings, is or is not sufficient in law. The sentence is before your Lordships, as part of that ground; but it is before you *as a sentence unimpeached*. The complaint made to the temporal court is not that the sentence is wrong, *which indeed the temporal court had no jurisdiction to correct if it were wrong*, nor is the complaint that the sentence was an excess of jurisdiction, or in any other respect a ground for prohibiting the Prize Court to carry it into execution. The case in the declaration is, that upon the authority of the sentence, coupled with the other matters of fact and law stated in the declaration, the plaintiff is entitled to ask, that the proceeds should not be taken out of the hands of the navy agents; and the plaintiff cannot now desert that ground, when he finds it untenable, and take up an objection to the sentence. Your Lordships are not a court of original jurisdiction to grant prohibitions; and indeed the cause and the parties would be placed in a very singular situation, if there could now be a prohibition issued to prevent the carrying this sentence into execution; for this sentence of the court below is undoubtedly reversed; and if the Commissioners of Prize Appeals were to be prohibited from carrying into execution the sentence of reversal, there would in effect be no sentence at all; and the crown, the navy, and the army, as far as I see, would be without remedy. In the course in which the Commissioners of Prize are proceeding, regular or irregular, the proceeds of this prize will be collected; and if the object of their proceedings be, *as probably it is*, to place the fund in the hands of the crown, the honour and justice of the crown will be an unfailing resource to the parties." 2 H. Black. Rep. 546, 7.

[206] 1 H. Black. Rep. 476-525: 4 Term Rep. B. R. 382: 2 H. Black. Rep. 533.

In Trinity Term 1788, application was made, by motion, to the Court of Common Pleas, for a writ of prohibition to be issued, to prohibit all further prosecution in his Majesty's High Court of Appeals, for prizes, in a business of appeal and complaint of nullity there depending, from the High Court of Admiralty of England, brought by commodore Johnstone, and the commanders, officers, and mariners on board of and belonging to his Majesty's ships composing the squadron, employed on an expedition against the Cape of Good Hope, captors of the Dutch ship called *The Hoogskarpel*, appellants; against major general William Meadows, and the officers, soldiers, and others of his Majesty's land forces, serving under his command, at the time of the said capture, respondents; on the hearing of which motion, in the Court of Common Pleas, the party applying for such writ, was directed to declare in prohibition, and thereupon, in Hilary term, the twenty-ninth year of George the Third, the now plaintiff in error declared against the present defendants in error; and on demurrer to that declaration judgment was given for the plaintiffs in error: the record of which proceedings is as follows:

Pleas inrolled at Westminster before the Right Honourable Alexander Lord Loughborough and his brethren, justices of his Majesty's Court of Common Bench, of Easter term, in the twenty-ninth year of the reign of our Sovereign Lord George the Third, by the Grace of God of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth:

Middlesex, to wit—The Right Honourable Charles Earl Camden, the Most Noble Francis Godolphin Duke of Leeds, the Right Honourable Charles Lord Hawkesbury, and Sir George Yonge, Baronet, being commissioners of our Lord the King duly appointed for receiving, hearing, and determining of appeals from the said Lord the King's Court of Admiralty in matters of prize, and having privilege of parliament, were summoned to answer Rodham Home, esq. who in this case sues as well for our said Lord the King as for himself, of a plea wherefore they have caused process to issue against John Pasley, in a certain business of appeal and complaint of nullity from our said Lord the King's High Court of Admiralty in England, promoted and brought by George Johnstone, esq. commander in chief of a squadron of his said Majesty's ships and vessels lately employed in an expedition against the Cape of

Good Hope and its dependencies, and the several commanders, officers, and mariners on board of and belonging to the said ships and vessels composing the said squadron, as the sole captors of the ship *Hoogskarpell*, whereof Hermyer was master, and her cargo, against major-general William Meadows, and the officers and soldiers and others of our said Lord the King's land forces, and the officers, privates, and others of our said Lord the King's royal artillery, and the engineers [206] serving under the command of the said William Meadows at the time of the capture and seizure of the said ship and goods, asserting themselves to be joint captors of the said ship and cargo, contrary to his Majesty's writ of prohibition before directed and delivered to them; and thereupon the said Rodham, who as well sues for our said Lord the King as for himself, by John Irving his attorney, complains, that whereas all and all manner of pleas of and concerning the validity, explanation, interpretation, construction, or exposition of the laws and statutes of this realm, and the cognizance of such pleas, belong and appertain to the said Lord the King and his royal crown, and to the common law, and in the courts of the said Lord the King of record ought, and always have been accustomed to be tried and discussed, and not in any court proceeding by any law differing from the common law of this realm: And whereas, the said Lord the King did, in the second year of his reign, by his commission under the great seal of Great Britain, nominate, constitute, ordain, and appoint all and every of his privy counsellors for the time being, and others therein named, or any three or more of them, to be his commissioners for receiving, hearing, and determining of appeals from the said Lord the King's courts of admiralty in matters of prize: And whereas the said court of commissioners of appeals proceeds by some law differing from the common law of this realm, and therefore have no power or authority to try or discuss the validity, explanation, interpretation, construction, or exposition of any act or acts of parliament, or to expound them otherwise than is warranted and allowed by the common law aforesaid: And whereas a statute was made in the parliament of the said Lord the King, held at Westminster, in the said county of Middlesex, in the twenty-first year of his reign, intituled, "An act for the encouragement of seamen, and for the more speedy and effectual manning his Majesty's navy:" And whereas by the said statute, reciting that his Majesty by order in council, dated the 20th day of December, in the year of our Lord 1780, was pleased to order general reprisals to be granted against the ships, goods, and subjects of the States General of the United Provinces; and that as well all his Majesty's fleets and ships, as also all other ships and vessels that should be commissioned by letters of marque, or general reprisals, or otherwise, by his Majesty's commissioners for executing the office of Lord High Admiral of Great Britain, should and might lawfully seize all ships, vessels, and goods belonging to the States General of the United Provinces, or their subjects, or others, inhabiting within any of the territories of the States General of the United Provinces, and bring the same to judgment in any of the Courts of Admiralty within his Majesty's dominions; for the encouragement of the officers and seamen of his Majesty's ships of war, and the officers and seamen of all other British ships and vessels having commissions and letters of marque, and for inducing all British seamen who might be in any foreign service, to return into this kingdom, and become [207] serviceable to his Majesty, and for the more effectual securing and extending the trade of his Majesty's subjects, it was enacted, That the flag officers, commanders, and other officers, seamen, mariners, and soldiers, on board every ship or vessel of war in his Majesty's pay, should have the sole interest and property of and in all and every ship, vessel, goods, and merchandizes which they might have taken since the 20th day of December in the year of our Lord 1780, or should thereafter take during the continuance of hostilities against the States General of the United Provinces, after the same should have been finally adjudged lawful prize in any of his Majesty's Courts of Admiralty in Great Britain, or in his Majesty's plantations in America or elsewhere, to be divided in such proportions, and after such manner, as his Majesty, by his proclamation of the 27th day of December, in the year of our Lord 1780, might have already ordered and directed, or as his Majesty, his heirs and successors, should think fit to order and direct by proclamation or proclamations thereafter to be issued for these purposes: And whereas the said Lord the King did by his proclamation of the 27th day of December, in the year of our Lord 1780, among other things order and direct that the produce of all prizes taken as aforesaid from the

States General of the United Provinces, or their subjects, or others, inhabiting within any of the territories of the said States General of the United Provinces, should be distributed as follows; that is to say, the whole of the net produce, being first divided into eight equal parts, the captain or captains of any of his said ships and vessels of war who should be actually on board at the taking of any prize, should have three eighth parts; but in case any such prize should be taken by any of his ships or vessels of war under the command of a flag or flags, the flag officer or officers being actually on board, or directing or assisting in the capture, should have one of the three eighth parts, the said one eighth part to be paid to such flag or flags officers, in such proportions, and subject to such regulations, as were therein after mentioned; the captains of marines and land forces, sea-lieutenants, and master on board, should have one eighth part, to be equally divided amongst them; the lieutenants and quartermasters of marines, and lieutenants, ensigns, and quarter-masters of land forces, secretaries of admirals or of commodores, with captains under them, boatswains, gunners, purser, carpenters, master's mates, chirurgion, pilot, and chaplain, on board, should have one-eighth part, to be equally divided amongst them; the midshipmen, captain's clerk, master sailmaker, carpenter's mates, boatswain's mates, gunner's mates, master at arms, corporals, yeomen of the sheets, cockswain, quarter masters, quarter master's mates, chirurgion's mates, yeomen of the powder room, serjeants of marines, and land forces on board, should have one eighth part, to be equally divided amongst them; the trumpeters, quarter gunners, carpenter's crew, steward's cook, armourer, steward's mate, cook's mate, gunsmith, cooper, swabber, ordinary trumpeter, barber, able seamen, or-[208]-dinary seamen, and marines and other soldiers, and all other persons doing duty and assisting on board, should have two eighth parts, to be equally divided amongst them: And whereas, in the month of January, in the year of our Lord 1780, one George Johnstone, esq. since deceased, was by the said Lord the King appointed commander in chief of a squadron of the said Lord the King's ships and vessels, in the pay of his said Majesty, to be employed on an expedition against the Cape of Good Hope, the same being a colony or settlement on the coast of Africa, belonging to the States General of the United Provinces; and Major General William Meadows was also at the same time appointed commander in chief of the said Lord the King's land forces, to be employed on the said expedition; and the said Rodham was also appointed captain and commander of a certain ship of war of our said Lord the King called the *Romney*, the same being one of the ships of the said squadron: And whereas secret instructions, dated at St. James's the 29th day of January, in the year of our Lord 1781, were given by the said Lord the King to the said George Johnstone and William Meadows, among other things directing, in order to prevent any contest or dispute that might otherwise arise concerning the distribution of such booty as should be gained from the enemy by the joint operations of his army and navy at the attack of the Cape of Good Hope, that all such booty should be divided between his land and sea forces into two shares, according to the numbers mustered in each service, and that that share which should fall to the sea service should be divided according to the regulations established in his navy; and that out of the share which should fall to his land forces, his commander in chief of the said land forces should be entitled to a division equal in proportion to that share with what should fall to the commander in chief of the sea forces, in proportion to the share so falling to the navy, the remainder to be distributed among the officers and men in proportion to their respective pay: And whereas the said squadron of ships and vessels in the pay of his said Majesty, whereof the said ship called the *Romney* was one, and whereof the said Rodham was captain and commander as aforesaid, under the command of the said George Johnstone, having on board the said William Meadows, and a body of land forces of the said Lord the King, destined to land and attack the said Cape of Good Hope, under the command of the said William Meadows, did afterwards, in the month of March, in the year of our Lord 1781, sail and proceed from England on the said expedition, and in the month of July then next following did arrive within a certain distance of the said Cape of Good Hope, but the said George Johnstone, with the said squadron under his command, and the said William Meadows, with the said land forces under his command, did not, nor did either of them, at any time make any attack on the said Cape of Good Hope: And whereas, on the 21st day of July, in the year last aforesaid, the said squadron, whereof the said ship called the *Romney*

was one, and whereof the said Rodham was captain and commander as aforesaid, under the command of the said George Johnstone, having [209] on board the said William Meadows, and the land forces aforesaid, did, in a certain open and unfortified bay, called Saldanha Bay, on the said coast of Africa, at a great distance from the said Cape of Good Hope, attack and seize as prize a certain ship or vessel called the *Hoogskarpell*, of which Hermyer was master, with divers goods, wares, and merchandizes in and on board the same, being the property of and belonging to the subjects of the said States General of the United Provinces: And whereas, on the 17th day of June, in the year of our Lord 1782, Philip Champion Crespigny, esq. procurator-general of the said Lord the King, did, in the name of our said Lord the King, institute a suit against the said ship and goods so taken as aforesaid, in his Majesty's High Court of Admiralty of England, before the worshipful Sir James Marriott knight, doctor of law, lieutenant of the High Court of Admiralty of England, and in the same court official principal, and commissary general and special, and president and judge thereof, and also to hear and determine all and all manner of causes and complaints as to goods and ships seized and taken as prize, specially constituted and appointed, and by a certain allegation by him exhibited in the said suit, among other things did propound and alledge, that the said ship *Hoogskarpell*, and the goods on board the same, had been taken and seized as prize by the said George Johnstone, commander in chief of the said squadron, and were, at the aforesaid seizure thereof, belonging to the said States General of the United Provinces, their vassals or subjects, or others, inhabiting within their countries, territories, or dominions, and did thereby pray that the said ship *Hoogskarpell*, and all and singular the goods, wares, and merchandizes seized and taken therein, might be pronounced to belong at the time of the aforesaid seizure to the States General of the United Provinces, their vassals or subjects, or others, inhabiting within their countries, territories, or dominions, and as such, or otherwise, liable to confiscation and condemnation, and might be adjudged and condemned as lawful prize to our Sovereign Lord the King, as being taken by the said George Johnstone, commander in chief of the said squadron: And whereas the said Sir James Marriott did afterwards, to wit, on the 4th day of September, in the year last aforesaid, condemn the said ship *Hoogskarpell*, and the goods, wares, and merchandizes laden on board her and therewith, seized, except a packet of diamonds, as good and lawful prize, generally, reserving the question who were captors, and having afterwards maturely considered the matter, did by his interlocutory decree, on the 28th day of May, in the year of our Lord 1785, pronounce for the interest of the army, agreeable to the spirit of His Majesty's aforesaid instructions, and decreed the prize in question to be distributed according to the directions of the said instructions: And whereas the said George Johnstone, and the several commanders, officers, and mariners on board of and belonging to the said ships and vessels composing the said squadron, conceiving themselves thereby aggrieved, did duly appeal from the said decree to the said commissioners for receiving, hearing, and [210] determining of appeals in matters of prize: And whereas, on the 30th day of the month of June, in the year of our Lord 1786, the right honourable Charles Earl Camden, lord president of the council of the said Lord the King, Richard Lord Viscount Howe, and Fletcher Lord Grantley, three of the said commissioners, having heard full information by council on both sides, did, by their interlocutory decree, reverse the decree appealed from, and pronounced the said ship *Hoogskarpell* and her cargo to have been taken by the conjoint operation of his Majesty's ships and vessels employed on an expedition against the Cape of Good Hope, under the command of the said George Johnstone, and of the army under the command of the said William Meadows, on the same expedition, and condemned the said ship, with the unclaimed part of the cargo, as good and lawful prize to the said Lord the King: And whereas Edward Taylor, since deceased, and John Pasley, were duly appointed agents by the officers and crews of the several ships companies of the said squadron, and did soon after the said decree of the 4th day of September 1782, as such agents, cause the said ship called the *Hoogskarpell*, together with the unclaimed goods, wares, and merchandizes taken in and on board the same, to be sold, and did receive divers large sums of money, being the produce of the same, part of which said sums of money was distributed by the said Edward Taylor and John Pasley among the officers and crews of the said squadron under the command of the said George Johnstone, and

the residue thereof now remains in the hands of the said John Pasley, and by him ought to be distributed to the captors aforesaid, in payment of their several shares, in pursuance of the said statute, and of the said proclamation of our said Lord the King: And whereas the said Rodham did, in Easter Term in the 28th year of the reign of our Lord the now King, in the Court of our Lord the King of the Bench here at Westminster, implead the said John Pasley in a certain plea of trespass on the case, on promises, for the purpose of recovering from the said John Pasley his damages by him sustained by reason of the said John Pasley having neglected and refused to pay to him his share of the produce of the said ship, and of the said goods and merchandizes so as aforesaid taken in and on board the same, and so as aforesaid condemned as lawful prize to our said Lord the King, and which said plea is still depending in the said Court of the Bench here at Westminster: And whereas the said commissioners of appeal in matters of prize have not, by the law of this realm, any power or authority to take out of the hands and possession of any agent or agents so constituted as aforesaid, the money arising from the sale or sales of any ship, vessel, goods, wares, or merchandizes, taken from the said States General of the United Provinces, or their subjects, during the said hostilities, by any ship or vessel of war in his Majesty's pay, which have been finally adjudged lawful prize to his Majesty in any of his Courts of Admiralty in Great Britain, or to compel them to bring in the same: Yet the said right honourable Charles Earl Camden, lord president of the council of the said Lord the King, the right [211] honourable Francis Godolphin, Lord Osborne, commonly called Marquis of Carmarthen, to whom the title of the Duke of Leeds has descended, Fletcher Lord Grantley, now deceased, Charles Lord Hawkesbury, and Sir George Yonge, baronet, five of the said commissioners for receiving, hearing, and determining of appeals in matters of prize, not weighing the said laws and statutes of this realm, but contriving the said Rodham to vex, aggrieve, injure, and oppress, and to take out of the hands of the said John Pasley, the surviving agent of the captors of the said ship and the cargo thereof, the monies arising from the sale of the said ship and the cargo thereof, and thereby to prevent the said Rodham from receiving from the said John Pasley his damages aforesaid, did, on the 3d day of May, in the year of our Lord 1788, admonish the said John Pasley personally to bring in an account of sale of the said ship and cargo, together with the proceeds of such part thereof as might be in his hands, power, or possession, within fifteen days, contrary to the laws and statutes of this realm: And although his Majesty's writ of prohibition in this cause to the contrary hath been directed and delivered to the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, on the 10th day of February, in the twenty-ninth year of the reign of our Lord the now King, to wit, at Westminster aforesaid, in the county aforesaid; nevertheless the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, as such commissioners of our Lord the now King as aforesaid, after his said Majesty's writ of prohibition first directed and delivered to them, to the contrary thereof, to wit, on the day and year last aforesaid, at Westminster aforesaid, in the county aforesaid, caused process to be issued against the said John Pasley, to compel the said John Pasley to bring in an account of the sale of the said ship and cargo, together with the proceeds of such part thereof as may be in his hands, power, and possession, in contempt of our said Lord the King, and to the damage, prejudice, and injury of the said Rodham, and contrary to the form and effect of the said customs and statutes: wherefore the said Rodham Home, who sues in this behalf as well for our Sovereign Lord the King as himself, saith that he is injured, and hath sustained damage to the amount of forty pounds, and therefore, as well for our Sovereign Lord the King as for himself, he brings his suit, etc.

And the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, by Robert Dynely their attorney, come and defend the wrong and injury, contempt and damages, and whatsoever else they ought to defend, when the Court here will please to take the same into consideration, and say, that they have not nor have any of them caused process to be issued against the said John Pasley, to compel him to bring in an account of the sales of the said ship and cargo, together with the proceeds of such part thereof as may be in his hands, power, and possession, against the King's prohibition, in manner and form as the said Rod-

ham, who sues as well for our Lord the King as for [212] himself, hath above thereof complained against them, and of this they put themselves upon the country, etc. But for having his Majesty's writ of consultation in this behalf, the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, say, that the declaration aforesaid, and the Matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law to bar the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, from proceeding against the said John Pasley to compel him to bring in an account of the sales of the said ship and cargo, together with the proceeds of such part thereof as may be in his hands, power, and possession; and that they the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, are not under any necessity, nor in anywise bound by the law of the land to answer the same, and this they are ready to verify: Wherefore, for want of a sufficient declaration in this behalf, they pray the judgment of this honourable Court, and his Majesty's writ of consultation to be granted to them, etc.

S. LE BLANC.

And the said Rodham, as to the plea of the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, of which they have put themselves upon the country, the said Rodham doth the like: And the said Rodham, as to the plea of the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, above pleaded, for having his Majesty's writ of consultation in this behalf, says, that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to bar the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, from proceeding against the said John Pasley, to compel him to bring in an account of the sales of the said ship and cargo, together with the proceeds of such part thereof as may be in his hands, power, and possession, and this he is ready to verify: Wherefore, inasmuch as the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, have not answered to the said declaration, nor in any manner denied the same, but altogether refused to admit the verifying the same, he the said Rodham prays judgment, and that the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, may not have his Majesty's writ of consultation, etc.

S. LAWRENCE.

And because the justices here will advise themselves of and upon the premises, (whereupon the parties aforesaid have submitted themselves to the judgment of the Court,) before they give their judgment thereon, day is therefore given here to the said parties until on the morrow of the Holy Trinity, to hear their judgment thereon, for that the said justices here are not yet advised thereof, [213] etc. And as to the trying of the issue aforesaid by the parties aforesaid above joined to be tried by the country, it is commanded to the sheriff, that he cause to come here on the morrow of the Holy Trinity, twelve, etc. by whom, etc. who neither, etc. to recognize, etc. because as well, etc. the same day is given thereupon to the parties aforesaid, etc. On which day come here as well the said Rodham, who as well, etc. as the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, baronet, by their attornies aforesaid, and the sheriff hath not sent here the writ aforesaid, to him in form aforesaid directed, nor done any thing thereon: Therefore, for trying the issue aforesaid above joined, between the parties aforesaid, it is commanded as before to the sheriff, that he cause to come here on the morrow of All Souls, twelve, etc. by whom, etc. who neither, etc. to recognize, etc. because as well, etc. the same day is given thereupon to the parties aforesaid, etc. And because the said justices here will further advise of and upon the premises whereof the parties aforesaid have put themselves on the judgment of the Court, before they give their judgment thereon, day is therefore given to the said parties until on the morrow of All Souls to hear their judgment thereon, for that the said justices here are not yet advised thereof, etc. On which day come here as well the said Rodham, who as well, etc. as the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, baronet, by their attornies aforesaid, and the sheriff hath not sent here the writ aforesaid, to him in form aforesaid directed, nor done any thing thereon: Therefore, for trying the issue aforesaid above joined, between the parties aforesaid, it is com-

manded as before to the sheriff, that he cause to come here on the octave of Saint Hilary, twelve, etc. by whom, etc. who neither, etc. to recognize, etc. because as well, etc. the same day is given thereupon to the parties aforesaid, etc. And because the said justices here will farther advise themselves of and upon the premises whereof the parties aforesaid have put themselves on the judgment of the court here, before they give their judgment thereon, day is therefore given to the said parties until on the octave of Saint Hilary, to hear their judgment thereon, for that the said justices here are not yet advised thereof, etc. On which day come here as well the said Rodham, who as well, etc. as the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, baronet by their attornies aforesaid, and the sheriff hath not sent here the writ aforesaid, to him in form aforesaid directed, nor done any thing thereon: Therefore, for trying the issue aforesaid above joined, between the parties aforesaid, it is commanded as before to the sheriff, that he cause to come here on the day of Easter, in fifteen days, twelve, etc. by whom, etc. who neither, etc. to recognize, etc. because as well, etc. the same day is given thereupon to the parties aforesaid. And because the said justices here will further advise themselves of and upon the premises whereof the parties aforesaid have put themselves on the judgment of the Court here, [214] before they give their judgment thereon, day is therefore given to the said parties from the day of Easter in fifteen days, to hear their judgment thereon, for that the said justices here are not yet advised thereof, etc. On which day come here as well the said Rodham, who as well, etc. as the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, baronet, by their attornies aforesaid, and the sheriff hath not sent here the writ aforesaid, to him in form aforesaid directed, nor done any thing thereon: Therefore, for trying the issue aforesaid above joined, between the parties aforesaid, it is commanded as before to the sheriff, that he cause to come here on the morrow of the Holy Trinity, twelve, etc. by whom, etc. who neither, etc. to recognize, etc. because as well, etc. the same day is given thereupon to the parties aforesaid, etc. And because the said justices here will further advise themselves of and upon the premises whereof the parties aforesaid have put themselves on the judgment of the court here, before they give their judgment thereon, day is therefore given to the said parties until on the morrow of the Holy Trinity, to hear their judgment thereon. On which day come as well the said Rodham, who as well, etc. as the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, bart. by their attornies aforesaid, and the sheriff hath not sent here the writ aforesaid, in form aforesaid to him directed, nor done any thing thereon; and thereupon the said Rodham, who as well, etc. freely here in court acknowledges that he will not further prosecute against the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, bart. upon the issue above joined, between them the said Rodham, who as well, etc. and the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, bart. as to the trespass and contempt aforesaid, or for the damages sustained by the said Rodham, who as well, etc. by reason thereof, but utterly disavows and refuses to prosecute any further against them upon that issue. Therefore let the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, bart. go thereof without day, etc. and the said Rodham be in mercy for his false claims against them as to the trespass, contempt, and damages aforesaid: and the said Rodham, who as well, etc. prays the judgment of the court hereof, and upon the premises aforesaid, whereof the parties aforesaid have put themselves on the judgment of the court here to be given. And because the justices here will further advise themselves of and upon the premises whereof the parties aforesaid have above put themselves on the judgment of the court here, before they give their judgment thereon, day is therefore given to the said parties here until on the morrow of All Souls, to hear their judgment thereon; at which day come here as well the said Rodham, who as well, etc. as the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, bart. by [215] their said attornies; whereupon all and singular the premises whereof the parties aforesaid have put themselves on the judgment of the Court, being seen and fully understood, for that it appears to the justices here that the aforesaid declaration of the said Rodham, in form aforesaid, and the matters therein contained, are sufficient in law to bar the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkes-



bury, and Sir George Yonge, bart. from proceeding against the said John Pasley, to compel him to bring in an account of the sales of the said ship and cargo, together with the proceeds of such parts thereof as may be in his hands, power, and possession; and that the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, bart. ought not to have any writ of consultation in this behalf. It is therefore considered by the court here, that the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, bart. have no writ of consultation in this behalf, and that the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, bart. be thereof in mercy, etc. It is also considered by the court here (signed 19th Nov. 1790), that the said Rodham, who as well, etc. recover against the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge, bart. sixty-nine pounds ten shillings, for his costs and charges by him about his suit in this behalf expended, by the Court here adjudged to the said Rodham, who as well, etc. and with his assent, according to the form of the statute in such case made and provided; and that the said Rodham, who as well, etc. have execution thereof, etc.

Whereupon the said Charles Earl Camden, Francis Godolphin Duke of Leeds, Charles Lord Hawkesbury, and Sir George Yonge brought their writ of error, returnable in the Court of King's Bench; and upon arguing the errors assigned, the judgment of the Court of Common Pleas was ordered to be reversed in Michaelmas term 1791; against which judgment of reversal the present plaintiff in error brought his writ of error, and assigned the general errors; to which the defendants rejoined.

Three questions (it was stated in the case of the plaintiff in error) arose upon this record. The first, Whether a prohibition will lie to the Prize Court for misconstruing an act of parliament?

Secondly, Whether in the present case the Prize Court had misconstrued an act of parliament?

Thirdly, Whether such misconstruction sufficiently appears upon this record?

The plaintiff in error contended that every one of these questions ought to be decided with him; and his counsel (J. Adair, J. Anstruther, S. Lawrence) suggested the following long and able reasons in his behalf:

1st, It is an ancient and essential maxim of the common law, That all courts of special jurisdiction must be limited in the exercise of that jurisdiction, *by such construction as courts of common law [216] give to the law by which they act*; because if they had a latitude to construe at their discretion the law by which they act, they would set themselves above the law. And it never has been disputed, that it belongs to courts of common law to controul the proceedings of all other courts, if they transgress the limits assigned to them. (See *Brymer v. Atkyns*. 1 H. Black. Rep. 164.)

2dly, It is admitted, That where a matter cognizable in a court of common law comes incidentally before a court of special jurisdiction, such court having cognizance of the principal, may also take cognizance of the incident: But this rule must universally be understood with this restriction; provided that such incident be decided and determined by the same rules by which it would have been determined had it been determined by that jurisdiction to which it properly belongs.

3dly, That the question of what is the rule by which any incidental matter arising in courts of peculiar jurisdiction is to be determined, the limits and extent of it, and the exceptions to it, must all be judged of by the rules of the common law; and if a court of peculiar jurisdiction determines (in a question incidentally before it) the extent or limitation of a rule of law differently from what it would have been determined in a court of common law, it is a ground of prohibition, whether the rule has been originally introduced by statute or not.

4thly, Where a right is given by an act of parliament, the act itself must be the object of the jurisdiction of the courts of common law, its extent and limits must be settled by those courts, and by them must its construction be ascertained; otherwise the extent and objects of the jurisdiction of courts of peculiar jurisdiction would depend entirely upon themselves: But where the right given by the act is itself the object of common law jurisdiction, if such right comes in question before a court of peculiar jurisdiction, it can be incidentally only; and it is then peculiarly necessary that it should be determined by the rules of the common law, otherwise the same right might be very differently judged of in one court and in another.

5thly, This principle is distinctly expressed by the learned commentator upon the laws of England, in the following terms, in treating of courts of peculiar jurisdiction: "The courts of common law have reserved to themselves the exposition of such acts of parliament as concern either the extent of these courts, or the matters depending before them; and therefore if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than the common law puts upon them, the King's Courts at Westminster will grant prohibitions to restrain them." 1 Comm. p. 84. These propositions are confirmed by two cases from 2d Rolle, p. 303. *Placita* 27 & 28, where the principle here laid down was expressly affirmed, and prohibitions were granted because the spiritual court were about to construe the statute of distributions otherwise than the courts in Westminster-hall would have interpreted it. *Placita* 27, "Si un administration [217] soit grant al plus prochain de sanke, & sur ceo un appeale est sue al delegates, & la ils intend a revoke le dit sentence, et a ceo grant al auter que n'est plus prochain del sanke per nostre ley mes est per l'ecclésiastical ley; un prohibition gist par ceo que ceo esteant ordin per statut doit estre interpret selonque nostre ley. M. 21 Ja. B. R. Enter Wingate & Fitch resolve; & prohibition pur ceo que l'administration fut grant al frere del demy sanke; & sur l'appelle al delegates ils incline a ceo repeler & a ceo grant al frere del entier sanke, & pur ceo prohibition grant a tryer la ley sur ceo per nostre ley." *Placita* 28, "Si administration soit grant al un cosen del demy sanke, & sur ceo un suit est per un autre que pretend d'estre un cosen del entier sanke lou son pere fuit un bastard per nostre ley & appelle al audience, & la ils intend a repeler le premier administration, & ceo grant al fils del bastard selonque l'ecclésiastical ley un prohibition gist per ceo que le statute est d'estre interpret selonque nostre ley. H. 22 Ja. B. R. Prohibition grant enter." These cases are admitted to be law by Lord Hale in the case of *Sir William Juxton v. Lord Byron*, 2d Lev. p. 64. Although in that case the prohibition was denied, it was denied only because the ecclesiastical court had proceeded to interpret the act in question according to the rules of the common law, and not contrary to these rules; and the Court entertaining the question, whether the construction put upon an act of parliament in that case was a true or false one? proves they thought themselves competent to enquire into that point, and that a prohibition would have gone if the construction had been false, because it would have been nugatory to discuss whether a construction was right or wrong, if its being either the one or the other could have made no difference in the decision. These cases from Rolle, and that opinion of Lord Hale's, are recognized and acknowledged by Lord Mansfield and the whole court of King's Bench, in the case of *Full v. Hutchins*, Cooper, p. 424. in the following words: "When matters which are triable at common law arise incidentally in a cause, and the ecclesiastical court has jurisdiction of the principal point, this Court will not grant a prohibition to stay trial: For instance, if the construction of an act of parliament comes in question, or a release be pleaded, they shall not be prohibited, unless the court proceed to try contrary to the course and principles of the common law, as if they refuse one witness, etc. And this is expressly laid down by Lord Hale in 2 Leo. 64. *Sir William Juxton versus Lord Byron*."

6thly, But in order to support the judgment of the Court of King's Bench, these cases are now denied to be law, although they have the sanction of centuries and the opinions of eminent judges in their favour; and their authority is denied, not on account of the position they contain being false, but on the grounds of criticism on the language in which they are reported. It is said, that the language of the report is, that the court intended to revoke the administration, and that no court ever was prohibited for what it [218] intended to do. In the first place, the cases do not say that the court intended; the words are, "If an administration be granted to the nearest of blood, and upon this an appeal is sued to the delegates, and there they intend to revoke the said sentence, and to grant this to another, etc. etc." Now as prohibitions may be directed either to the parties or the judge, there is even no inaccuracy of language in applying the words *they intend* to the parties to whom the prohibition might have been directed, and the words of a prohibition to the party are "Prohibemus tibi ne sequaris placitum tuum in cur, etc." the meaning of which is to prohibit the party from doing what *he intended* to do, i.e. to follow up his suit. And for aught appears in the report, these might have been cases where the prohibitions were directed to the party. 2dly, The words of the report are the common and

formal words used in the suggestion, viz. "*daily threatening to condemn*," "*endeavouring and attempting to condemn*, &c." Now, although the forms of pleading do not make the law, but are only evidence of what it is, yet a report of a case does not cease to be an authority because it is couched in the words used in the pleadings. 3dly, The language is not peculiar to the case in question, but is the common language of other cases upon the same subject, and which never have been contradicted or denied: Of this the case of *Hill & Uxor v. Bird*, Alleyn 56. is a strong example, and for which reason the plaintiff in error inserts it at length. "Letters of administration of the goods of Sir J. L. were committed by the ecclesiastical court to the wife of Hill, being near to the intestate, and upon suggestion of a suit there by others of equal degree, for distribution of the goods of the intestate, according to agreement made by the administrator, as was pretended. Hill prayed for a prohibition, and it was granted, for the statute wills that administration be granted to the next of kin for their advantage; and when the ordinary hath once executed his power according to the statute, *he cannot alter it*, nor hath any power to compel the administrator to make distribution notwithstanding the agreement; and Hill said, that the court THREATENED to repeal the letters unless he would bring in a true inventory of the estate of the intestate, and give a true account of the administration. To which Rolle said, that the court there may cite her to bring in an inventory and to give an account; but if it should APPEAR THAT THEY GO ABOUT TO REPEAL THE LETTERS FOR NOT DOING IT, you shall have a prohibition, which was not denied by Bacon; and Hale would have had a prohibition against all the cousins, as well those who sued there as others, because the proceedings there were on terms, and the rest may join in a suit when they will; but the court denied to grant any prohibition *quia timet*."

Now from this case the following propositions are clearly deducible:

1st, That it is no objection to the authority of the case, that the reporter uses the phrase, that *the Court threatened to do an act, or that the Court was about to do it*.

[219] 2dly, That when it sufficiently appears by any unequivocal act, that the Court is proceeding to divest rights vested by law, it is a ground of prohibition.

3dly, That where a statute has vested a right in a certain person, as is vested in administrators after administration granted, that right cannot be divested by any construction inconsistent with the construction given to the statute by the courts of common law.

4thly, That the bare suspicion of a party is not a sufficient ground of prohibition, unless the intention be manifested by some act; but that an intention manifested by an act, is a sufficient ground for prohibition.

7th, By the 22d and 23d Charles II. the distribution of intestates effects is directed to be among relations of a certain description.—Suits for the purpose of distribution may accordingly be brought in the ecclesiastical court: It never was denied, that if the ecclesiastical court put a construction upon that statute different from that which would have been put upon it by courts of common law, that a prohibition might issue. It is accordingly expressly laid down by Holt, 1 Williams, folio 49. "If the spiritual court, since the statute of Charles II. shall ATTEMPT a distribution contrary to the rules of the common law, we will prohibit them, for by that statute they are restrained to the rules allowed among us." Now the ground of such prohibitions could only be, that by a misconstruction of the statute, they had deprived persons of the rights given them by that statute.

Therefore, if a right to certain shares of a prize is given by an act of parliament, and that right be divested by a wrong construction given to the prize act, a prohibition ought equally to issue in the one case as in the other.

The same doctrine is laid down in Sir Thomas Ray, folio 496, *Crawley v. Crawley*: The question was upon the exposition of the statute of distributions, and it is there said. "It is a question of great importance. For whatever is determined by the common law to be the true meaning of this act, must be a rule to the ecclesiastical courts; for the courts of common law are intrusted with the exposition of acts of parliament; and we ought not to suffer them to proceed in any other manner than shall be adjudged by the King's courts to be the true meaning of this act." Now all that the plaintiff in error contends for is, that the construction to be put upon the prize act, with respect to the rights given to individuals by that act, is equally under

the controul of the King's courts, with the construction given by the ecclesiastical courts to the statute of distributions; and *that the prize courts shall no more be suffered to proceed in any other manner than shall be adjudged by the King's courts to be the true meaning of the prize act*, than the ecclesiastical court is with respect to the statute of distributions.

8thly, But it is further said, that the prize act is directory only. If all that is meant by this be, that the true construction of the prize act, shall be the rule by which the prize court shall direct itself, when the rights given by that act come incidentally before it, the proposition is indisputably true; but then the question will [220] still remain, What is the true construction, and who is to declare it?—But, if by its being called directory is meant, that prize courts may construe the prize acts as they please, without being subject to prohibition, it is apprehended by the plaintiff in error, that in such sense the act cannot be called directory.

It must be admitted, that in the last sense, the statute of distributions is not directory, for it cannot be disputed that a prohibition would lie for a misconstruction of that act. Now a bare perusal of the statute of distributions will satisfy any person, that in its terms it is infinitely more directory than the prize act. The first part of it gives power to the ecclesiastical court to take bonds from administrators, *directs* the form of the bond, *directs* how administrators shall be called to account, and how the surplus shall be distributed. There might be some reason for concluding it was peculiarly meant to *direct* the conduct of the ecclesiastical court and its judges, for to them and them only it addresses itself.

The prize act, on the contrary, in those parts of it which declare to whom the property of prizes shall belong, does not mention the prize court; it contains a pure parliamentary grant of property belonging to his Majesty; in one case to the navy, and to the owners of privateers in another. So far from directing the prize court, it vests the right absolutely after the prize court have done with the subject; i.e. after they have declared the subject to be lawful prize. This parliamentary grant therefore must, like every other, be determined upon by the King's courts. But further, the prize act vests an interest absolutely, which, when vested, may be transmissible like any other interest, and may be made the subject of demand and litigation in the ordinary courts of law. It is therefore a fallacy to state an act of parliament to be directory merely to courts of peculiar jurisdiction, when by it rights are absolutely vested, at a period when the court supposed to be directed has done with the subject, and when the rights may be and frequently have been the subject of ordinary judicature. If the act were directory merely, the provisions of it would only be taken notice of in the court which it is supposed to direct; and, if this were true, it would follow, that a right to a share of a ship adjudged lawful prize, could only be sued in the prize court. Now the reverse is true, for it is only incidentally to the question of prize that the rights of individuals to their shares can be tried there at all.

9thly, Before the prize act, all prizes, when lawfully condemned, became the property of the King. Before that act therefore, questions on the rights of individual captors could not arise. When the act passed, by declaring the property to belong to the navy in certain cases, no new authority was given to the prize court; new legal rights became vested in individuals, and those rights might sometimes incidentally be discussed in a prize court. The rights themselves, their extent and limits, are now more properly cognizable in a prize court than any where else.

The only question is upon the effect and extent of a parliamentary grant, which is more purely the subject of common law judicature than of any other; and what the plaintiff in error contends is, that the right vested in him by that parliamentary grant should not be divested by any other construction of that grant than the courts of law will give it. He does not desire to draw a question of prize, or of who are the captors, from the exclusive jurisdiction of the prize court; but he contends that after the prize court has exercised its jurisdiction as to the question of prize or no prize, the rights which are vested in him, and the cases in which his Majesty's right is conveyed to him, shall be judged of by the rules of the common law.

The exclusive jurisdiction of the prize court is confined to questions of prize, and who are the captors. Before the prize act, as all captors belonged to the King, the moment there was an adjudication of lawful prize to the King, the property was completely vested in him *jure coronae*, and might be by him recovered or conveyed

from any persons in whose hands it might be, or to whom the crown might wish to convey it, by the ordinary forms by which the crown either conveys or recovers property, but certainly without any necessary application to a prize court. The prize act declares, that in future, all that property which by the adjudication of prize became vested in the crown, should by the same adjudication be vested in the description of persons mentioned in the act. The act does not mention the prize courts; it does not operate upon subjects within its jurisdiction properly vested in the crown *jure coronae*; the act affects the property at a period when the prize court is completely *functus officio*. With regard to it, it seems difficult therefrom to conceive how such an act, so operating, can be called directory to the prize court.

But a bare inspection of the act itself decides the question. It never mentions the prize court; it directs the mode in which the agents shall be appointed, how they shall distribute the property, imposes duties upon them, enforces these duties in the same manner as other legal duties are enforced, imposes a variety of penalties to be recovered in Westminster Hall, without any other direct means of enforcing any part of the act than through the medium of an action at law. It therefore seems impossible, by any law construction, to call this act directory to the prize court, which does not affect any thing which is the subject of the prize court's jurisdiction, and which does not apply to any case in which it can directly and immediately give relief. This leads to the second question, Whether in this case the act in question is misconstrued?

*Second Question.*—The prize act enacts, that the flag officers, commanders, and other officers, seamen, mariners, and soldiers, on board every ship and vessel of war in his Majesty's pay, shall have the sole interest and property of and in all and every ship and vessel, goods and merchandize, which they had taken since the 20th day of December in the year of our Lord 1780, or should thereafter take, etc. after [222] the same should have been adjudged lawful prize to his Majesty, etc. to be divided in such proportions and after such manner as his Majesty, by his proclamation of the 27th day of December 1780, might have already directed and ordered, or as his Majesty, his heirs and successors, should think fit to order and direct, by proclamation or proclamations thereafter to be issued for these purposes.

The facts to which this law is to be applied, as they are to be collected from the pleadings, are as follows:

That George Johnstone, esq. was commander in chief of a squadron to be employed upon an expedition against the Cape of Good Hope:

That General Meadows was commander in chief of the land forces that were to be employed upon the said expedition:

That certain instructions were given by his Majesty for the division of booty taken upon the expedition against the Cape, which it is not necessary to state, because the pleadings afterwards state that neither the army nor the navy ever did make any attack upon the Cape of Good Hope:

That the squadron having on board the said General Meadows and a body of land forces, did in an open unfortified bay, called Saldanna Bay, at a great distance from the Cape of Good Hope, seize as prize a ship called *Hoogskarpell*.

Such being the facts of the capture, the pleadings state certain proceedings in the Court of Admiralty, where, upon the 4th September, the said ship was condemned as prize, reserving the question, Who were the captors?

They then state a sentence, pronouncing for the interest of the army, agreeable to the spirit of his Majesty's instructions.

And lastly, there is stated a decree of the court of appeals reversing the above sentence, and declaring the ship in question to have been taken *by the conjoint operation of his Majesty's ships and vessels employed on an expedition against the Cape, and of the army under the command of the said William Meadows* upon the said expedition, and *condemned the ship as lawful prize to the King*; by which is understood that it belonged to him *jure coronae*, and was not disposed of by the prize act.

The plaintiff in error admits that all questions of prize, and who are the captors, exclusively belong to the prize court of admiralty; but he contends, that after that court has decided the ship in question to be prize, and declared who are the captors, that court could not vary the rights of these captors, as vested in them by the prize act, without misconstruing that act, and making themselves liable to a prohibition.

2dly, The sentence of the court of appeals means to declare, that whenever there is a conjoint operation of the army and navy, the case is out of the prize act, and

vests in the King *jure coronae*, and may by him, at his pleasure, be given either both, or to neither: A proposition which is certainly new, and very alarming to the naval service; for if the prize court has a latitude to take whatever cases it thinks fit out of the prize act, that act, which is [223] the only security the navy have for their property in the prizes which they take, may be reduced to a dead letter. The act declares, that the descriptions of persons mentioned in it are entitled to whatever they take, and vests the property in them *instantly* after the thing is declared prize. The sentence does not deny the navy to be captors; on the contrary, it expressly admits that they are captors, although it states them to be so along with others. And although the act vests in them every thing they do take, yet the decree infers that they are entitled to no part of the prize; not because they have not taken the prize, but because they *have taken it* conjointly with others.

3dly, The questions, therefore, which are raised upon the construction of this act, and which are the grounds of the prohibition, do not interfere with the exclusive jurisdiction of the prize court in matters of prize, or of who are the captors, but are simply, 1st, Whether it appears upon the pleadings in this cause that the descriptions of men mentioned in the prize act did solely take the prize in question, and whether that fact be not affirmed by the sentence and the pleadings? If so, then it is a misconstruction of the prize act to vest in the King *jure coronae* that which the prize act vests in them. And, secondly, whether by the true construction of the prize act, the navy are entitled to nothing, except in cases where they solely take?

4thly, The first of these questions is a question of fact; and if it appears that the army gave no other assistance than as being on board ship, then they are clearly within the description of soldiers on board mentioned in the act; and the navy, or the soldiers on board, are clearly entitled to the sole property. It ought always to be remembered, that the construction contended for by the defendants in error leads to the total exclusion of the navy, while that contended for by the plaintiff gives a vested right to the army as well as to the navy; and in the present case the common soldier would receive a larger share if the construction contended for by the navy were to take place, than he can do under the other, even if his Majesty should be graciously pleased to divide the prize according to the spirit of the instructions.

5thly, In deciding the question between the parties in error, the facts must be taken as they appear upon the record; but it is a considerable satisfaction to the plaintiff, that the real fact as it happened corresponds exactly with that stated upon the pleadings. The soldiers on board the ships were, by the express orders of the admiralty, subject to naval and not to military martial law; they were borne upon the ship's books; they never were landed and formed into a distinct army; if they had, they must have been struck off the ship's books, and ceased to be any longer under the command or direction of the naval commander.

The attack was made for the purpose of capturing ships at sea. It was planned, undertaken, and conducted, under the directions of Commodore Johnstone, the whole responsibility of the measure being thrown upon him by the general. Some troops were ordered to land, undoubtedly not to act as a separate army, but to assist in a naval capture, by preventing the Dutch from setting fire to their ships. In point of fact, no troops were landed till several hours after the service was performed. It never can be contended that this was so distinct a land service as to form an operation of the army as such. It was entirely for a naval purpose, and was a service performed by soldiers on board ship acting as such, and which might have been, and often is, performed by sailors themselves.

If it could be contended with any decree of justice and truth, that the army acted as such distinctly, it would lead to a strange conclusion; for the effect of it would be, to deprive by far the greater part of the army of all share whatever. It never could be argued, that any part of the army acted distinctly except that part which was landed, and therefore the only claim which by far the greater part of the army can have, is as soldiers on board, of which claim they too are deprived as well as the navy, the whole being supposed to belong to the crown *jure coronae*.

The plaintiff in error does not state these facts from any sort of wish not to confuse himself strictly to the case as it appears upon the record; but it must be a satisfaction to every court, to feel that they are not called upon to put any other construction upon a record than is consistent with the truth of the case, and that the question raised by the pleadings arises from a true state of the transaction.

Such being the fact, independent of legal form, let us now see how it stands upon the pleadings, and what is admitted or denied upon the record itself.

It stands admitted, that the squadron, *with a body of land forces on board*, did take this prize in an open unfortified bay on the coast of Africa. It can make no possible difference upon the case, that the capture was in a bay, instead of being 100 leagues from the shore.

It is admitted, that the capture was at sea by ships, and not at land. The sentence or decree of the court of appeals does not contradict this, on the contrary it is consistent with it. Being on board the fleet, the army was aiding in the capture, it increased the force of the ships; and there is no more correct way of describing a capture at sea by ships having an army on board, than stating it as a conjoint operation of army and navy. If the plaintiff in error is correct in this state of the fact, as it appears from the pleadings, this is the common case of a capture at sea by ships having soldiers on board, a case expressly provided for by the prize act: And the proposition, that the description of persons mentioned in the prize act did solely take the prize in question is correctly true, and the misconstruction is apparent, by deeming that to belong to the crown which has been taken by the description of men mentioned in the prize act, and depriving them of the rights thereby vested.

6thly, But the plaintiff in error contends, that even if he should [225] admit that the navy were not the sole takers, yet the conclusion drawn by the court of appeals, that this is a case out of the prize act, and that the property vests in the crown *jure coronae*, would be equally ill-founded, and contrary to the prize act. The sentence, it has been already observed, expressly admits the navy to be captors, but is understood to deny their being sole captors, and asserts, that, upon that account, nothing vests by the prize act. But the act itself does not say one syllable about sole captor; it does indeed say, that the descriptions of persons mentioned shall have the sole property of what they do take; and it may be a question what it is that they have taken, but it never can be disputed that a right to what they do take is vested by the prize act; yet it is this very right which the sentence divests, and declares the right and property to be in the crown.

7thly, The prize act contains a parliamentary grant to the navy of whatever they take, without the least reference to the manner of the taking, and in all cases when there is capture by ships, vests an interest after the thing is declared prize; any sentence, therefore, which admits that the navy are captors of any thing, and at the same time denies that any right is vested in them by the prize act in consequence of the capture, evidently defeats and misconstrues the act in question. The act evidently meant, and actually does take every right from the crown in every case where the navy are captors. The sentence construes the act to leave every right in the crown, except in the single case where the navy are the sole captors.

8thly, The prize act contains a clause, vesting in the owners and the crew of a privateer with a commission the whole property of what they take from the enemy. There is no reason why this clause should not equally be confined to such prizes as such privateer shall solely take, as that the former clause relating to the navy should be so confined in its construction; and if such meaning is put upon both clauses, then, by the same reasoning which is attempted in the present case, viz. that neither are entitled to any thing unless they solely take both king's ships and privateers, will be divested of the property in every prize which they jointly take; a construction which, however consistent with the decree of the court of appeals, is totally inconsistent with the uniform practice ever since the prize act had an existence.

9thly, In the case of seizures by custom-house or excise officers, which stand upon a footing nearly similar to captures in war, it never occurred to any person to contend that they lost all interest and property in what they did seize, merely because they were assisted in the seizure by persons having no regular authority to make it; such persons never have been thought entitled to any thing more than *quantum meruit* for their trouble; and yet in that case it might be contended with equal force as in the present, that the officers were entitled only to what they *solely* seized, and that in every other case the property remained in the crown *jure coronae*.

10thly, Till very lately it was understood that the same rule [226] prevailed in cases of capture by a king's ship, and a non-commissioned ship, as still prevails in cases of seizure by a custom-house and excise officer assisted by an unauthorized per-

son, viz. that the whole belonged to the commissioned ship, and that the unauthorized one was only entitled to a *quantum meruit*. That rule has indeed been varied by two cases, and by two cases only, in which it has been held, that although the non-commissioned ship could take nothing for herself, yet she took a share as trustee for the crown. It is unnecessary for the plaintiff in error to dispute the authority of these cases, because, whatever that may be, it is totally inconsistent with the present case, and none of the cases ever contended for what the present case decides, viz. that in such a case nothing whatever vests in the navy; a construction which never has yet in any one instance been contended for, and which is obviously against the declared intention of the act.

11thly, But the present case is infinitely more favourable than the case of a non-commissioned and a king's ship; for this is a case where, under the very words of the act, the army are entitled to a share as soldiers on board; whereas, in the case of a non-commissioned ship and a king's ship, the latter either claims all, and allows a *quantum meruit* to the former, or the supposed capture of the former is held by the non-commissioned ship as a trustee for the crown: It might therefore be, with infinitely more force, contended, that that was a case entirely out of the act, than it can be in the present instance, where the very persons who joined in the capture have a distinct share given them by the act itself; and yet it is upon account of their joining in the capture that it is contended that the *whole* belongs to the crown. This is the case of a conjoint expedition by sea and land forces, and of an operation whereby ships are reduced, which are admitted to be taken on the high seas. General Meadows in his answers acknowledged, that the small party of troops were landed by the orders of Commodore Johnstone, they therefore remained subject to naval martial law. It is hardly possible to figure a case upon which the right of the navy under the act can attach, if it does not attach upon this; and if it attaches at all, it must be upon all which the ships have taken. Fewer or more persons or descriptions of persons may be interested in the division; but the interest, which was vested the moment the capture was declared marine prize, cannot be taken away by any court of justice deciding according to the prize act.

12thly, In the case of Lieutenant Cras and Hughes, *Parke's Law of Insurance*, p. 307, it was solemnly determined, that upon a joint capture by the army and navy, the officers and crews of the ships had an insurable interest, even before condemnation, by virtue of the prize act. But if the construction now put upon the prize act be the right one, that case must be wrong; for if the mere circumstance of a joint capture took the case out of the prize act, and vested the whole in the crown *jure coronae*, no interest possibly could have remained with the navy which it was possible to insure: And it is clear from the whole of Lord Mansfield's reasoning on [227] that case, that he considered the case of a joint capture as within the prize act, and that he considered the case of a capture by ships having land forces on board, as being a case of joint capture expressly provided for by the prize act, which are the points contended for by the plaintiff in error in the present case. The construction therefore which he contends for is not only one which may be put upon the prize act, but is one which actually has been put upon it by a court of common law.

Upon the whole then, the plaintiff in error trusts that he has made it clear,—First, That a prohibition will lie to the prize court for misconstruction of an act of parliament; and secondly, That such misconstruction has taken place in the present case:

1st, Because upon the facts stated, it is admitted that this is the case of a *capture at sea*, where the descriptions of men mentioned in the prize act were the sole captors, and therefore ought to have the sole interest under the prize act.

2dly, That the words of the sentence of the court of appeals do not contradict this: a conjoint operation for the capture of ships at sea by no means necessarily implying that the army acted distinctly as an army, or as contradistinguished from soldiers on board; on the contrary, it more naturally implies, and is more consistent with that assistance which is given by soldiers on board ships acting under the orders of the naval commander, and subject to naval martial law, as was the fact in the present case.

3dly, That if it should be admitted, that the navy were not the sole captors, yet it is a new and dangerous construction of the prize act, to make the right of the navy



to any thing depend upon the circumstance of their being sole captors; the words of the act not warranting any such construction, but giving them the sole interest in all they do take, not in what they solely take only.

4thly, That it is the more unwarranted in this than in any other case, because the very persons whose assistance in the capture is supposed to take the case out of the prize act, have a distinct interest provided for them by the act itself.

*Third question.*—The demurrer admitting in the present case that this is the case of a capture at sea by the squadron with soldiers on board, and the prize act vesting a right in the navy to whatever they take as their sole property, and that right attaching the instant of the condemnation, which in this case has taken place; the question comes to be, has a prize court done any thing to defeat that legal vested right, or to obstruct the plaintiff in the exercise of it? and does that fact sufficiently appear? It is possible to understand the second sentence of the prize court consistently with the vested right of the navy; because, as has been already stated, it does not negative the fact of capture by the navy with soldiers on board; and because it condemns the ship and the unclaimed part of the cargo as lawful prize to the king, which certainly may be understood consistently with a sole right in the persons described by the prize act, for by it [228] condemnation as lawful prize is necessary in order to vest any right under it. Taking it therefore merely upon the sentence, it might be said, that it did not sufficiently appear upon the pleadings that the prize court had misconstrued the act, because their sentence may be understood to support and adopt the very construction contended for by the plaintiff in error.

It is however impossible to disguise, that the prize court, in giving that sentence, meant to declare, that the present was a case out of the prize act; and by condemning it as lawful prize to the king, it was meant to declare, that it belonged to him *jure coronæ*, and was disposable by him. The whole arguments, both of the counsel and of the Court, proceeded upon the idea, that this was a question upon the construction of the prize act, and that they meant to construe it so as to exclude the right of the navy. At the same time, had it stopped with the sentence, it would have been difficult for the plaintiff to have made out a case of misconstruction upon the face of the record, so as to entitle him to a prohibition.—But the prize court has issued a monition, which establishes clearly what they meant by the sentence, and the construction they meant to give to the prize act, divesting any right given by that act to the navy, and obstructing them in the recovery of what the navy conceives to be their legal vested right.—The monition directs the agent to bring in the accounts of sales, together with the proceeds which may be in his hands. If the navy have no right, then their agent has nothing to do with the prize; and upon that supposition, the monition may be very properly issued; but the monition is utterly inconsistent with a vested right in the navy to any thing, and therefore if any right is vested by the act, this monition defeats it.—The issuing it can only be grounded upon a misconstruction of the law; and it being stated in the declaration, sufficiently shows to the Court that such misconstruction has taken place.—There is no instance of any monition to agents duly appointed, issued by the authority of the Court, and without any application from the parties, whose agents they are, where the ship has been adjudged *lawful prize*, and this adjudication not appealed from.—When the right is vested, the agent must follow the directions of the act with regard to distribution. To take the proceeds of the prize out of his hands, is to take it out of the hands in which it has been placed by those legally entitled to it, against their will, and without their desire, and to defeat the whole provisions of the prize act.

The whole duty of the agent is directed by the act; he is to make sales and appraisements; to make payment in a variety of cases; he is subject to actions at common law for the shares of the prize; he is in other cases by the act furnished with a defence to such actions. The clear intention of the act is, that the distribution of the interest in the prize, after it is so adjudged, is to be managed like the distribution of any other legal right, according to the laws, by an action in the courts of law: By taking the proceeds of the prize into the hands of the court all these provisions [229] are defeated. The individuals cannot sue the court of admiralty, or bring an action against the lords of appeal; they have no redress against the register; he cannot be compelled to make distribution; he is not bound by the provisions of the act. The issuing the monition is therefore totally inconsistent with the idea of any

right in the navy. If they have such right, which the plaintiff in error apprehends he has proved them to have, and if that right is vested by the prize act, which is incontestably is, if it exists; then this monition proves, that the prize court has defeated that right, has interfered with the duty of the agent, and subverted the law as between agents and captors, by taking the property out of the hands where the law has placed it, subject to actions in Westminster Hall, and placing it in hands subject to no such action, and not answerable to that jurisdiction. The plaintiff in error therefore contends, that there is a legal right vested in him by the prize act, that that legal right is sufficiently stated in the face of his declaration, and that the construction put upon the prize act by the monition and sentence defeats that right, and obstructs and prevents him in recovering it, and therefore that he is entitled to judgment.

The counsel (T. Erskine, G. Rooke, S. Le Blanc) for the defendant in error relied on the principles laid down by the Judges of the Court of King's Bench, in reversing the judgment of the Court of Common Pleas; and shortly stated the following reasons for affirming that judgment of reversal.

1. The proceeding complained of by the declaration as a ground of prohibition is a proceeding of a prize court, in a prize cause, after sentence, for the purpose of carrying that sentence into effect. But it is a settled rule in granting prohibitions, that after sentence the courts of common law will not grant a prohibition to inferior courts, unless the want of jurisdiction appear on the face of the libel. In the present case the subject is peculiarly within the jurisdiction of the prize court; the question of prizes and all its consequences belonging exclusively to that court. (*Hutchins v. Full Cowper* 422; *Le Caux v. Eden*, Dougl. 594; *Lindo v. Rodney*, Ibid. 613; *The King v. Broom*, Carth. 398; *Brown v. Franklin*, Carth. 474.)

2. The question who are the captors is subject solely to the prize jurisdiction: the sentence of the court of appeal, stated in the declaration, has decided that question; their sentence is conclusive, and no averment can be admitted contrary to it: for an error in the sentence of a court having jurisdiction over the subject is not ground of prohibition, but only of appeal. That sentence has determined the capture to have been made by the army, as an army, and by the navy; and it became a necessary consequence of that sentence, that the proceeds of the prize should be taken out of the hands of the agent appointed solely by the navy, and be brought into court to abide the sentence; for otherwise the court of appeals would have the exclusive power of giving a judgment, which, when given, they could not enforce.

3. The court of appeals, having, by their sentence, decided against the sole claim of the navy, that the capture was by the army and navy jointly, the same is not a capture within the prize act 21 G. 3. c. 13. which gives the sole interest to the navy in all ships taken by them, but which cannot be construed to give to [230] them the sole interest in ships taken jointly by the army and navy under their respective commanders, consequently the navy cannot, under that act of parliament, support a legal right as vested in them against the crown, nor can their agent, appointed solely by them, claim to retain the whole proceeds of the capture, independent of the control of the prize court.

Lastly. But, whatever construction a court of common law might put upon the above act of parliament, if the subject of prize were within its cognizance, the defendants in error humbly contend that the court of prize, to whose jurisdiction the subject solely belongs, having determined the present case not to be within the act, it is not now competent to a court of common law to examine that question.

ACCORDINGLY, after hearing counsel four days, the following question was put to the Judges:

"Whether the declaration is sufficient in law to bar the defendants from proceeding against John Pasley, to compel him to bring in the account of the sales of the ship and cargo, together with the proceeds of such part thereof as may be in his hands, power, and possession?" (See 2 H. Black, 533.)

And the Judges, having taken time to consider the said question, the Lord Chief Justice of the Court of Common Pleas (Eyre), delivered their unanimous opinion thereupon in the negative.

Whereupon, it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench, reversing a judgment of the Court of Common Pleas, BE AFFIRMED: and that the record be remitted, etc. (See MS. Jour. *sub an.* 1795.)

## [231] PROMISSORY NOTES AND BILLS OF EXCHANGE.

CASE 1.—JOHN DUNBAR, and others,—*Appellants*; ROBERT WILSON,—*Respondent* [25th March 1763].

[Mews' Dig. ii. 1549.]

The holder of a note delivered to him without indorsement, after it is become due and noted for non-payment, shall not be staid by injunction from enforcing a judgment at law, obtained by default.

From the following statement it will appear that this judgment is not likely to be considered as a precedent for any material purpose.

The appellant Dunbar employed one Sylva as his broker in some illegal stock-jobbing transactions; and indorsed to him a note (drawn by the appellant Scandrett, payable to the appellant Goble, and by him indorsed to Dunbar) for the balance between them. This note not being paid when due, was returned to Dunbar, who paid Sylva part of the amount in money, and delivered him a new note for the remainder; (drawn by Dunbar, payable to Goble, and indorsed by Goble and Scandrett). Sylva delivered this note, without indorsing it, to Lejay and Chamier, who (seven weeks after it became due *and had been noted*) delivered the same, also without indorsing it, to the respondent, to whom they were indebted in a much larger sum than the amount of the note.

The House of Lords AFFIRMED an Order of L. Northington C. for dissolving an injunction, which prevented the respondent proceeding at law to enforce judgments obtained by default against the appellants.

See the case of *Brown v. Davies*, 3 Term Rep. K. B. 80. that where a note is *indorsed* after it is due, *and appears on the face of it to be dishonoured*, it shall be left to the jury *on the slightest circumstances* to presume fraud. See also *Banks v. Colwell*, and *Taylor v. Mather*, there cited.

Michael Lejay and Henry Chamier of London, merchants, being indebted to the respondent in a much larger sum of money than the value of the note in question, they, or one of them, on the 10th of January 1762, in part payment of the same, *delivered* to the respondent the following note; viz.

£610 0 0

London, August 31, 1761.

Ten weeks after date, I promise to pay to Martin Goble, esq. or his order, six hundred and ten pounds, value received.

John Dunbar.

Which note appeared to be indorsed by Martin Goble and Christopher Scandrett, and for which the respondent paid a valuable consideration, by giving Lejay and Chamier credit in account for the amount thereof.

Soon after the note was thus passed to the respondent, he carried it to the appellant Dunbar's compting house several times; and being there trifled with by Dunbar, or his agents, who refused to pay him the note, the respondent, in Hilary term 1762, brought three several actions in the Court of King's Bench against the appellants, and held them to bail, and declared against them in those actions upon this note.

In Easter term following, the appellants filed their bill in the [232] Court of Chancery, against Isaac Fernandes da Sylva, Andrew Harrison, John Harrison, Robert Bagshaw, the respondent, and the said Michael Lejay and Anthony Chamier; stating, that in the months of May, June, and July, 1761, the appellant Dunbar employed Sylva as a broker, to purchase for him, at a future day, a large quantity of subscriptions for raising the supplies granted by parliament for that year; and that on making up their accounts for those months, of the differences in ready money, Dunbar gave several notes to Sylva for the same, and amongst others, a note, dated in June 1761, drawn by Scandrett, payable to Goble, for £910, and indorsed by Goble to Dunbar, by him to Sylva, and by Sylva to Messieurs Harrisons and Bagshaw.—That the note not being paid when due, was returned to Dunbar; who, on the 31st of August 1761, paid Sylva £300 in part, and delivered to him a new note for £610, residue thereof, which was the note above-mentioned, drawn by Dunbar, payable to

Goble ten weeks after date, and indorsed by the appellants Goble and Scandrett—That Sylva delivered this note for £610 to Lejay and Chamier, without indorsing it: who, on the 1st of January 1762, seven weeks after the note became due, and had been noted, delivered the same also, without indorsing it, to the respondent; and that such deliveries were colourable, and without real consideration. That the note was given upon an unjust and illegal contract, and was only a stock-jobbing note: and therefore the bill prayed an injunction to stay proceedings at law in the several actions, and to have the said note for £610 delivered up to be cancelled.

The respondent put in his answer to this bill, and denied that he knew or ever was informed, save by the bill, that the note was given on account of any subscription, or stocks; and said, that he was an entire stranger to the transactions between the appellants and Sylva; that he received the note from Messieurs Lejay and Chamier, who were then actually indebted to the respondent in much more than the amount thereof, in discharge of part of such debt; and denied, that he knew from whom Lejay and Chamier had the note; but insisted, that, by taking the same of Lejay and Chamier, he (the respondent) *bona fide* paid a full consideration for the note, by giving them credit in account for the amount thereof; and denied the whole equity of the bill.

In Hilary term 1762, the respondent obtained three several judgments in the said actions, *by default*, and thereupon executed writs of inquiry, and signed final judgment in each cause, on the 4th of May following; upon which the appellants brought a writ of error in parliament in each cause, and having transcribed the records, were ordered to assign errors on a certain day, which they not having done, the said writs of error were thereupon non-pross'd, and £20 costs in each cause awarded to the respondent, and the records remitted back to the Court of King's Bench, the execution might be had of the said judgments.

The appellants, on coming in of the respondents answer, applied by motion on the 24th of May 1762, for an injunction; [233] when his honour the Master of the Rolls then sitting for the Lord Chancellor, upon hearing counsel on both sides, was pleased to order, that an injunction should be awarded against the respondent's proceedings at law on the note in question, until the defendant Sylva should have put in his answer to the appellants bill, and until the further order of the court.

Sylva having put in his answer, the respondent obtained an order, on the 19th of January 1763, to dissolve the injunction, unless cause; and on the 19th of February following, the appellants shewed cause before the Lord Chancellor Northington, against dissolving the injunction; but his lordship disallowed the cause, and ordered the injunction to be dissolved.

From this order the appellants appealed, insisting (C. Yorke, C. Ambler), that the note in question was given for differences of subscriptions for the year 1751, pretended to have been bought by Sylva the broker, in his own name, by the order and on the account of the appellant Dunbar, for the June payment; but it appeared, that those subscriptions were neither delivered or assigned to Dunbar, nor was he able to pay for them; that the whole was a fictitious, speculative transaction, and a gross fraud and imposition on Dunbar; but if real, as those subscriptions were public securities, deliverable and assignable, the transaction was void to all intents and purposes, by the act 7 Geo. 2. c. 8. intituled, "An act to prevent the infamous practice of stock-jobbing." That Lejay and Chamier were not *bona fide* purchasers of the note, for a valuable consideration, but took the same from Sylva, without his indorsing it, as a further security for a debt of £508 15s. for securing which, they had before taken a note, under the hand of the appellant Dunbar, for that sum, dated the 31st of July, payable to Sylva, or order, in six months, with assurance from Sylva that the money would be paid sooner; and in case the money upon it was not received, the note was to be returned to Sylva. That this note was delivered by Lejay and Chamier to the respondent, who was Chamier's father-in-law, about six weeks after it became due, and after it had been noted, and without being indorsed by either of them, because no consideration was paid by the respondent at the time of the note being delivered to him; nor did he say that he paid a full and valuable consideration for it, but only that Lejay and Chamier were indebted to him in much more than the amount of the note. That the contract on which the note was given, being null and void to all intents and purposes, the note was so also; and especially

in the hands of one, who only pretended to have taken it in account upon credit, and consequently not as a purchaser, but subject to all the equity of fraud, or want of consideration, with which it was originally affected. That the appellants were proper, and even under a necessity of resorting to a court of equity for a discovery of the transactions, and to have the note delivered up; no part of this relief being obtainable in a court of law. That the merits of the appellants case had not been, nor could be heard in the actions brought upon the note, and it was not only of the utmost consequence to the appellant Dunbar, but was also of general and great importance to the public, to have the matter discussed upon the merits; as a means of preventing the like iniquitous practices of brokers for the future. That upon the motion for continuing the injunction, the appellant Dunbar offered, by his counsel, to pay the money recovered on the judgment into the bank, in the name of the accomptant general of the Court of Chancery, to wait the event of hearing the cause in that court; so that the respondent could not be prejudiced, if the merits of the case were in his favour; and if they were not, it was highly unjust, and against conscience, that he should have execution upon a judgment obtained by default.

On the other side it was said (F. Norton, W. de Grey), that notes or bills given for the purpose mentioned by the appellants, upon the sale of new stocks, subsequent to the act of 7 Geo. 2. at a future day, by a person not actually possessed of such stock, and paid away for a valuable consideration to persons unaffected with notice of the transaction, are not void by law, nor made void by that statute; which only made void *the contract* relative to stocks then in being, and as between the parties themselves, and inflicted penalties on them, but never meant to affect innocent persons; and by the act of 2d Geo. III. c. 10. for raising by annuities the sum of twelve millions, that sum was to be raised at nine different times, and receipts given at the bank for the same, and such receipts were made assignable at any time before the 5th of December 1762, and were not to be made stock till the whole payments were completed; so that if such subscriptions were within the act of 7th Geo. II. at all, they were not within it till they became stock; and the appellant Dunbar, as well as a great many other persons, purchased subscriptions for a future day of payment, under an apprehension that they would sell for an advanced price at the time of delivery; but the event proving otherwise, he would now endeavour to invalidate his own contracts. But though such notes should be deemed within the act of 7th Geo. II. it would not follow that the note in question was so, that note *not having been originally given upon any such contracts or dealings in stock*; but the same, together with the sum of £300, was given and paid by the appellant Dunbar, in discharge of a note of £910, and was a new and different security, independent of any such contract. That if this note could be considered as within the act of parliament, advantage might have been taken thereof at law; and there were no equitable circumstances, to entitle the appellants to any relief in a court of equity; for the respondent had denied by his answer, that he knew or ever heard of any of the transactions between Dunbar and Sylva, or that the note was negotiated from Sylva to Harrisons and Bagshaw, or that he knew from whom Lejay and Chamier had the same; but that he took the note from them, in part payment of a much larger sum which was then due to him, and gave them credit in account for the same. It was therefore conceived, that a court of equity ought not to give any relief against the respondent; it being an invariable rule [235] in courts of equity, not to interpose to the prejudice of persons who are purchasers for valuable consideration, and having no notice of any claim or interest that any other persons have in or against the thing so purchased. That it would be injurious to trade and dangerous to credit, and affect the currency of negotiable notes and inland bills of exchange, and might hurt many innocent persons, if negotiable notes, originally given for subscriptions at a future day, or to answer any difference in the price which happened thereon, and indorsed to others for valuable consideration, without notice upon what account such notes were given, should be deemed void in the hands of honest and *bona fide* purchasers; for in that case, no person would be safe in accepting any note or bill whatever in the course of trade or merchandize, unless he knew the consideration for which such note was given.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the order therein complained of, affirmed. (Jour. vol. 30. p. 375.)

And it appearing by the answer of Isaac Fernandes de Sylva put in to the appellants bill, that he had grossly misbehaved himself in the business of a broker, in not keeping books of the contracts made by him, pursuant to the act of 7 Geo. 2. c. 8. it was ORDERED, that it should be recommended to the court of the Lord Mayor and Aldermen of the city of London, to cause the bond given by him for performance of his duty as a broker, to be put in suit against him for his misbehaviour; and further to censure him for the same, as they were enabled and ought to do, consistently with law and justice. And it was ORDERED, that a copy of this order should be sent to the Lord Mayor of the city of London.

CASE 2.—THOMAS GIBSON and JOSEPH JOHNSON,—*Plaintiffs* (in Error); ROBERT HUNTER,—*Defendant* (in Error).

[This cause came before the House of Lords, *first* (June 6, 1793) on appeal from the judgment of the Court of King's Bench on the *demurrer to evidence*: and *secondly* (June 2, 1794) [see *post*, p. 1064] on appeal from the judgment of the same Court on the *bill of exceptions* to the evidence, given on the trial had in consequence of the *venire de novo* awarded by the House of Lords on the first appeal. The determinations of the House, on the technical points on which those appeals were grounded, are stated below under their several dates. But it will probably be gratifying to the historical as well as legal reader, that the Editor should explain, as concisely and accurately as may be, the general rule which seems now to be fully established from all the circumstances of this and preceding cases; together with the origin and particulars of those cases.

The general rule may be thus stated: "A bill of exchange, payable to a *fictitious payee* or order, and indorsed in his name, by concert between the drawer and acceptor, is to be considered as a bill payable to *bearer*; in an action by an innocent indorsee for a valuable consideration, either against the drawer or acceptor of the bill."—The grounds of this rule may be gathered from the reasons for the defendants in error, in the case of *Gibson et al. v. Minet et al.*; (*ante* vol. ii. p. 60, 61; 1 H. Black. Rep. 582, 3;) It is there said that "It is not necessary to the validity of deeds or [236] contracts that they can in all cases operate according to the words in which they are expressed: When the rules of law prevent such operation, the instrument may legally operate in a different manner to give effect to the legal intent of contracting parties. The intent of the drawer and acceptor of the bill in question was to make a negotiable instrument; and if for want of an actually existing payee, nominated in the bill, it could not be so indorsed as to be put in a state of negotiability by indorsement, *it may be transferred by delivery*: that being the only other method of negotiating bills of exchange. By thus giving effect to the bill, justice is done between the parties: And the rule affords protection to the fair holder of bills of exchange against frauds, by which they might otherwise be injured; without which protection the currency of bills of exchange would be greatly obstructed, and great inconveniences would arise in commercial transactions." See also the opinion of Lord Loughborough, in *Collis v. Emett*. 1 H. Black. Rep. 320, 321.

This question, which long and greatly agitated the commercial world, arose from the rule of law, "That in an action against the drawer or acceptor of a bill, payable to order, proof must be given of the signature of the payee, being the first indorser; as well as of all those to whom an indorsement was specially made." A bill payable to the order of a fictitious person, and indorsed in a fictitious name, is not a novelty among merchants and traders. See *Stone v. Freeland*, (A. D. 1769, alluded to in 3 Term. Rep. K. B. 176; and reported in 1 H. Black. Rep. 316. n.) *Peacock v. Rhodes*, (Doug. 632.) and *Price v. Neale*, (3 Burr. 1354.)—But in the years 1786, 7, and 8, two or three houses, connected together in trade, entering into engagements far beyond their capital, and apprehending that the credit of their own names would not be sufficient to procure currency to their bills, adopted, in a very extensive degree, a practice which before had been found convenient on a small scale.

So long as the acceptors or drawers could either procure money to pay those bills, or had credit enough with the holder to have them renewed, the subject of these fictitious indorsements never came in question; but when the parties could no longer support their credit, and a commission of bankrupt became necessary, the other creditors felt it their interest to resist the claims of the holders of these bills; and insisted that they should not be admitted to prove their debts, because they could not comply with the general rule of law requiring proof of the hand writing of the first indorser. The question came before the Chancellor (Thurlow) by petition, who directed trials at law; and several were had; three against the acceptor in the Court of K. B. and one against the drawer in the Court of C. P. though not all expressly by that direction. The whole disclosed a system of bill negotiation to the amount of *a million a year* on fictitious credit, which ended in the bankruptcy of many, but which had at least the good effect of shewing that the obligations of law are not so easily eluded as those of honour and conscience. The injury to these latter was animadverted upon in pretty severe terms by the Judges in the course of the several discussions; They did not, however, consider the fictitious indorsement, under all circumstances, as an absolute *felonious forgery*, though, in point of morality, little short of that crime; to the existence of which it is essential that it should be committed with intent to defraud some person who must be particularly specified; a fact not found by the special verdicts.

The first case in order of time was that of *Tatlock et al. v. Harris*. (Easter, 29 Geo. 3. 1789. 3 Term Rep. K. B. 174.) That case was determined by the Court of King's Bench, on a demurrer to evidence. There a bill of exchange was drawn, by the defendant and others, on the defendant alone, in favour of a fictitious person, and indorsed in the name of such fictitious payee. These circumstances were known to all the parties concerned in drawing the bill. The defendant accepted the bill, and received the value of it in account from Lewis and Potter, to whom he was indebted, and by whose desire the bill was drawn. This bill was discounted by the plaintiffs for Lewis and Potter; and it was held that the plaintiffs being thus *bona fide* holders of the bill for a valuable consideration, might recover the amount against the defendant as acceptor, on the counts for *money paid, and money had and received*; on the ground, as it seems, that the giving the bill was an appropriation of so much money to be paid to the person who should become holder of the bill; and therefore when the plaintiffs discounted it, *they paid the money to the use of the defendant*; and when Lewis and Potter gave the defendant credit for the value of the bill, [237] that was money *had and received* to the use of such persons as should afterwards be the holders of the bill.

The case of *Vere et al. v. Lewis et al.* determined by the Court of K. B. on the same day, was decided on the same ground; the declaration in that case continued a count on the bill as payable *to bearer*; on which the court then hinted their opinion that the plaintiffs might have recovered.

Next came the case of *Minet et al. v. Gibson et al.* (Michaelmas, 30 Geo. 3. 1789. 3 Term. Rep. K. B. 481.) The special verdict there stated in substance, "That Livesey and Co. drew a bill on the defendants, payable to J. White, or order; Livesey and Co. well knowing that no such person as J. White existed: That an indorsement in the name of J. White was made by Livesey and Co. requiring the contents of the bill to be paid *to them*, or their order:—That they afterwards indorsed the bill to the plaintiff for a full and valuable consideration: That the defendants afterwards accepted the bill, knowing the name and indorsement of J. White to be fictitious: That the defendants had not, at the time of the making or accepting the bill, any effects of Livesey and Co. or of the plaintiffs in their hands." (As to this latter point, see Mr. J. Gould's opinion, 1 H. Black. Rep. 596; and that of Chief Baron Eyre, id. p. 601.) The Court of K. B. gave judgment, (without argument,) for the plaintiff, on a count in the declaration stating the bill to be payable *to the bearer*: and the House of Lords (Feb. 14, 1791,) affirmed that judgment; in

consequence of the opinion of the majority of the Judges in favour of the count. See *ante* vol. ii. p. 48—61; and the opinions of the Judges at full length, in 1 H. Black. Rep. 569—625.

The case of *Collis et al. v. Emett*, (Hil. 30 Geo. 3. 1790; 1 H. Black. Rep. 313.) was an action in the Court of C. P. against the drawer; and the special verdict disclosed the following circumstances—"The defendant (who was a partner with Livesey and Co. in a certain concern in the country) signed his name on a piece of stamped blank paper, and delivered it to Livesey and Co. for the purpose of their drawing any such bill of exchange as they might choose. Livesey and Co. being indebted to one Jeffery, for goods actually sold, had given him a bill of exchange for the amount. Jeffery's clerk applying for payment of that bill when due (in London), Livesey and Co. requested him to take a fresh bill on their house for the amount of the former bill and interest, and accordingly gave him the blank paper with Emett's name thereto; upon which, a clerk of Livesey's filled up the bill for the sum requisite, which was then carried to another clerk, who accepted the same in Livesey's name, and by their authority; the name of the fictitious payee was then indorsed on the bill by Livesey's authority: and this new bill being delivered to Jeffery's clerk, he gave up the former bill. The plaintiffs discounted this bill for Jeffery, deducting 4 per cent. The defendant gave no other authority for this transaction, than the signing his name to the blank paper. The plaintiff knew nothing of the circumstances of drawing the bill; but Jeffery had full knowledge of the whole transaction." Lord Loughborough gave the judgment of the court in favour of the plaintiff, on the count stating the bill to be payable to bearer; and also stated their opinion, that the plaintiff might have had judgment on the *special count* of the declaration which stated the whole of the transaction, had it not differed from the special verdict in a few circumstances.

This decision of the Court of C. P. in *Collis v. Emett* was never appealed from; but was relied upon by the counsel in argument, and by several of the Judges in giving their opinion on the questions put to them in the case of *Minet v. Gibson* in the House of Lords. See 1 H. Black. Rep. 590—595.—Mr. Justice Heath, however, on that occasion, pointedly declared his dissent from the determination of the Court of C. P. of which he was one of the Judges. 1 H. Black. Rep. 624.

On the appeal in the case of *Minet v. Gibson*, (which was not heard till after the determination in the case of *Collis v. Emett*), several of the Judges also gave their opinions, that the plaintiff might have recovered on some of the special counts in that declaration; but Chief Baron EYRE was altogether of a different opinion, as well on those counts, and the money counts, as on the count stating the bill to be payable to bearer. See his admirable argument *against* the judgment of the Court of K. B. 1 H. Black. Rep. 598—619: as also Mr. Justice Heath's argument immediately following. When it is moreover recollected, that Lord Chancellor Thurlow delivered his sentiments against affirming that judgment; and due attention is paid to the suggestions of the Chief Baron, as to the evil which might arise by encouraging monied persons to *discount* such fictitious bills, it must be confessed that the subject was on all sides encompassed with considerable difficulties, and is not yet perhaps fully at rest—*non nobis tantas componere lites*.

6th June 1793.—On a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the evidence offered conduces to prove.

The same point was also determined, at the same time, in another cause between *Gibson and Johnson*, plaintiffs in error, and *Master and others* defendants, in which cause the circumstances and the reasons were almost exactly similar to those here reported; the only difference being, that the bill was paid away by the drawer, instead of by the indorsers, as indorsees of the fictitious payee.]

2 H. Black. Rep. 187—211:

This was an action by original in the Court of King's Bench, brought by the



defendant in error, Mr. Robert Hunter, as indorsee of a bill of exchange, against the plaintiffs in error, Gibson and Johnson, the acceptors thereof.

The cause came on to be tried before the Right Honourable Lloyd Lord Kenyon, the Lord Chief Justice of the Court of King's Bench, and a Special Jury, at Guildhall, London, at the Sittings after Michaelmas term 1791, when the plaintiffs in error demurred to the evidence given by the defendants in error, in support of the said action. In Hilary term 1792, the Court of King's Bench gave judgment thereon for the defendants in error; and the following is a copy of the record:

Pleas before our Lord the King of the term of Holy Trinity, in the 31st Year of our Sovereign Lord George the Third, by the Grace of God of Great Britain, France, and Ireland, King, Defender of the Faith, etc. and in the Year of our Lord 1791.

R O L L

London, to wit.—Thomas Gibson, late of London, merchant, and Joseph Johnson, late of the same place, merchant, were attached to answer Robert Hunter, in a plea of trespass on the case, etc. And whereupon the said Robert Hunter, by Edwin Dawes, his attorney, complains: For that whereas one Nathaniel Hingston, on the 11th day of March, in the year of our lord 1788, at Falmouth, to wit, at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap, according to the usage and custom of merchants, made his certain bill of exchange in writing, with his own hand and name thereunto subscribed, bearing date the same day and year aforesaid, and directed the said bill of exchange to the said Thomas Gibson, and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London, and thereby required the said Thomas Gibson and Joseph Johnson, two months after date, to pay to Mr. William Fletcher, or order, £521 7s. value re-[239]-ceived, with or without advice, HE, THE SAID NATHANIEL HINGSTON, THEN AND THERE WELL KNOWING THAT NO SUCH PERSON AS WILLIAM FLETCHER IN THE SAID BILL OF EXCHANGE MENTIONED, EXISTED; upon which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of William Fletcher named in the said bill, and to be subscribed with his name, and which said indorsement purported to require the said sum of money, in the said bill of exchange contained, to be paid to certain persons using trade and commerce as copartners in the copartnership name and firm of Livesey, Hargreave, and Company, or their order,\* [which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof, and the said Thomas Gibson and Joseph Johnson then and there, according to the usage and custom of merchants, accepted the same, THEY THE SAID THOMAS GIBSON AND JOSEPH JOHNSON THEN AND THERE WELL KNOWING THAT NO SUCH PERSON AS WILLIAM FLETCHER, IN THE SAID BILL NAMED, EXISTED, AND THAT THE NAME OF WILLIAM FLETCHER SO INDORSED ON THE SAID BILL OF EXCHANGE, WAS NOT THE HAND-WRITING OF ANY PERSON OF THAT NAME]; and the said bill of exchange being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing made upon the said bill of exchange, and subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livesey, Hargreave, and Company, according to the usage and custom of merchants, appointed the said sum of money in the said bill of exchange contained, to be paid to the said Robert Hunter, and then and there delivered the said bill of exchange so indorsed as aforesaid, as well with the name of the said William Fletcher as with the name of the said Absalom Goodrich, to the said Robert Hunter, by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Robert Hunter the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange, and their acceptance thereof as aforesaid; and being so

\* In the printed case for the defendant in error on the second appeal, this clause was transposed in all the counts, and placed after that stating the indorsement by Livesey, and the delivery of the bill to the defendant in error.

liable, they the said Thomas Gibson and Joseph Johnson in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange and their acceptance thereof as aforesaid.

And whereas also, the said Nathaniel Hingston, on the said 11th [240] day of March, in the year of our Lord 1788, at Falmouth, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made his certain other bill of exchange in writing with his proper hand and name thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the name and description of Messrs. Gibson and Johnson, bankers, London, and thereby requested them the said Thomas Gibson and Joseph Johnson, two months after date to pay to Mr. William Fletcher, or order, £521 7s. value received, with or without advice, and then and there delivered the said last mentioned bill of exchange to the said William Fletcher, which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was presented and shewn to the said Thomas Gibson and Joseph Johnson for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson then and there, according to the usage and custom of merchants, accepted the same; and the said WILLIAM FLETCHER afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, indorsed the said last mentioned bill of exchange, and by that indorsement appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said persons using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, or their order, and then and there delivered the said last mentioned bill of exchange so indorsed as aforesaid, to the said Livesey, Hargreave, and Company, and the said last mentioned bill of exchange being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livesey, Hargreave, and Company, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing made upon the said last mentioned bill of exchange, and subscribed with the hand and name of the said Absalom Goodrich, by procuration of the said Livesey, Hargreave, and Company, according to the usage and custom of merchants, appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said Robert Hunter, and then and there delivered the same bill of exchange so indorsed as aforesaid to the said Robert Hunter, by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Robert Hunter the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill, and their acceptance thereof, as aforesaid, and being so liable, they the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised to pay to him the said sum of money [241] in the said last mentioned bill of exchange contained, according to the tenor and effect of the same bill and their acceptance thereof as aforesaid.

And whereas also, the said Nathaniel Hingston, on the said 11th day of March in the said year of our Lord 1788, at Falmouth, to wit, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, made his certain other bill of exchange in writing, the hand and name of him the said Nathaniel Hingston being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London, and thereby required them the said Thomas Gibson and Joseph Johnson, two months after date, to pay to THE BEARER of the said last mentioned bill £521 7s. value received, with or without advice, which said last mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was presented and shewn to the said Thomas Gibson and Joseph Johnson, for their acceptance

thereof, who thereupon then and there duly accepted the same, according to the usage and custom of merchants aforesaid; and the said Robert Hunter, in fact, says, that afterwards, and before any payment of the said last mentioned bill of exchange, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, he the said Robert Hunter became, and was the bearer and owner of the said last mentioned bill of exchange, of which last mentioned premises the said Thomas Gibson and Joseph Johnson then and there had notice, by reason whereof, and according to the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Robert Hunter the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same bill; and being so liable, they the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Robert Hunter, then and there faithfully promised to pay to him the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same last mentioned bill of exchange.

And whereas also, the said Nathaniel Hingston afterwards, to wit, on the same day and year aforesaid, at Falmouth, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made his certain other bill of exchange in writing, the hand and name of him the said Nathaniel Hingston being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London, and thereby required the said Thomas Gibson and [242] Joseph Johnson, two months after date, to pay to Mr. William Fletcher, or order, £521 7s. value received, with or without advice, which said last-mentioned bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was presented and shewn to the said Thomas Gibson and Joseph Johnson for their acceptance thereof, who then and there duly accepted the same, according to the usage and custom of merchants: And the said Robert Hunter avers, that when the said last-mentioned bill of exchange was so made as aforesaid, or at any time afterwards, THERE WAS NOT ANY SUCH PERSON AS WILLIAM FLETCHER, THE SUPPOSED PAYEE, NAMED IN THE SAID LAST-MENTIONED BILL OF EXCHANGE, BUT THAT THE SAME NAME WAS MERELY FICTITIOUS, to wit, at London aforesaid, at the parish and ward aforesaid, by reason whereof, and according to the usage and custom of merchants aforesaid, the said sum of money, mentioned in the said last-mentioned bill of exchange, became and was payable to the bearer thereof, according to the effect and meaning of the said last-mentioned bill; and the said Robert Hunter also avers, that he the said Robert Hunter afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, in due form of law became and was the bearer and proprietor of the said last-mentioned bill of exchange, by reason whereof, and according to the usage and custom of merchants, they, the said Thomas Gibson and Joseph Johnson, then and there became and were liable to pay to the said Robert Hunter, the said sum of money, in the said last-mentioned bill of exchange specified, according to the tenor and effect thereof; and being so liable, they, the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said sum of money in the said last-mentioned bill of exchange specified, according to the tenor and effect of the same bill.

And whereas also, the said persons using trade and commerce in the name and firm of LIVESBY, HARGREAVE, AND COMPANY, on the said 11th day of March, in the said year of our Lord 1788, at Falmouth, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made THEIR certain other bill of exchange in writing, with the hand and name of the said Absalom Goodrich, by procuracy of the said Livesey, Hargreave, and Company, thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last-mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, bankers, London, and thereby requested them, the said Thomas Gibson and Joseph Johnson, two months after date, to pay to the said Robert Hunter, or order, £521 7s. value received, with

or without advice, which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at [243] the parish and ward aforesaid, was shewn and presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof, and the said Thomas Gibson and Joseph Johnson then and there, according to the usage and custom of merchants, accepted the same, and the said persons, using trade and commerce in the name and firm of Livesey, Hargreave, and Company, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid delivered the said last-mentioned bill of exchange to the said Robert Hunter, by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson then and there became liable to pay to the said Robert Hunter the said sum of money in the said last-mentioned bill of exchange contained, according to the tenor and effect of the said last-mentioned bill of exchange; and being so liable, they, the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said sum of money, in the said last-mentioned bill of exchange contained, according to the tenor and effect of the said last-mentioned bill of exchange. (See Chief Baron Eyre's opinion in *Gibson v. Minet*, in Dom. Proc. 1 H. Black. Rep. 609.)

And whereas also, before and at the time of making the promise and undertaking of the said Thomas Gibson and Joseph Johnson, next hereinafter mentioned, to wit, on the said 11th day of March, in the said year of our Lord 1788, at London aforesaid, at the parish and ward aforesaid, the said Nathaniel Hingston was indebted to the said Robert Hunter in a large sum of money, to wit, in the sum of £521 7s. of lawful money of Great Britain, for money by the said Nathaniel Hingston before that time HAD AND RECEIVED, to and for the use of the said Robert Hunter, and for money before that time PAID, LAID OUT, AND EXPENDED by the said Robert Hunter, TO AND FOR THE USE OF THE SAID NATHANIEL HINGSTON, at his special instance and request: and the said last-mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due and owing, and unpaid from the said Nathaniel Hingston to the said Robert Hunter, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year last-mentioned, at London aforesaid, at the parish and ward aforesaid, in consideration of the last-mentioned premises, and also in consideration that the said Robert Hunter, at the special instance and request of the said Thomas Gibson and Joseph Johnson, would forbear and give day of payment of the said last-mentioned sum of money until the 14th day of May, in the said year of our Lord 1788, and would not sue or prosecute the said Nathaniel Hingston for the recovery of the said last-mentioned sum of money, at any time before default should be made by the said Thomas Gibson and Joseph Johnson in payment of the said last-mentioned sum of money, according to their promise and undertaking next hereinafter mentioned, undertook, and to the said Robert Hunter then and there [244] faithfully promised to pay him the said last-mentioned sum of £521 7s. on the 14th day of May, in the said year of our Lord 1788: And the said Robert Hunter in fact says, that he the said Robert Hunter, confiding in the said last-mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, did forbear and give day of payment of the said last-mentioned sum of money, until the said 14th day of May, in the year of our Lord 1788, aforesaid, and did not sue or prosecute the said Nathaniel Hingston for the recovery of the said last-mentioned sum of money, or any part thereof, at any time before the said Thomas Gibson and Joseph Johnson had made default in paying the said last-mentioned sum of money, according to their said last-mentioned promise and undertaking; neither hath the said Robert Hunter, at any time since the making of the said last-mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, sued or prosecuted the said Nathaniel Hingston for the recovery of the same sum of money, or any part thereof, but hath wholly forborne so to do, and the said last-mentioned sum of money remains wholly due and unpaid to the said Robert Hunter, whereof the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the 15th day of May, in the year last aforesaid, at London aforesaid, at the parish and ward aforesaid, had notice.

And whereas also, before and at the time of making the promise and undertaking of the said Thomas Gibson and Joseph Johnson next hereinafter mentioned, to wit, on the said 11th day of March, in the said year of our Lord 1788, at London aforesaid, the said parish and ward aforesaid, the said Nathaniel Hingston was indebted to the said Robert Hunter in another large sum of money, to wit, in the sum of other £521 7s. of like lawful money, for money by the said Nathaniel Hingston before that time had and received, to and for the use of the said Robert Hunter, and for money before that time paid, laid out, and expended by the said Robert Hunter, to and for the use of the said Nathaniel Hingston, at his like instance and request; and the said last-mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due, and owing, and unpaid, from the said Nathaniel Hingston to the said Robert Hunter, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the said parish and ward aforesaid, in consideration of the last-mentioned premises, and also in consideration that the said Robert Hunter, at the special instance and request of the said Thomas Gibson and Joseph Johnson, would forbear and give day of payment of the said last-mentioned sum of money, until the 14th day of May, in the year of our Lord 1788, and would not sue or prosecute the said Nathaniel Hingston for the recovery of the said last-mentioned sum of money, at any time before default should be made by the said Thomas Gibson and Joseph Johnson in paying the said last-mentioned sum of money, according to their promise and undertaking next hereinafter mentioned, undertook, and to the said Robert Hunter then and there faithfully [245] promised to pay him the said last-mentioned sum of money, on the said 14th day of May, in the said year of our Lord 1788, IF THE SAID LAST-MENTIONED SUM OF MONEY SHOULD THEN REMAIN UNPAID TO THE SAID ROBERT HUNTER: And the said Robert Hunter in fact says, that he the said Robert Hunter, confiding in the said last-mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, did forbear and give day of payment of the said last-mentioned sum of money, until the said 14th day of May, in the year of our Lord 1788 aforesaid, and did not sue or prosecute the said Nathaniel Hingston for the recovery of the said last-mentioned sum of money, or any part thereof, at any time before the said Thomas Gibson and Joseph Johnson had made default in paying the same sum of money, according to their said last-mentioned promise and undertaking; neither hath the said Robert Hunter, at any time since the making of the said last-mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, sued or prosecuted the said Nathaniel Hingston for the recovery of the same sum of money, or any part thereof, but hath wholly forborne so to do; and the said last-mentioned sum of money, on and after the said 14th day of May, in the year of our Lord 1788, remained, and was, and still remains, and is wholly due and unpaid to the said Robert Hunter, of all which premises the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the 15th day of May, in the year of our Lord 1788, at London aforesaid, at the parish and ward aforesaid, had notice.

And whereas also, before and at the time of making the promise and undertaking of the said Thomas Gibson and Joseph Johnson next hereinafter mentioned, to wit, on the said 11th day of March, in the said year of our Lord 1788, at London aforesaid, at the parish and ward aforesaid, the said persons using trade and commerce in the name and firm of LIVESSEY, HARGREAVE, AND COMPANY were indebted to the said Robert Hunter in another large sum of money, to wit, in the sum of other £521 7s. of like lawful money, for so much money by the said persons using trade and commerce in the name and firm of Livesey, Hargreave, and Company, before that time had and received to and for the use of the said Robert Hunter, and the said last-mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due and unpaid from the said persons so using trade and commerce in the name and firm of Livesey, Hargreave, and Company as aforesaid, to the said Robert Hunter, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year last-mentioned, at London aforesaid, at the parish and ward aforesaid, in consideration of the last-mentioned premises, and also in consideration that the said Robert Hunter, at the special instance and request of the said Thomas Gibson and Joseph Johnson, would forbear and give day of payment of the said last-mentioned sum of money until the 14th day of May, in the said year of our Lord 1788,

and would not sue or [246] prosecute the said persons so using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, for the recovery of the last-mentioned sum of money, at any time before default should be made by the said Thomas Gibson and Joseph Johnson, in payment of the said sum of money, according to their promise and undertaking next hereinafter mentioned, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said last-mentioned sum of £521 7s. on the said 14th day of May, in the said year of our Lord 1788: And the said Robert Hunter in fact says, that he the said Robert Hunter confiding in the said last-mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, did forbear and give day of payment of the said last-mentioned sum of money until the said 14th day of May, in the year of our Lord 1788 aforesaid, and did not sue or prosecute the said persons so using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, for the recovery of the last-mentioned sum of money, or any part thereof, at any time before the said Thomas Gibson and Joseph Johnson had made default in payment of the said last-mentioned sum of money, according to their said last-mentioned promise and undertaking, neither hath the said Robert Hunter at any time since the making of the said last-mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, sued or prosecuted the said persons so using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, or any of them, for the recovery of the said last-mentioned sum of money, or any part thereof, whereof the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the 15th day of May, in the year last aforesaid, at London aforesaid, in the parish and ward aforesaid, had notice.

And whereas also, before and at the time of making the promise and undertaking of the said Thomas Gibson and Joseph Johnson next hereinafter mentioned, to wit, on the said 11th day of March, in the said year of our Lord 1788, at London aforesaid, in the parish and ward aforesaid, the said persons so using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, were indebted to the said Robert Hunter in another large sum of money, to wit, in the sum of other £521 7s. of like lawful money, for so much money by the said persons so using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, before that time had and received, to and for the use of the said Robert Hunter, and the said last-mentioned sum of money, at the time of making the promise and undertaking next hereinafter mentioned, being wholly due, and owing, and unpaid from the said persons so using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, to the said Robert Hunter, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, in consideration of the last-mentioned premises, and also in consi-[247]-deration that the said Robert Hunter, at the special instance and request of the said Thomas Gibson and Joseph Johnson, would forbear and give day of payment of the said last-mentioned sum of money until the 14th day of May, in the said year of our Lord 1788, and would not sue or prosecute the said persons using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, for the recovery of the said last-mentioned sum of money, at any time before default should be made by the said Thomas Gibson and Joseph Johnson in payment of the said sum of money, according to their promise and undertaking next hereinafter mentioned, undertook, and to the said Robert Hunter then and there faithfully promised to pay to him the said last-mentioned sum of money on the said 14th day of May, in the said year of our Lord 1788, IF THE SAID LAST-MENTIONED SUM OF MONEY SHOULD THEN REMAIN UNPAID TO THE SAID ROBERT HUNTER; and the said Robert Hunter in fact says, that he the said Robert Hunter, confiding in the said last-mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, did forbear and give day of payment of the said last-mentioned sum of money until the said 14th day of May, in the year of our Lord 1788 aforesaid, and did not sue or prosecute the said persons so using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, for the recovery of the said last-mentioned sum of money, or any part thereof, at any time before the said Thomas Gibson and Joseph Johnson had made default in payment of the said sum of money, according to their said last-mentioned promise and under-

making, neither hath the said Robert Hunter at any time since the making of the said last-mentioned promise and undertaking of the said Thomas Gibson and Joseph Johnson, sued or prosecuted the said persons so using trade and commerce in the name and firm of Livesey, Hargreave, and Company, as aforesaid, for the recovery of the same sum of money or any part hereof, but hath wholly forborne so to do; and the said last-mentioned sum of money, on and after the said 14th day of May, in the year of our Lord 1788, remained, and was and still remains and is wholly unpaid to the said Robert Hunter, of all which premises the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the 15th day of May, in the said year of our Lord 1788, at London aforesaid, at the parish and ward aforesaid, had notice.

And whereas also, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the 1st day of May, in the year of our Lord 1789, at London aforesaid, at the parish and ward aforesaid, were indebted unto the said Robert Hunter in the further sum of £1000 of lawful money of Great Britain, for so much money by the said Thomas Gibson and Joseph Johnson before that time HAD AND RECEIVED to and for the use of the said Robert Hunter; and being so indebted, they the said Thomas Gibson and Joseph Johnson in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, at the parish and ward [248] aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said last-mentioned sum of money, whenever they should be hereunto afterwards requested.

And whereas also, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, were indebted unto the said Robert Hunter in the further sum of £1000 of like lawful money, for so much money by the said Robert Hunter before that time PAID, LAID OUT, AND EXPENDED to and for the use of the said Thomas Gibson and Joseph Johnson, at their like instance and request, and being so indebted, they the said Thomas Gibson and Joseph Johnson in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised, to pay him the said last-mentioned sum of money, whenever they should be thereunto afterwards requested.

And whereas also, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, were indebted unto the said Robert Hunter in the further sum of £1000 of like lawful money, for so much money by the said Robert Hunter before that time LENT AND ADVANCED to the said Thomas Gibson and Joseph Johnson, at their like instance and request, and being so indebted, they the said Thomas Gibson and Joseph Johnson in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Robert Hunter then and there faithfully promised to pay him the said last-mentioned sum of money whenever they should be thereunto afterwards requested.

And whereas also, the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, HAD ACCOUNTED with the said Robert Hunter, of and concerning divers other sums of money, from the said Thomas Gibson and Joseph Johnson, to the said Robert Hunter before that time due and owing, and then being in arrear and unpaid: And upon that account, the said Thomas Gibson and Joseph Johnson were then and there found in arrear to the said Robert Hunter, in the further sum of £1000 of like lawful money, and being so found in arrear, they the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and then and there faithfully promised the said Robert Hunter, to pay to him the said last-mentioned sum of money, whenever they the said Thomas Gibson and Joseph Johnson should be thereunto afterwards requested.

Nevertheless the said Thomas Gibson and Joseph Johnson, not regarding their said several promises and undertakings in form aforesaid made, but contriving and fraudulently intending, craftily [249] and subtilely to deceive and defraud the said Robert Hunter in this behalf, have not, although often requested, nor hath either of

them paid to the said Robert Hunter, the said several sums of money, or any of them or any part thereof, but to pay the same to the said Robert Hunter they the said Thomas Gibson and Joseph Johnson have hitherto altogether refused and still do refuse. Whereupon the said Robert Hunter says that he is injured, and hath sustained damage to the value of £700, and therefore he brings suit, etc.

And the said Thomas Gibson and Joseph Johnson, by Joseph Kaye, their attorneys come and defend the wrong and injury, when, etc. and say, that they did not undertake and promise in manner and form, as the said Robert Hunter hath above there complained against them, and of this they put themselves upon the country. And the said Robert Hunter doth the like. Therefore, it is commanded the sheriffs, etc. etc.

Afterwards the process is continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before our Lord the King, at Westminster, until in eight days of Saint Hilary, unless the King's right trusty and well-beloved Lloyd Lord Kenyon, his Majesty's Chief Justice, assigned to hold pleas before the King himself, shall first come on Saturday, the 17th day of December, at the Guildhall of the city of London, according to the form of the statute in that case made and provided, for default of the jurors, because none of them did appear; at which day before our Lord the King, at Westminster, come the said Robert Hunter by his attorney within named, and the said Thomas Gibson and Joseph Johnson, by their attorney within named; and the aforesaid Chief Justice, before whom the said issue was tried, sent hither his record in these words:

AFTERWARDS (that is to say) on the day, and at the place within contained, before the Right Honourable Lloyd Lord Kenyon, the Chief Justice within named, William Jones, gentleman, being associated unto the said Chief Justice, by force of the statute in such case made and provided, came as well the within named Robert Hunter, by his attorney within named, as the within named Thomas Gibson and Joseph Johnson, by their attorney within named; and the jurors of the jury, whereof mention is within made, being called likewise, come, and being chosen, tried, and sworn, to say the truth of the premises within contained, the said Robert Hunter produced to the jury aforesaid, a certain instrument in writing in the words and figures following: (that is to say),

£521 7s.

Falmouth, 11th March 1788.

Two months after date, pay to Mr. Will. Fletcher, or order, five hundred twenty-one pounds 7s. value received, with or without advice. Nathaniel Hingston.

To Messrs. Gibson and Johnson, Bankers, London.

No. 2068, G. & J.

[250] And whereupon are the following indorsements, "William Fletcher," "by Pron. of Livesey, Hargreave, and Co. A. Goodrich," and the said Robert Hunter, to prove and maintain the issue within joined on his part, shews in evidence to the jury aforesaid, by Robert Booth, a witness duly sworn in that behalf, that he, the said Robert Booth, was a clerk to certain persons using trade and commerce as copartners in the copartnership name and firm of Livesey, Hargreave, and Company, and that one Nathaniel Hingston was, at the time of the drawing of the said instrument, a shopkeeper, and carried on the business of a shopkeeper, at Falmouth, in the county of Cornwall: That the name of Nathaniel Hingston, subscribed to the said instrument, was the hand-writing of the said Nathaniel Hingston, and that he drew the same as agent to the said Livesey, Hargreave, and Company: That Livesey, Hargreave, and Company, used to send down to the said Nathaniel Hingston blank bills of exchange for him to sign as the drawer thereof: That many such blank bills were sent down together: That when they were returned to the said Livesey, Hargreave, and Company, they filled up the blanks with the sum to be paid, and the name of the person to whom the same was to be payable: That when the bills were so drawn and filled up, they were carried indiscriminately with other bills to the house of Thomas Gibson and Joseph Johnson, the defendants, for their acceptance: That Livesey, Hargreave, and Company, give Gibson and Johnson advice of the bills so drawn by the said Nathaniel Hingston: That such bills, indiscriminately with the said other bills, used to be carried two or three times a day from the house of Livesey, Hargreave, and Company, to the house of Gibson and Johnson for acceptance, and were often carried wet: That the acceptance written upon the bill produced was the acceptance of the defendants Thomas Gibson and Joseph Johnson: That the said Robert Booth, upon those occasions, used to see the defendant, Johnson: That Livesey,



Hargreave, and Company, were generally indebted to the defendants, Gibson and Johnson, upon the balance of accounts, for cash advanced by the said Gibson and Johnson to the said Livesey, Hargreave, and Company: That the defendants, Gibson and Johnson, were covered for these acceptances by bills of exchange given as a security for the same, but that the said bills so given as a security have not been paid: That no such person as William Fletcher, in the said instrument and indorsement named, existed; and that the name William Fletcher, so indorsed on the said instrument, was not the hand-writing of any person of the name of William Fletcher. And the said Robert Hunter further shews in evidence to the jury aforesaid, by one Stephen Barber, a witness duly sworn in that behalf, that he negotiated the instrument, now produced, with the plaintiff, Robert Hunter; that he carried it from Livesey, Hargreave, and Company, to get it discounted for them; and that he told the said Robert Hunter, from whom he came; that the said Robert Hunter gave him the value for the said instrument in money, and he took it back to be indorsed by Livesey, Hargreave, and Company; and that it was in-[251]-dorsed by Absalom Goodrich, by procurator of Livesey, Hargreave, and Company; that the said instrument had been accepted by Gibson and Johnson before it was carried to be discounted; and the said Thomas Gibson and Joseph Johnson say, that the aforesaid matters, to the jurors aforesaid, in form aforesaid, shewn in evidence by the said Robert Hunter, are not sufficient in law to maintain the said issue within joined on the part of the said Robert Hunter, and that they, the said Thomas Gibson and Joseph Johnson, to the matters aforesaid, in form aforesaid, shewn in evidence, have no necessity, nor are they obliged by the law of the land to answer; and this they are ready to verify: Wherefore, for want of sufficient matter in that behalf, shewn in evidence to the jury aforesaid, the said Thomas Gibson and Joseph Johnson pray judgment, and that the jury aforesaid may be discharged from giving any verdict on the said issue, and that the said Robert Hunter may be precluded from having his said action against the said Thomas Gibson and Joseph Johnson.

## S. SHEPHERD.

And the said Robert Hunter, for that he hath shewn sufficient matter in maintenance of the said issue in evidence to the said jurors, which matter the said Thomas Gibson and Joseph Johnson do not deny, nor in any manner answer thereto, prays judgment and his damages, by reason of the premises to be adjudged to him.

## A. CHAMBRE.

Whereupon it is told to the jurors aforesaid, That they shall inquire what damages the said Robert Hunter has sustained, as well by reason of the matter shewn in Evidence as aforesaid, as for his costs and charges, by him about his suit in this behalf expended, in case it shall happen that judgment shall be given upon the evidence aforesaid for the said Robert Hunter; and the jurors aforesaid, upon their oaths aforesaid, thereupon say, That if it shall happen that judgment shall be given for the said Robert Hunter upon the evidence aforesaid, then they assess the damages of the said Robert Hunter, by him sustained by reason of the matter shewn in evidence as aforesaid, besides his costs and charges by him about his suit in this behalf expended, to £521 7s. and for those costs and charges to 40s. And thereupon the said jurors, by the assent of the said parties, are discharged from giving any further verdict upon the premises. And thereupon all and singular the premises being seen by the said court of our said Lord the King, before the King himself, now here fully understood and considered, it seems to the said court here, that the aforesaid matter, to the jury aforesaid, in form aforesaid, shewn in evidence by the said Robert Hunter, is sufficient in law to maintain the said issue above joined, on the part and behalf of the said Robert Hunter. Therefore it is considered by the said court of our Lord the King, before the King himself here, that the said Robert Hunter doth recover his aforesaid damages, by the jury aforesaid, in form aforesaid, assessed: [252] and also £199 3s. for his costs and charges, by the said court of our said Lord the King now here adjudged of increase to the said Robert Hunter by his assent, which said damages in the whole amount to £722 10s. and that the said Thomas Gibson and Joseph Johnson be in mercy, etc.

In Hilary Term 1792, this demurrer to evidence was set down for argument before the Court of King's Bench, but it being the understanding of both parties that the same was to be brought by writ of error before the House of Lords for ultimate

decision, the Court of King's Bench gave judgment for the defendant in error, without argument.

Upon this judgment a writ of error was brought, returnable in parliament; and the plaintiffs in error having assigned general errors; and the defendant in error having pleaded that there was no error in the record and proceedings, the plaintiffs in error stated (T. Erskine, F. Bower) the following reasons why the said judgment should be reversed.

First. There is no count in the declaration at all supported by the evidence.

As to the first count, there is nothing to warrant any inference or presumption that the acceptors of the bill of exchange knew the payee to be a fictitious person at the time of their acceptance of the bill; or that they ever meant to accept a bill payable to such payee, or to any other description of person than a real payee, or his indorsee, in the fair and usual course of negotiation. The allegations in the first count of the declaration are wholly destitute of proof, and it would be necessary, in order to support them, to presume the acceptors to be parties to a fraud without evidence, and contrary to the established rule, that every thing is to be presumed to have been fairly done until proof is given to the contrary.

The second count is expressly negatived by the evidence.

The third count is negatived by the mere inspection of the instrument produced, which purports to be a bill payable to Fletcher or order; and although it has been determined that a bill purporting on the face of it to be payable to order, may, in particular circumstances, be considered as a bill payable to bearer; the case in which that decision was made, was where an indorsement had been made by the drawers subsequent to the indorsement in the name of the fictitious payee, and where the acceptor was privy to the fact of the payee being fictitious at the time of the acceptance of the bill, neither of which circumstances occur in this case, but the direct contrary appears.

The fourth count depends upon the same reasoning as the third, and only differs from it by drawing a supposed inference of law, which will not follow, if the arguments used in support of the third count shall be thought insufficient.

The fifth count is negatived by the evidence, in the same manner as the third, by the mere inspection of the instrument produced, which purports to be a bill payable to Fletcher, or order, and indorsed by him to Livesey, Hargreave, and Company, and by them [253] to the defendant in error; and not a bill drawn by Livesey, Hargreave, and Company, payable to the said Robert Hunter, as is supposed by the said fifth count.

The sixth, seventh, and eighth counts are wholly negatived by the evidence, from which it appears, that so far from the plaintiffs in error having engaged themselves as a collateral security to pay an antecedent debt, due from the drawers of the bill to the defendant in error, they had actually accepted the bill, and made themselves liable, (so far as any obligation to pay the bill was imposed by law upon them), previous to the bill's being discounted by the defendant in error, and were themselves, if they are bound at all, the principal debtors, to whom resort must, in the first instance, be made for payment, before the defendant in error had acquired any interest at all in the debt, or become party to the transaction.—If, as is humbly submitted by the plaintiffs in error, they were not liable, under the circumstances, as principal debtors, they could not be liable, as collateral securities, for a debt which became due from the drawer to the defendant in error, subsequent to the acceptance.

The ninth, tenth, eleventh, and twelfth counts are wholly unsupported by proof, inasmuch as it appears that so far from the plaintiffs in error being indebted to the drawers of the bill, (in whose place the defendant in error is supposed to stand, and through whom he derives his claim), the plaintiffs in error were actually in advance to the drawers, and had no security for their monies so lent, but bills, which have not been paid.

Lastly. On the supposition (which is wholly denied) that the plaintiffs in error were privy to the payee being fictitious, and the indorsement being made in the name of a person they knew not to exist, and that they put the bill into the hands of the drawers that they might negotiate it, concealing the circumstance of the payee being fictitious, their conduct would amount to a direct uttering of a forgery, with intent to defraud the person to whom such bill was passed in circulation, and the

remedy by civil action would be merged in the felony. If it is to be taken that the defendant in error was acquainted with the whole transaction, and made himself a party in it with full knowledge of all the circumstances, it is submitted, that he cannot entitle himself to maintain an action through the medium of an instrument which, at the time he received it, he knew to be a forgery.

The defendants in error suggested (E. Bearcroft, J. Mingay) the following arguments for the affirming the judgment of the Court of King's Bench.

First. The plaintiffs in error having demurred to the evidence produced in support of the action, and thereby prevented the jury from finding any facts, have virtually admitted every fact, which upon the evidence the jury might have found in favour of the defendant in error, in case the trial had proceeded and a verdict had been given; and on the other hand, no intendment but such as are absolutely necessary, can be made in favour of the plaintiffs in error. The evidence shews the defendant in error to be the *bona* [254] *fide* holder of the bill for a valuable consideration, and the jury might upon the evidence have found, that the plaintiffs in error accepted the bill, knowing that the name of the payee was fictitious; these acts therefore may be assumed in considering the question of law, but no act of forgery can be presumed, so as to raise the question, whether the policy of the law will suffer an action to be founded upon a transaction accompanied with forgery.

Second. The defendant in error being a fair holder of the bill in question, and having advanced his money upon the faith of the acceptance, and the plaintiffs in error as acceptors sustaining no disadvantage from the drawers using the name of a fictitious payee, the justice of the case as between the parties requires, that the acceptors should not be permitted to avoid the effect of their acceptance, and the rather, as they may be intended to have known the circumstances relating to the bill and its indorsement.

Third. The case of Gibson and Johnson, against Minet and Fector, lately determined in the House of Lords (see *ante*, vol. 2. p. 48), is a decision of the highest authority to prove, that the bill in question may have effect against the acceptors as a bill payable to bearer, and there does not appear to be any material distinction between that case and the present.

Fourth. An indorsement has the effect of creating a new bill, and the indorser becomes a security to the subsequent proprietors of the bill, in like manner as the original drawer; the defendant in error, therefore, to whom this bill has been indorsed, by Livesey, Hargreave, and Company, may maintain his action against the acceptors, as being the real payee of the bill, and duly so constituted according to the custom of merchants.

Fifth. If the instrument could not take effect in any way as a bill of exchange, then the money which was paid for it, was advanced without consideration, and the persons who received it become indebted to the defendant in error, for the amount. The plaintiffs in error, by the terms of their acceptance, promised to pay this debt, and the promise being founded upon a valuable consideration proved by writing, so as to comply with the requisitions of the statute of frauds, may entitle the defendant in error to recover upon the counts in the declaration which apply to that view of the case.

COUNSEL having been fully heard to argue the errors in this cause, the following questions were proposed to the Judges.

1. Whether upon the state of the evidence given for the plaintiff in this case, it was competent to the defendants to insist upon the jury being discharged from giving a verdict; by demurring to the evidence, and obliging the plaintiff to join in demurrer?

2. Whether on this record any judgment can be given?

3. In case no judgment can be given, what ought to be the award?

On these questions the Lord Chief Justice Baron Eyre delivered the unanimous opinion of the Judges (see 2 H. Black. Rep. 205-209): After stating the general nature of a demurrer to evidence, and its application to the present case, he stated their opinion on the first question to be, "That upon the state of the evidence it was not competent to the defendants to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer, without distinctly admitting upon the record every fact and every con-

clusion, which the evidence given for the plaintiff conduced to prove." To the second question the Judges gave it as their opinion, "That no judgment could be given on this record;" and assigned for their reason, that the examination of the witnesses had been conducted so loosely, or the demurrer had been so negligently framed, that there was no manner of certainty in the state of the facts upon which any judgment could be founded. To the third question they answered, on the authority of the case of *Wright v. Pindar* (Al. 18. Sty. 22), that there ought to be an award of a *venire facias de novo*: the issue joined between the parties not having in effect been tried.

It was therefore ORDERED and ADJUDGED, That the judgment given in the Court of King's Bench be reversed: And that the said court do award a *venire facias de novo*, and proceed according to law: And that the record be remitted, etc. (See MS. Journ. *sub anno* 1793.)

CASE 3.—THOMAS GIBSON and JOSEPH JOHNSON,—*Plaintiffs* (in Error); ROBERT HUNTER,—*Defendant* (in Error) [2d June 1794].

[*Mews' Dig.* ii. 1473. See *Sewell v. Burdick*, 1884, 10 A.C. 99; *Vagliano v. Bank of England*, 1889, 23 Q.B.D. 258 (1891), A.C. 107; *Clutton v. Attenborough* (1897), A.C. 90.]

- A. draws a bill of exchange on B. payable to a fictitious payee or order, and indorsed in the name of such payee, which B. accepts. In an action by an innocent indorsee, for a valuable consideration, against B. on the bill, in order to draw an inference either that B. at the time of his acceptance knew the name of the payee to be fictitious, or that B. had given an authority to A. to draw the bill in question, by having given a *general* authority to A. to draw bills on B. payable to fictitious persons, evidence is admissible of irregular and suspicious transactions and circumstances relating to other bills drawn by A. on B. payable to fictitious payees and accepted by B. though none of these transactions or circumstances have any apparent relation to the bill in question; and though none of them prove that B. accepted any of these other bills with a knowledge that the payees mentioned in them were fictitious.

JUDGMENT of the Court of King's Bench AFFIRMED.

This cause came on to be tried a second time (in consequence of the *venire de novo*, awarded in the former appeal) before Lord Kenyon, at Guildhall, at the sittings after Trinity term 1793; when the plaintiffs in error tendered a bill of exceptions to his Lordship's directions to the jury. The following is a copy of the record:

[256] *PLEAS* before our Lord the King, of the term of the Holy Trinity, in the thirty-third year of the reign of our Sovereign Lord George the Third, by the Grace of God of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth; and in the year of our Lord 1793.

See the case immediately preceding, and 2 H. Black. Rep. 288-298.

London, S.S.—The jury between Robert Hunter, by his attorney, plaintiff, and Thomas Gibson, late of London, merchant, and Joseph Johnson, late of the same place, merchant, defendants, of a plea of trespass on the case, is respited before our Lord the King, until the morrow of All Souls, wheresoever the King shall then be in England, unless the King's right trusty and well-beloved Lloyd Lord Kenyon, late Majesty's Chief Justice, assigned to hold pleas before the King himself, shall come on Friday the 21st day of June, at the Guildhall of the city of London, according to the form of the statute in such case made and provided for default of the jurors, because none of them did appear: therefore, let the sheriffs have the bodies of the said jurors, to make the said jury between the parties aforesaid, of the plea aforesaid, accordingly the same day is given to the parties aforesaid, there, etc.

Which said issue, in form aforesaid, joined between the parties aforesaid, afterwards, to wit, at the sittings of *nihi prius*, held at the Guildhall of the city of London aforesaid, in and for the said city, before the Right Honourable Lloyd Lord Kenyon, Chief Justice of the Court of our Lord the King himself, William Jones, esq. being

associated to the said Chief Justice, according to the form of the statute in such case made and provided, on Friday the 21st day of June, in the thirty-third year of the reign of our said Lord the now King, came to be tried by a jury of the city of London aforesaid, for that purpose duly impanelled (that is to say) Francis Vincent, John Danvers, John Bourke, George Maltby, Benjamin Hutton, John Yeathard, Thomas Lewis, John Nixon, John Wilkinson, William Harriman, Joseph Kemble, and John Hasken, good and lawful men of the said city of London, at which day came there as well the said plaintiff as the said defendants, by their respective attornies aforesaid. And the jurors aforesaid, impanelled to try the said issue being also come, were then and there in due manner chosen and sworn, to try the same issue, and upon the trial of the said issue so had, the said plaintiff, in maintenance of the said issue, so joined as aforesaid, on his part, produced to the jury aforesaid, a certain paper writing, purporting to be a bill of exchange, in the words and figures following; that is to say:

£521 7s.

Falmouth, 11th March 1788.

Two months after date pay to Mr. William Fletcher, or order, five hundred and twenty-one pounds 7s. value received, with or without advice.

Nathaniel Hingston.

To Messrs. Gibson and Johnson, Bankers, London. No. 2068, G. and J.

[257] And upon which paper writing were the following indorsements; that is to say, "William Fletcher." "By procuration of Livesey, Hargreave, and Company. A. Goodrich." And the said plaintiff thereupon proved, and gave in evidence to the said jury, that the said name of the said Nathaniel Hingston, purporting to be subscribed to the said paper writing so produced to the said jury as aforesaid, was of the proper hand writing of the said Nathaniel Hingston, and that the said Nathaniel Hingston so subscribed the same paper writing as the drawer of the same, and as the agent of the said Livesey, Hargreave, and Co. in the said declaration mentioned, and was accustomed to draw bills of exchange for them, in his own name, as their agent, and that the said Nathaniel Hingston resided at Falmouth, in the county of Cornwall, and that no such person as William Fletcher, the supposed payee, in the said paper writing mentioned, ever existed, and that the name of William Fletcher, contained in the same paper writing, was merely fictitious, and that the said paper writing so subscribed by the said Nathaniel Hingston, and before the same was indorsed with the name of "A. Goodrich, by procuration of Livesey, Hargreave, and Co." and also before the letters and figures, No. 2068, and the letters G. and J. were subscribed thereto, was sent by the said Livesey, Hargreave, and Co. being the same persons mentioned and described in the said indorsement, by the name or firm of Livesey, Hargreave, and Co. to the said defendants for their acceptance, who accordingly accepted the same, by subscribing thereto the said letters and figures, No. 2068, and also the said letters G. and J. as the initials of their respective surnames. That the indorsement of the name of William Fletcher upon the said paper writing, produced in evidence, was made by a clerk of the said Livesey, Hargreave, and Co. whose name was not William Fletcher. And that the said bill was afterwards indorsed with the words, "By procuration of Livesey, Hargreave, and Co. A. Goodrich." by the said A. Goodrich, a clerk of the said Livesey, Hargreave, and Co. for and by procuration of the said Livesey, Hargreave, and Co. and paid and delivered by them to the said plaintiff for a valuable consideration, then paid to them by the said plaintiff AND THAT THE SAID PLAINTIFF DID NOT KNOW THAT THE PAYEE NAMED IN THE SAID PAPER WRITING WAS FICTITIOUS.

And the said plaintiff, in further maintenance of the said issue so joined as aforesaid, on his part, and to shew that the said defendants at the time of their said acceptance of the said paper writing, either knew that the said name of William Fletcher, contained in the same paper writing, and indorsed thereon as aforesaid, was a fictitious name; or that the said defendants had given authority to the said Livesey, Hargreave, and Co. to draw the said paper writing so produced to the jury upon them, the said defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein, to be made payable to the order of a person who

did not in fact exist, and whose name was a fictitious name, by having given a general authority to the said Livesey, Hargreave, and Co. [258] to draw bills of exchange upon them the said defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein, to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names, did further prove and give in evidence to the said jury, that the said Livesey, Hargreave, and Co. used to send down to the said Nathaniel Hingston, at Falmouth, printed forms of bills of exchange, upon paper duly stamped for that purpose, with blanks therein for the dates, the times of payment, the names of the payees, and the sums to be made payable therein, to be signed by him the said Nathaniel Hingston, who used to return the same signed by him the said Nathaniel Hingston accordingly to the said Livesey, Hargreave, and Co. who then filled up the bills so returned, according to their convenience, with the dates, the times they were made payable, the payee names, the greater part of which were fictitious, and the residue real, and the sums for which they were to become payable; and that this was done as the exigencies of the house of Livesey, Hargreave, and Co. required. That when the bills were thus filled up they were taken to the defendants for acceptance; some of the said bills when they were so taken for acceptance being unindorsed, and others of such bills at the time they were so taken for acceptance, having the names of the supposed payees in such bills indorsed upon the same in various hand writings. That this happened in a great variety of instances, and to the amount of £20,000. That the said bill or paper writing produced in evidence, although dated at Falmouth, was not in fact filled up with the date, the time of payment, the name of the payee, or the sum of money therein mentioned, at Falmouth, but in London. That bills so drawn by the said Nathaniel Hingston, and dated from the same place, were frequently carried at several different times on the same day, by the said Livesey, Hargreave, and Co. to the defendants for acceptance, and accepted by them accordingly. That it requires three days to transmit a bill from Falmouth to London by the post. That a letter sent from Falmouth on the first day of any month, would not by the post reach London until the fourth. That in several instances, such bills drawn by the said Nathaniel Hingston, as from Falmouth, have been presented by the said Livesey, Hargreave, and Co. on the second day after the date of them, to the defendants for acceptance, and that they have accepted them without objection. That in many instances, bills so drawn by the said Nathaniel Hingston, were presented by the said Livesey, Hargreave, and Co. to the defendants for acceptance on the days on which, by the course of the post, the same bills would have arrived, if sent on the respective days of their respective dates, but before the hours of the post's arrival on those days, and that they were accepted by the defendants without objection. That in some instances such bills so drawn by the said Nathaniel Hingston, were carried by the said Livesey, Hargreave, and Co. to the said defendants for acceptance, after the arrival of the post from Falmouth, and [259] other bills of the like kind were carried by them to the said defendants for acceptance, at different times afterwards on the same day. That in many instances, bills so drawn by the said Nathaniel Hingston upon the said defendants, were carried by the said Livesey, Hargreave, and Co. to the said defendants for acceptance, upon the day on which they were filled up by the said Livesey, Hargreave, and Co. the instant they were filled up, and whilst the ink with which they were so filled up has been wet. That the house of the said Livesey, Hargreave and Co. where the said bills were so filled up, was not three minutes walk from the defendant's house. That this was the general course of dealing between the said house of Livesey, Hargreave, and Co. and the defendants. That the ink has been apparently so wet at many times when the bills were so delivered for acceptance at the house of the said defendants, and that the person who so delivered the said bills was careful in carrying them, that they might not smear from the ink's being so wet as aforesaid. That at the time of the carrying such bills in this manner, it was very apparent that the signature of Nathaniel Hingston was dry, and an old writing, and that what had been written in to fill up the bills was fresh and wet. That the witnesses, by whose testimony the said plaintiff gave the said evidence of the said several instances of the manner of presenting and accepting the said bills, had no particular memory to distinguish the bill or paper writing produced in evidence, as aforesaid, from the rest of the bills presented to and accepted by the said

defendants, as aforesaid: That the date of the said bill or paper produced in evidence, the name of the payee, and the sum therein expressed to be made payable, were filled up by a clerk in the said house of the said Livesey, Hargreave, and Company, in London, and that was the general course, before described, with respect to the other bills that were carried by the said Livesey, Hargreave, and Company to the said defendants wet for acceptance. That the defendants paid bills under these circumstances to a large amount, and for a considerable length of time.

And thereupon the counsel of the said defendants *did then and there object to the evidence* so further given by the said plaintiff in further maintenance of the said issue so joined, as aforesaid, on his part, and to prove that the said defendants, at the time of their said acceptance of the said paper writing, either knew that the said name of William Fletcher, contained in the said paper writing, and endorsed thereon, as aforesaid, was a fictitious name, or that the said defendants had given authority to the said persons using trade and commerce in the name or firm of Livesey, Hargreave, and Company, to draw the said bill or paper writing, so produced to the jury, upon them the said defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of a person who did not in fact exist, and whose name was a fictitious name, by having given a general authority to the said Livesey, Hargreave, and Company, to draw bills upon them, the said defendants, by and in the name of the said [260] Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names, and did then and there insist, that the same evidence ought not to be received, or left to the consideration of the said jury in that behalf; and prayed the said Chief Justice, that he would declare to the jury aforesaid, that the same evidence was not proper evidence to be received, or to be taken into their consideration as evidence in maintenance of the said issue on the part of the said plaintiff, or upon which they could find that the said defendants at the time of their said acceptance of the said paper writing, either knew that the said name of William Fletcher contained in the said paper writing, and indorsed thereon as aforesaid, was a fictitious name; or that the said defendants had given authority to the said Livesey, Hargreave, and Company to draw the said bill or paper writing, so produced to the said jury, upon them, the said defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of a person, who in fact did not exist, and whose name was a fictitious name, by having given a general authority to the said Livesey, Hargreave, and Company to draw bills of exchange upon them, the said defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names.

Yet the said Chief Justice did then and there declare and deliver his opinion to the jury aforesaid, that the said evidence, so objected to by the counsel of the said defendants as aforesaid, was proper evidence to be received in maintenance of the said issue, on the part of the said plaintiff, *as to the third count of the said declaration* (stating the bill as payable to bearer), and to be left to their consideration as evidence in maintenance of the said issue on that count, to prove that the said defendants, at the time of the said acceptance of the said paper writing, either knew that the said name of William Fletcher, contained in the said paper writing, and indorsed thereon as aforesaid, was a fictitious name; or that the said defendants had given authority to the said Livesey, Hargreave, and Co. to draw the said bill or paper writing, so produced to the said jury, upon them, the said defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of a person who in fact did not exist, and whose name was a fictitious name, by having given a general authority to the said Livesey, Hargreave, and Company to draw bills of exchange upon them, the said defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names; *and that if the said jury should believe, upon that evidence, that the said defendants had such knowledge, or had given such authority to the said Livesey, Hargreave, and Company, they might upon the whole evidence find their verdict for the said plaintiff upon the said issue so joined as aforesaid, as to the said*

*third count of the said de-[261]-claration*, but not upon any of the other counts contained in the said declaration: And thereupon, with that direction, left the same to the said jury; and the jury aforesaid then and there gave their verdict for the said plaintiff, as to the said third count of the said declaration, with £521 7s. damages, and 40s. costs; and for the said defendants as to all the other counts in the said declaration mentioned.

Whereupon the said counsel for the said defendants did then and there except to the aforesaid opinion of the said Chief Justice, and insisted that the evidence so given as aforesaid, for the purpose aforesaid, and which had been so objected to as aforesaid, was inadmissible to maintain the said issue on the part of the said plaintiff: and to prove that the said defendants, at the time of their said acceptance of the said paper writing, knew that the said name of William Fletcher contained in the said paper writing, and indorsed thereon as aforesaid, was a fictitious name; or that they had given authority to the said Livesey, Hargreave, and Company to draw the said bill or paper writing, so produced to the said jury, upon them, the said defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of a person who in fact did not exist, and whose name was a fictitious name; by having given a general authority to the said Livesey, Hargreave, and Company to draw bills upon them, the said defendants, by and in the name of the said Nathaniel Hingston, their said agent, expressed therein to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names: And inasmuch as the said several matters so produced and given in evidence on the part of the said plaintiff, and by the counsel of the said defendants objected to and insisted on as not admissible in evidence on the trial of the issue aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the aforesaid defendants did then and there propose their aforesaid exception to the opinion of the said Chief Justice, and requested the said Chief Justice to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said plaintiff as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said Chief Justice, at the request of the counsel for the above-named defendants, did put his seal to this bill of exceptions, pursuant to the aforesaid statute, in such case made and provided, on the 21st day of June aforesaid, in the 33d year of the reign of his said present Majesty.

In Michaelmas term 1793, the court of King's Bench gave judgment for the defendant in error, for the damages so assessed by the jury, and his costs were taxed at £108 3s.

Upon this judgment the plaintiffs in error brought their writ of error; and Lord Kenyon personally in the House of Lords acknowledged his seal, put to the said bill of exceptions pursuant to the requisition of the usual writ for that purpose.

[262] The plaintiffs in error assigned the common errors, and the defendant in error pleaded *in nullo est erratum*. For the plaintiff in error the following reasons were adduced (T. Erskine, F. Bower) why the judgment of the Court of King's Bench should be reversed.

1st, Because the evidence excepted to, has no relation to the particular bill now in question, and does not purport or affect to apply itself to such bill, and it is impossible that the facts of any one particular transaction can legally be inferred from circumstances applying wholly to others.

2d, Because it follows as a consequence from the first reason, that even if it had been proved that the plaintiffs in error had accepted other bills, knowing that the supposed payees in them were fictitious, it could not legally be inferred from thence, that they had *actual* knowledge of the supposed payee being fictitious in the bill in question.

3dly, Because, if the evidence excepted to was not legally admissible, and to be left to the jury as evidence, from which they might properly infer *actual* knowledge in the plaintiffs in error of the bill in question, being made payable to a fictitious payee, it cannot be admissible to prove a *general authority* to have been given by the plaintiffs in error to Livesey, Hargreave, and Co. to draw bills upon them payable to fictitious payees, inasmuch as a *general* authority to do certain acts, where an *actual* authority is not proved, can only be inferred by shewing an acquiescence



of the person supposed to have given such authority, in other acts of a similar nature, done with his privity or consent; and if the evidence excepted to did not prove any one act of a similar description with that in question to have been done, with the privity and by the consent of the plaintiffs in error, no given number of instances of the same kind can be proper evidence upon which to presume a *general authority* to have been given by them to do such acts. Any number of instances, each of which, taken singly, proves nothing, can never prove any thing when taken collectively; and if the evidence excepted to would not be admissible to prove that the plaintiffs in error had accepted any single bill with knowledge that the payee therein was fictitious, the permitting it to be offered to the jury as evidence, from which they might infer the fact of the plaintiffs in error, having given *general authority* to Livesey, Hargreave, and Co. to draw bills upon them, payable to fictitious payees, would be attended with this absurdity, that the fact of such general authority would be inferred from the assumption of a number of antecedent facts, when the evidence was not admissible to prove the existence of any single antecedent fact, from a number of which, the fact of general authority was to be inferred.

For the defendant in error the following arguments were used (E. Bearcroft, J. Mingay, A. Chambre), to show that the judgment of the Court of King's Bench ought to be affirmed. .

It is presumed that the plaintiffs in error mean to argue, that the evidence given at the trial, to prove their knowledge that the [263] payee named in the bill in question, was a non-existing person, or that the house of Livesey, Hargreave, and Company, with their privity, or under their authority, drew bills upon them, payable to fictitious payees, ought not to have been received, as neither directly proving the facts to which such evidence was applied, nor raising any probability or presumption of the existence of such facts, or at most a probability or presumption so light and uncertain, as not to be entitled to any attention in a court of law.

The defendant in error humbly submits, that it is competent to a jury to find matters of fact, without direct or positive testimony of those facts, and upon circumstantial evidence only, although the inference or conclusion to be drawn from the circumstances proved, be not absolutely certain or necessary.

That it is sufficient if the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, and if the evidence has that tendency, it ought to be received, and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue.

The defendant in error humbly contends, that the privity or authority attempted to be proved has, if necessary, to support the verdict, been found upon circumstances affording a degree of probability of the fact, sufficiently strong to entitle the defendant in error to prove those circumstances, and submit them to the consideration of the jury, as a ground of presumption.

The whole of the bill transaction in evidence appears, as between Livesey, Hargreave, and Company, and the plaintiffs in error, to have been a joint concern of those two houses, merely for the purpose of raising money. Though the extent of the negotiation was so large, there is no evidence to shew that it arose out of any real mercantile transaction between them, but the contrary is to be inferred from the whole of the evidence given. The irregularities and improprieties in the manner of making the bills, are such as would, for preserving the credit of the drawers, have been carefully concealed by them from the persons required to accept such bills, unless those persons had been privy to the whole plan of the negotiation, and the mode of conducting it; but the evidence which is objected to, proves the most open and undisguised exposure of all those circumstances to the view and knowledge of the plaintiffs in error.

These are all circumstances hardly reconcileable with any other supposition than that of an entire privity betwixt Livesey, Hargreave, and Company, and the plaintiffs in error; and it would be greatly injurious to the fair purchasers of bills of exchange, and a great encouragement to fraud, if such circumstances could not be proved against an acceptor, and that the acceptor might always resist the performance of his engagements when there should be a defect of positive or demon-

trative evidence of a fact, of which [264] none but the drawer and acceptor, the parties interested, might have a full knowledge.

After argument by counsel, the following question was proposed to the Judges (see 2 H. Black. Rep. 298.), viz.

Whether the circumstances mentioned in the *bill of exceptions* be sufficiently relative to the propositions therein also mentioned, viz. that the defendants in the action knew the name Fletcher was fictitious; or that the defendants had given authority to Livesey and Co. to draw bills upon them the said defendants payable to fictitious payees; so that they ought to have been received and left to the jury as evidence thereof?

On this question there was a division among the Judges, who delivered their respective opinions *seriatim*: But the majority of them, together with the Lord Chancellor and Lord Kenyon, declared that they thought the evidence ought to have been received and left to the jury.

It was therefore "ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench be, and the same is hereby AFFIRMED; and that the record be remitted back to the Court of King's Bench.\*" (See MSS. Journ. *sub an.* 1794.)

CASE 4.—PATRICK REID, and others,—*Appellants*; ARCHIBALD and JOHN COATS,—*Respondents* [21st February 1794].

Where, on a bill of exchange being dishonoured and protested, a fresh bill was received by the holder (accepted by new parties) as an *additional security*, the holder is bound to use *due diligence* to obtain payment of this latter bill: And in a case of *gross neglect* in so doing, he shall not recover against the acceptor or indorsers of the first bill; though the acceptors of the second bill become bankrupts, and though in the receipt given for such second bill it is expressly stated to be agreed, "that such bill was in no respect to exonerate the acceptors of the first bill, or any of the parties thereby bound, until actual payment thereof made."

INTERLOCUTORS of the Scotch Court REVERSED.

"The receipt of a bill or note implies an undertaking from the receiver, to every person who would be entitled to bring an action on paying it, to [265] present in proper time, the one where necessary for acceptance, and each for payment; to allow no extra time for payment; and to give notice without delay, to such person, of a failure in the attempt to procure a proper acceptance or payment; and a default in any of these respects will discharge each person from all responsibility on account of a non-acceptance or non-payment: and make the bill or note operate as a satisfaction of any debt or demand for which it was given." Bailey's Bills of Exchange, cap. 4.

See the case of *Nicholson v. Gouthal*, "That it is no excuse for not having presented a note in time for payment, etc. that the defendants indorsed it to guarantee a debt from the maker."—2 H. Black. Rep. 609. In that case

\* Among other causes which originated from the bankruptcies of these bill-negotiators was that of *Curtis et al.* assignees of Gibson and Johnson, v. *Chippendale*, trustee (or assignee) of M'Alpine and Co. callico printers, near Perth in Scotland: determined by the House of Lords, February 23, 1797—A system of bill-negotiation had been agreed upon between Gibson and Johnson and M'Alpine and Co. which was extended to the amount of £90,000 in the course of six weeks. On both houses becoming bankrupts, the assignees of Gibson and Johnson claimed, as holders of M'Alpine's bills to the amount of £25,000 against the estate of M'Alpine.—Indorsees of dishonoured bills, accepted by Gibson and Johnson, and indorsed by M'Alpine, also claimed against M'Alpine's estate to the amount of £22,000 and received dividends thereon.—M'Alpine's assignees insisted therefore that this £22,000 should be set off against the £25,000 claimed by Gibson and Johnson's assignees: and the balance only proved against M'Alpine's estate by Gibson and Johnson's assignees.—The Courts in Scotland decreed accordingly; but their decision was reversed by the House of Lords.

A. being in insolvent circumstances, B. undertook to be a security for a debt owing from A. to C. by indorsing a promissory note made by A. payable to B. at the house of D.—The note was accordingly so made and indorsed with the knowledge of all the parties.—Just before it became due, B. being informed that D. had no effects of A. in his hands, desired D. to send the note to him (B.) and said he would pay it.—It was determined that C. could not maintain an action against B. on the note, *without having used due diligence* in presenting the note, as soon as it was due, to D. for payment, and in giving immediate notice to B. of the nonpayment by D. for B. *has a right to insist on the strict rule of law respecting the indorser of note, notwithstanding the particular circumstances of the case.*" See also statute 3 and 4 Ann. c. 9. sec. 7.

The appellants Messrs. James Wilson and Co. late of Glasgow, merchants, drew a bill of exchange, dated January 28, 1784, upon the appellants Messrs. Reid, King, and Co. payable at the house of Cumberland Wilson, esq. Glasgow, for £400 at twelve months after date. This bill was indorsed by the appellants Messrs. James Wilson and Co. to the other appellants Messrs. Wilson and Sons, by them to the respondents, and by the respondents to Archibald Graham, cashier to the Thistle Bank in Glasgow, who protested it for non-payment when it became due, against the acceptors, drawers, and indorsers, in consequence of which the respondents paid the amount to him.

The respondents having thus become creditors to the appellants Messrs. James Wilson and Co. for the sum contained in the bill, immediately applied to them for payment; but, at this period, Ross and Butler, merchants of Antigua, being indebted to the appellants James Wilson and Co. to the extent of nearly £3000 sterling, Cumberland Wilson went to the West Indies for the purpose of recovering this and several other sums due to him and his partners in that country. The respondents knowing this, and that the appellants James Wilson and Co. could not command money to pay the bill unless it should be recovered in the West Indies, transmitted it to Ledwell and Scott, as their attornies there, in order to obtain payment from Cumberland Wilson. Upon the bill being presented to Mr. Cumberland Wilson at Antigua, he at once told Ledwell and Scott that he could not pay it, unless he should be enabled to do so by recovering his money from Ross and Butler.

The two houses of Ross and Butler and Ledwell and Scott were very closely connected together both by relation and in business; Ross having married Scott's sister, and Butler, Ledwell's cousin; and Ledwell and Scott being likewise securities for Ross and Butler, to their correspondents Henry Pearson and Co. of London, for large cargoes of goods exported to them. For their reimbursement, Ross and Butler made payment to them of the money they collected [266] from these goods, and indeed made no payment to any one without their knowledge.

Hearing then that Ross and Butler were so considerably indebted to James Wilson and Co. Ledwell and Scott proposed that Cumberland Wilson should give them an additional security on behalf of their constituents the respondents, by a draft on Ross and Butler, which they were to accept, and of which Ledwell and Scott promised to recover payment, as indeed they could be under no difficulty of doing, considering the footing on which matters stood between them and Ross and Butler. That this proposition for giving this draft came originally from Ledwell and Scott, is proved beyond a doubt by their own letter to the respondents, in which they say, "We proposed an additional security by a draft on Messrs. Ross and Butler of this island, who, we find, are indebted to Cumberland Wilson and Co. and this *he consented to* on condition of our taking it at twelve months."

Accordingly the following state was made out, shewing the amount of the respondent's claim, as stated by their attornies Ledwell and Scott:

|  |           |
|--|-----------|
| Messrs. James Wilson and Co. to Archibald and John Coats of Glasgow, Dr. |           |
| 1785,  | £. s. d.  |
| January 28. To your draft on Messrs. Reid, King, and Co. of New York,    |           |
| dated the 28th of January last, at twelve months date, in-               |           |
| dorsed to us, and accepted by them, payable in Glasgow                   | 400 0 0   |
| To charges of protest for non-payment                                    | 0 11 10   |
| Carry forward . . . . .  | 400 11 10 |

|           |  |                    |
|-----------|--|--------------------|
| 1785,     | Brought forward  | £ s d<br>400 11 10 |
| August 1. | To interest from the 28th of January 1785, to the 1st of August, is nineteen months, at five per cent. per annum | 31 13 4            |
|           |  | 432 5 2            |
|           | To commission for recovering and remitting at five per cent.   | 21 12 3            |
|           |  | 453 17 5           |

For this sum a bill of the following tenor was drawn by Cumberland Wilson, and accepted by Ross and Butler: "Antigua, August 1, 1785. *Twelve months after date*, pay to Archibald and John Coats, of Glasgow, or their order, the sum of £453 17s. 5d. sterling money of Great Britain, and charge it to account of (signed) Cumberland Wilson and Co. (Addressed) To Messrs. Ross and Butler, merchants, in Antigua. Accepted (signed) Ross and Butler."

And this acceptance being delivered to Ledwell and Scott, they gave a receipt for the same in the following terms to Mr. Wilson: "Antigua, August 1, 1785. Received from Cumberland Wilson, [267] esquire, partner in the house of Messrs. James Wilson and Co. his draft of this date on Messrs. Ross and Butler for the sum of £453 17s. 5d. sterling, and accepted by them, payable in this island, at twelve months date; which bill is received *as an additional security* for the said protested bill; *but by express agreement, it is in no respect to exonerate the acceptors, or any of the parties thereby bound, until actual payment thereof is made.* (Signed) L. and S. attorneys for A. and J. Coats."

Mr. Cumberland Wilson being now, and having been for a considerable time past, in North America, the appellants have not had access to the original receipt, and indeed, owing to the same cause, they labour under many other disadvantages in point of information. The above is taken from a copy of the receipt produced by the respondents, subjoined to which is a note, "That in case the said bill for £400, with charges and interest, should be paid by the drawers, indorsers, or acceptors, in Glasgow, on or before the 1st day of August 1786, (the time when Ross and Butler's bill became due), conformable to an agreement, which (by Mr. Wilson's information) was made by A. and J. Coats at the time of drawing said bill, and by which an indulgence was to be given to the 1st day of August 1786, if required; then it is agreed that the charge of £21 12s. 3d. above stated for commission, shall be refunded by A. and J. Coats."

The above bill, being thus given on the 1st of August 1785, about the end of December in that year, Mr. Wilson went to some of the other islands. He returned to Antigua in April following, and on the 5th of May he settled all accounts with Ross and Butler, giving them credit for the draft he had given to Ledwell and Scott. At the same time he obtained from Ross and Butler the security of a Mr. Eales for the balance due to him and his partners, being £1916 13s. 1d. which security Messrs. James Wilson and Co. assigned to a Mr. Alexander Rymer, who afterwards duly received the whole; so that had Cumberland Wilson had the smallest reason to suspect that Ledwell and Scott would not have taken effectual care to demand the payment of his bill when it became due, there would not have been any difficulty in getting Mr. Eales's security for that as well as the rest, by which he would have been perfectly sure of the whole. Confident however that this money would be paid, as Ledwell and Scott had so many better opportunities of procuring money from Ross and Butler than any one else, Cumberland Wilson gave himself no further trouble about it; nor indeed could he have required Eales to become security for it, as, in what had passed, he no longer considered himself or his partners as creditor for that sum.

Having made this settlement with Ross and Butler, Cumberland Wilson returned to Scotland in August 1786; from which time, till about the middle or near the end of the year 1789, (a period of full three years,) neither he, nor any of the persons originally liable for the payment of the bill to the respondents, ever heard a single word of its not being discharged by the above draft on Ross and [268] Butler, who, it is without controversy, remained solvent, and continued to go on in business, not only when it became due, but for two years after. From this silence they naturally concluded that it was paid.

Even this is not all, for independently of the intimate connection which, it has been stated, subsisted between the houses of Ledwell and Scott, and Ross and Butler, the fact is, that Ledwell and Scott, for the security of their engagements to Henry Pearson and Co. on Ross and Butler's account, received the whole of Ross and Butler's collections for the year 1786, to a very large amount; from which, if they had been so inclined, they might have received every sixpence of Cumberland Wilson's draft to the respondents their constituents, as indeed it was their duty to have done, especially as they were apprized of the settlement in 1786, between Cumberland Wilson and Ross and Butler; Mr Scott himself being the person to whom the bonds, granted by them and Mr. Eales their surety, were delivered, as attorney for Mr. Brymer; at which time Mr. Wilson might have gotten this bill included in the security then given, and most undoubtedly would have done so, had not Scott assured him that he would take care to receive the money when due, and remit it to the respondents.

It was not therefore without considerable surprise that the appellants found a demand made upon them for the original bill of £400 by the respondents, in the year 1789. The demand not being complied with, the appellants were cited at the instance of the respondents in the present action, in November 1789, concluding for payment of the principal sum of £400, with interest thereon from the 28th of January 1785, without taking any notice of Ross and Butler's bill, which hath never yet been produced.

This action came in course of the rolls before Lord Dregghorn, who was pleased, (November 20, 1790,) after hearing counsel, to pronounce the following interlocutor:—"The Lord Ordinary having heard parties procurators, before answer, ordains the pursuers to give in a condescendence of the facts they aver in support of their libel, and that between and next calling."

From this interlocutor it was suggested by the appellants, that the Lord Ordinary was of opinion that it was incumbent on the pursuers to account for the conduct of their attornies in Antigua; and the condescendence was evidently ordered with a view that they should therein explain what steps had been taken by their attornies for the recovery of the money previously to the failure of Ross and Butler; but nothing of this kind was attempted in the condescendence. The pursuers rested their plea merely upon two points: 1st, An argument in law, that the bill on Ross and Butler having been given only as an additional security, *neither the pursuers nor their attornies were bound to use any sort of diligence*; and therefore it was of no consequence whatever degree of neglect there might have been in not recovering payment of it. 2d, An allegation, in point of fact, that the appellants Messrs. Wilsons actually received the sum in the bill libelled, from the other appellants, Messrs. Reid, King, [269] and Co. for the purpose of paying the respondents. This averment passed unnoticed in answers and duplies afterwards given in for the appellants, owing to a want of information on the subject, occasioned by the death of Mr. Paterson, writer, in Kilmarnock, who was agent for the appellants in the country. But it now turns out to have been a mere misrepresentation, as will be shewn hereafter. To this accident however the appellants principally impute the misfortune of having the Lord Ordinary's opinion against them, on advising condescendence, answers, replies, and duplies, the interlocutor being expressed in the following terms:—"Having considered the condescendence, etc. and having particularly considered that the pursuers did, by their attornies, Ledwell and Scott, demand payment of the bill in question (i.e. the bill now pursued on) when due from the defenders, who were then unable to pay the same; and that the said attornies did receive from them another bill on Ross and Butler for the amount, interest, charges, and commission, as an additional security, and under an expresse declaration, that it was in no respect to exoner all the acceptors, or others bound, until actual payment; and this was so received by said attornies without any communication with their constituents, and at the request and for the accommodation of the defenders; and having further and *separatim* considered what is stated in the condescendence, with regard to the transaction between Reid, King, and Co. and the other defenders, the Wilsons; and that no notice is taken thereof in the answers, nor even in the duplies, although the defenders were called upon in the replies to speak to it; and it was therein averred that the defenders, the Wilsons, got the sum in the bill to pay to the pursuers; repels the defences; finds the defenders liable in the sum libelled, and decerns; finds them liable in expences; modifies the same, as hitherto incurred, to £10 sterling; and de-

cerns against them for that sum, and the expence of extract." To this interlocutor the Lord Ordinary adhered, by refusing a representation and answers of this date.

The appellants, dissatisfied with the interlocutors above-mentioned, presented a reclaiming petition, which the whole Court were pleased to refuse without answer (Dec. 13, 1791.)

The appellants presented a second petition to the like effect; but the Court were pleased to refuse the desire of this petition also, and to adhere to their former interlocutors. (January 17, 1792.)

The appellants conceiving themselves to be greatly aggrieved by the two interlocutors of the Lord Ordinary, and by the two interlocutors of the whole Court above recited or referred to, appealed from the same to the House of Lords; and since (J. Anstruther, W. Adam) the following reasons why the interlocutors should be reversed:

1st, It is clear that Ledwell and Scott were the attornies of the respondents; they describe themselves as such in the receipt which they gave for the bill upon Ross and Butler; a copy of that receipt, it must necessarily be presumed, was shewn to the respondents; [270] the respondents recognized, approved, and confirmed their act. It is not now therefore competent to the respondents to deny that Ledwell and Scott acted in that character, or to allege that they exceeded the extent of their commission. Supposing, indeed, that they had gone beyond the scope of their commission, the appellants are not to suffer on that account. It is admitted that Ledwell and Scott had power to treat with Cumberland Wilson; the extent of that power Cumberland Wilson could not possibly know: If the attornies abused the confidence reposed in them, if they exceeded the bounds of that authority which was given them, their employer must be the sufferer; where one of two innocent persons must sustain a loss from the misconduct of a third person, it must fall upon him who originally introduced such third person.

2dly, There is a strong legal presumption that the bill upon Ross and Butler has been satisfied. The length of time which elapsed between the time when the bill became payable, and that of giving notice of its being dishonoured; the relation in which the holders stood to the acceptors, Ross and Butler; the holders themselves, men trained in the habits of business, and well acquainted with all the forms of it; these circumstances leave little room to doubt but that the bill has been paid, or in some way settled.

3dly, But supposing the bill not to have been satisfied, it is established law, *that the holder of a bill must demand payment of it immediately as it becomes due*; and that he must take the earliest opportunity of informing the indorser, or drawer, of its dishonour, otherwise he will lose his recourse. In the present case it does not appear, nor is it even pretended, that any demand was made at the time of the bill becoming due, nor indeed at any time after; no notice at all was taken of it for nearly three years, not till the insolvent circumstances of the acceptors, Ross and Butler, rendered it impossible to take any measures for recovering the payment of it from them. The respondents, therefore, *by their laches*, or, which is the same thing, *by the laches of their agents, have made the bill their own*, and have forfeited all claim upon the appellants. And the wisdom of the law in requiring this diligence in the holder was, perhaps, never more manifest than upon the present occasion, since, if the bill had been presented in the regular course, there is no reason to doubt but that it would have been honoured, as Ross and Butler were at that time solvent, and continued so for two years after. From the negligence of Ledwell and Scott, therefore, the appellants have sustained an actual loss.

Objection. But it has been objected, and so the interlocutor seems to say, That this bill upon Ross and Butler having been received only *as an additional security*, and under an express declaration that it was in no respect to exonerate the acceptors, or others bound in the other bill, until actual payment was made, the argument arising from neglect to use proper diligence upon it can have no weight.

[271] Answer. But surely there can be no difference between a bill sent as a remittance from one correspondent to another, or given as an additional security for a debt. *The bill has the same properties, and the same obligations attach upon the holder with respect to it, in the latter case as in the former.* Where a bill is remitted to another, as in the present instance, as a security for one that has been dishonoured.

This bill does not therefore cease to be a negotiable instrument, nor is it discharged of the rules required in negotiation: The correspondent takes it only in security, because he would otherwise lose the remedy which he has against the obligants in the dishonoured bill; but *no greater latitude is allowed him in the terms of negotiation with respect to this bill than with respect to the other.* The receipt, in the present case, so far as it goes, makes no alteration in the properties of the bill; it only declares that the bill is not to relieve the drawer from an antecedent debt till actual payment is made; *it does not say that the indorsees are not to be bound by the usual rules of negotiation.* But supposing that the giving of a bill in security were not to be considered as making the holder liable to the diligence generally required, the mischief to the commercial world would be enormous; merchants would be deprived of that early notice of the state of the claims that can be made upon them, which is so essential to business. And where there are several indorsers upon a bill, and the last indorses in security only, can it be imagined that the holder, who, as such, is the only person who can protest for non-payment, and intimate the dishonour, could be excused for neglect of due negotiation, or pretence that he was only an indorsee in security, when he must infallibly know that this neglect will deprive the last indorser of his recourse against the drawer and all former indorsers? To tolerate such a wanton destruction of the property of another, would not only be repugnant to every idea of property in mercantile conduct, but even to the first principles of natural justice and equity. But if there were any doubt of this obligation to negotiate a bill in security and to use exact diligence where the parties live in the same place, yet surely there can be no such doubt where the bill is remitted to a foreign place. Where the person who has given the bill is, perhaps, one thousand miles distant from the place where it is payable; there must necessarily be an implied contract that the holders shall negotiate duly; and therefore, as they take the draft in security, they must be presumed to undertake the trust and charge of negotiating it, as it cannot be otherwise negotiated.

4thly, But even supposing the holders of a bill in security to be in general not liable for any neglect whatever, still there are some circumstances which would render the respondents accountable for the amount of this bill. 1st, Ledwell and Scott knew that Cumberland Wilson, in settling with Ross and Butler, took security for the balance remaining due to him and his partners, after deduction of the bill which he had some months before drawn in favour of the respondents, one of them being a party to the transaction: And they further knew, that after he had settled with Ross and [272] Butler in this manner, he returned to Britain a short time before the bill he had drawn in their favour became due, leaving no person, except themselves, who could possibly attend to it. From all which it is evident, that it must have been understood between the parties, that Ledwell and Scott, who received the bill, were also to pay attention to the recovery of it, and that it was given them on these terms. 2d, Ledwell and Scott were not guilty merely of neglect; their conduct amounts to a positive wrong done to the appellants, they having recovered large sums of Ross and Butler after this bill became due, which they applied wholly to relieve themselves of debts for which they were bound, but did not apply, at least, it is now pretended by the respondents that they did not apply, any part they so received, in payment of this bill, which was lying in their hands past due; and all the while they said nothing, but left those concerned to suppose that the bill was paid. 3d, It is to be observed, that the respondents, or their attornies for them, took a sum in name of *commission for receiving* the money for Ross and Butler, as appears from the state above set forth, which was produced by the respondents, and transmitted to them by Ledwell and Scott in August 1785, when the bill was given. This therefore, independently of every thing else, it is submitted, makes them liable, if not for strict negotiation, at least for some diligence, in which they and their attornies have totally failed.

The respondents stated (W. Grant, A. Campbell, W. Tait) the following reasons for affirming the decree.

The bill for £400, upon which the appellants put their names, *has never been paid*, and neither has the bill granted by Ross and Butler in security of the former bill; consequently the respondents have not recovered payment of the debt justly due to them for value received from the respondents by the appellants, in consequence of goods furnished in the fair course of trade.

This is proved by the fact of both the bills being now in the possession of the respondents; who, upon receiving payment of the £400 bill with interest and charges will deliver up both the original bill by which the appellants are bound, and the bill granted in security by Ross and Butler.

The defence pleaded by the appellants against paying the debt, which is in its manner proved to be still owing to the respondents is, that the respondents should have recovered payment of the bill due by Ross and Butler; and that if they have done so, they have themselves to blame, and cannot now have recourse against the appellants. The respondents, it is said, should have negotiated the bill against Ross and Butler in all the forms known in law and practice; but instead of doing so, they took no step whatever to recover its contents, but neglected demanding payment till Ross and Butler became bankrupt. They were therefore guilty of a gross neglect, and the damage arising from that neglect they must bear themselves.

This defence, the respondents contended, was ill founded, both in point of fact and in point of law.

[273] When Ledwell and Scott took the bill upon Ross and Butler from Cumberland Wilson, they took it as an *additional security* for the debt owing by the appellants, and under the *express declaration that it was in no respect to exonerate the acceptors of the original bill, or any of the parties thereby bound, till actual payment of the bill by Ross and Butler was made.*

The bill by Ross and Butler therefore was not taken *in solutum* of the debt due by the appellants, but merely in security of that debt.

There is no point more clearly fixed in the law of Scotland than this, that where a bill is granted in security, it requires not to be duly negotiated like other bills, in order to preserve the right of the person who holds it to insist for the original debt in security of which the bill was granted; if the bill given in security is paid, the debt is of course extinguished to the amount of that payment; but if the bill given in security is not paid, the debt remains still due, and it does so though the holder of the bill in security has taken no step whatever to operate his payment.

This has been found by repeated decisions.—In particular, it was decided to be law in the case of *Alexander against Cuming*, 3d January 1758; in which case it was found, that where a bill is granted not *in solutum* of a debt, but only in security, the indorser was still liable on the original ground of debt, though the holder of the bill had taken no step whatever to recover payment of the bill given him in security. The same doctrine was held to be law in the still later cases of *M'Kinnon against Garreck*, 1st February 1775; *Glass against Kellie*, 26th November 1776; *Pringle against Keltie*, 11th February 1777; and *M'Ausland against Hamilton and Company*, 27th November 1779.

Had the bill by Ross and Butler been taken *in solutum* of the debt owing by the appellants, the case would have been different. But a *novatio debiti* is never to be presumed; and in this case there is no room for presumption, as the fact, that the bill upon Ross and Butler was taken merely as an additional security for the bill in which the appellants were bound, is proved, not only by the terms of the receipt granted by Ledwell and Scott to Cumberland Wilson, but by this circumstance of real evidence, that both the original bill, and the bill upon Ross and Butler, remained in the possession of Ledwell and Scott.

Whether Ledwell and Scott took any steps to recover payment of the bill granted by Ross and Butler, the respondents cannot tell; but it is certain that, from the moment that Ledwell and Scott took the bill in security, which they did (originally) without any authority from the respondents, repeated letters were written by the respondents, during the course of two years, urging Ledwell and Scott to recover payment of the bill from Ross and Butler, and urging them to procure payment of the debt in question. Whether Ledwell and Scott took any steps to that purpose, it is immaterial to enquire, because it was not incumbent upon the respondents to make a single demand upon Ross and Butler to pay the bill which they had granted.

For it is clearly contrary to law to say, that if a creditor does not pursue a cautioner or surety for a debt, he is not to be allowed to make a demand upon the principal obligant: That a creditor cannot distress a surety, without discussing the principal debtor, is established law; but to reverse the rule, and to say that a creditor must discuss the cautioner or lose his claim against the principal obligant, is a



doctrines that was never heard of before. Supposing the respondents to have been perfectly well acquainted with every thing that took place in the West Indies, and supposing them never to have made any demand upon Ross and Butler for the contents of the bill due by them, that could in no shape bar the present demand against the appellants; because, if the respondents were satisfied with the security which they had for the debt due to them, they certainly were at liberty not to exact payment of it till they thought proper. Had the bill granted by Ross and Butler been *in solutum* of the debt due by the appellants, then the respondents again repeat, that the case would have been totally different from what it is; but as that is not the fact— as Ross and Butler were merely sureties for the appellants, it is impossible to conceive upon what ground the fact of the respondents' not having prosecuted the sureties while they were solvent is to have the effect of liberating the appellants. If the appellants were desirous to have the debt due to the respondents paid by Ross and Butler, it was the duty of the appellants to have taken proper measures for that purpose; but as to the respondents, it would be sufficient for them to contend, that they were satisfied with the two bills which they held for their debt, the one binding the appellants, the other Ross and Butler.

It is perhaps unnecessary to quote any authorities in support of so clear a doctrine, as that a creditor, obtaining an additional security for his debt, is not bound to do diligence upon that security; and that both the person bound in that security, and the original debtor, remain liable to him. The respondents therefore shall content themselves with referring to a strong case of this kind mentioned in the Dictionary, vol. i. page 228. *Smith against Vint*.

Could any doubt be entertained as to what has been stated, the respondents apprehend that the decision of the Court of Session ought to be affirmed, in consideration of the precise terms of the receipt granted by Ledwell and Scott for the bill on Ross and Butler, that receipt positively saying, that the acceptors and indorsers of the original bill were to remain bound. The Wilsons ought to have paid their own bill when the year was expired, or at least they ought to have taken care to see that Ross and Butler's bill was paid; and upon finding that it was not, they ought to have paid the original bill, taken back Ross and Butler's bill, and recovered its contents themselves.

[275] It deserves farther to be noticed, that Reid and Company were no parties to the transaction in the West Indies. That transaction took place between Ledwell and Scott and the Wilsons. If there was any neglect upon the part of Ledwell and Scott, by which the debt due by Ross and Butler to the Wilsons was lost, that might found the Wilsons in an action against Ledwell and Scott or the respondents, but it never could free Reid and Company from payment of the original bill, which certainly remained effectual, notwithstanding the transaction in the West Indies.

The appellants argued upon a number of circumstances, from which, they said, it was perfectly clear that Ledwell and Scott might have recovered payment of the bill upon Ross and Butler, if they had made their demand when the bill became due; and they also said that Ledwell and Scott actually received payment from Ross and Butler of other debts. But in answer to all of those and other circumstances, of none of which there is any evidence whatever, and several of which indeed tend to disprove one another, the respondents must again return to the fact, that the bill upon Ross and Butler was granted merely in security of the debt due by the appellants, and therefore it was the business of the appellants to take care that the debt which they owed was paid; for they could not but know, that notwithstanding the bill granted by Ross and Butler, they themselves still continued bound to the respondents.

It is equally in vain for the appellants to say that they understood, long after the time when the bill granted by Ross and Butler became due, that it was paid in extinction of the debt owing to the respondents. This allegation, were it true, would be of no consequence; but it is not true, because the respondents have already stated and quoted the words of the bond establishing the fact to be so, nor has any thing been said that refutes the allegation, that in 1787 a transaction was concluded between the Messieurs Wilsons, and Reid, King, and Company, from which it appeared, that it was the understanding of both of these contracting parties, that the sum in question was an outstanding debt due by them to the respondents.

But after hearing counsel, it was ORDERED and ADJUDGED, that the interlocutor

complained of be reversed; and that the defenders be assolizied. (MSS. Journals, *sub an.* 1794.)

[276] CASE 5.—CHARLES FERGUSSON and others,—*Appellants*; DOUGLAS.

HERON, & Co., and others,—*Respondents* [11th November 1796].

[Mews' Dig. ii. 1561, 1634: ix. 6. 1 Scots R. R. 769.]

The *three days of grace* allowed by the custom of merchants for payment of bills of exchange, are allowable on bills drawn and payable in Scotland; the limitation of an action on such bill therefore only begins to run from the third or last day of grace.

JUDGMENT of the Court of Session, on this point, *AFFIRMED*.

Some other points, not material to the reader, were involved in this cause: Such part only of the case is stated as relates to the above decision.

John Grant esquire, deceased, late one of the Barons of Exchequer in Scotland, accepted two bills for £500 each, dated the 16th May 1772, drawn by John Fordyce, merchant in Edinburgh, and payable sixty-five days after date to the drawer, or his order.

John Fordyce indorsed those two bills to Gilbert Innes, for behoof of the respondents Douglas, Heron, and Company, who remitted the same to Sir George Colebrooke and Company, their agents in London.

On the 23d of July 1772, being the *last day of grace*, the bills were protested for non-payment, at the instance of the holders.

On the 29th of July, Mr. Hog, cashier to the respondents, wrote to Mr. Fordyce as follows:—"I have advice that your bills on Baron Grant, 16th May, at sixty-five days date, for £500, are protested for not payment, which I notify to you."

Mr. Alexander Fergusson, a partner of the respondents' company, and then acting for them in London, having paid the amount to Sir George Colebrooke and Company, got back the bills, and sent them down to Edinburgh, the 30th July 1772.

A short time before this, Fordyce, Malcom, and Company, of which John Fordyce was a partner, had become bankrupt, and applied for a sequestration under the Act 12 Geo. 3. c. 72, which was accordingly awarded, both against the Company and the individual partners.

Some time after this a compromise took place between Mr. Fordyce and his creditors: in consequence of which the respondents received, in 1775, the sum of £340 7s. 9d. being about 6s. and 6d. in the pound of the above-mentioned two bills.

Baron Grant, the acceptor of the said two bills, having died without making payment of them, the respondents charged Andrew Grant, esquire, some time merchant in Edinburgh, then in Grenada, the baron's brother and heir at law, to enter heir to his said brother; and (on July 23d 1778) brought an action in the Court of Session against him and Mr. Fordyce, concluding against Mr. Grant and Mr. Fordyce jointly, for the two sums of £500 each, contained in the said two bills, with interest, commission, and charges, in-[277]-curred thereon; deducting therefrom £340 7s. 9d. paid by Mr. Fordyce in August 1775.

Mr. A. Grant having died, the action (to use the Scotch phrase) *fell asleep*: but in 1790, after some fruitless proceedings against Mr. A. Grant's widow and children, the respondents brought another action against the appellants, as trustees, in whom Mr. Grant had vested his estates, real and personal, to enforce payment to the respondents of the balance of the two foresaid bills due by Mr. Baron Grant to them.

Appearance having been made for the appellants, it was pleaded for them in defence (*inter al.*) That the debt, for which the action was brought, was *prescribed*: (i.e. that it was not recoverable on account of the statute of limitations, 12 Geo. 3. c. 72, sec. 37. See *post.*)

In November 1792, the Lord Ordinary pronounced an interlocutor, in which he "*sustained the defence of prescription of the bills pursued for.*"

By a reclaiming petition to the whole Lords against this interlocutor, the respondents prayed the Court, "to repel the defence of prescription;" and upon advising, (February 19, 1793), the Court pronounced an interlocutor, altering the interlocutor of the Lord Ordinary: "The Lords having advised this petition with the

answers thereto, *they repel the plea of prescription*, in respect of the claim entered upon the bills in question."

On a second reclaiming petition, (November 19, 1793), answers thereto were put in for the respondents, and the following interlocutor was thereupon pronounced: The Lords, having advised this petition with the answers thereto, find that the time requisite for completing the prescription in question *only began to run from the third or last day of grace*, and therefore repel the plea of prescription pleaded for the petitioners.

Against this interlocutor (as well as certain others) the appellants appealed to the House of Lords, and as to this part of the case insisted (R. Dundas, R. Dallas),

That the claim in question was cut off by the *sexennial* prescription introduced by the act of the 12th Geo. 3. cap. 72. The bills they insisted became payable on the 20th July 1772, and no legal step was taken to preserve them till the 23d July 1778, six years *and three days* subsequent to the term of payment: That a bill is held (under that act) to be payable, in the law of Scotland, on the very day specified: By that law all the bills that are protested, and on which summary execution or diligence is to pass, must be registered within *six months* after they fall due. Now, it was not disputed that the six months run *not from the last day of grace*, but from the day on which the bill is made payable, which clearly shews what is considered to be the precise and fixed period of payment. Besides, it seems doubtful, whether the action brought against Mr. Andrew Grant in the year 1788 can be considered as at all interrupting the prescription. At this time, and for several years before, as admitted by the respondents themselves, Mr. Grant [278] had gone to reside in Grenada, his domicile was there, the demand ought therefore to have been made in that country.

On the part of the respondents it was contended (W. Grant, J. Anstruther) on this head:

That the bills in question were in full force and not prescribed, because the prescription of six years, introduced by the act of 12 Geo. 3. c. 72, runs only from the last day of grace; and a summons, concluding for payment of these bills, was executed against Andrew Grant, as representing the acceptor, and also against John Fordyce, the drawer of the said bills, on the 23d of July 1778, which was within the six years, *computing from the last day of grace*.

The bills being dated the 16th May 1772, and payable at sixty-five days date, the 23d of July 1772, was the last day of grace; and of consequence the foresaid summons was unquestionably within the six years, computed from that date. This the appellants could not deny; but they have insisted that the sixty-five days, mentioned in the bills, expiring on the 20th of July 1772, the six years should be computed from that date, and not from the 23d of July, the last day of grace. The question therefore is, whether the six years ought to be computed from the one term or the other? And the respondents humbly conceive that the words of the statute, the practice of merchants, and the general principles of law respecting prescription, do all concur in supporting the judgment which the Court of Session has pronounced upon this point.

The enactment of the statute (12 Geo. 3. c. 72, sec. 37), is in these words: "Be it enacted by the authority aforesaid, That no bill of exchange, or inland bill, or promissory note, executed after the 15th day of May 1772, shall be of force, or effectual to produce any diligence or action in that part of Great Britain called Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of *six years from and after the terms at which the sums in the said bills or notes became exigible*."

In applying this enactment to the present case, the thing to be considered is, at what time the bills in question became *exigible*, so that forbearance after that period should make the course of prescription to run against the holders.

This the respondents apprehend must be determined according to the usage and custom of merchants, which regulates every thing concerning the payment and acceptance of bills; and in conformity to which any particular provision, superadded by statute, ought to be expounded, unless where the declared purpose of the statute is to make an innovation. Now it is perfectly settled, that although a bill is by the tenor of it appointed to be paid upon a particular day, or so many days after date, yet, according to the established usage in Great Britain, it is only held to be *exigible* on the third day thereafter; three days of grace being allowed to the acceptor; and no

acceptor of a bill ever thinks of paying, or any holder of a bill of demanding payment, sooner than the last of these [279] days. And in other mercantile countries, although they differ as to the number of days, it is universally established, wherever bills are known, that the same shall not be exigible upon the precise day therein mentioned; but that a certain additional number of days, more or less according to the custom of different countries, shall be allowed to the acceptor, in order to be prepared for making payment. Accordingly, though bills bear interest from the term of payment, yet when a bill is paid on the last day of grace, (which is the soonest that any bill is paid even by merchants who have the fullest command of cash), no interest is ever paid or demanded, because the bill is understood to have been punctually paid on the term of payment, that is the term fixed by established mercantile usage. When a bill is discounted for ready money, which is one of the most common operations respecting bills, the bank or banker who discounts the same always deducts the interest, not to the day of payment mentioned in the bill, which is merely nominal, but down to the last day of grace, which is considered to be the real and effective term of payment, when the sum in the bill first becomes exigible. Again, when a remittance is made by a bill, the contents are only held to be cash, as upon the last day of grace; and the account is always so stated betwixt the remitter and his correspondent. And in the same way, when a bill is either accepted or received by a merchant, and entered in his books under the account either of bills payable or bills receivable, the last day of grace is uniformly stated as the day when the money is either to be paid or received: the only use of the nominal term mentioned in the bill being to fix and ascertain the other which is the real term.

In judicial proceedings, in like manner, the last day of grace is considered to be the term of payment, or the day upon which a bill properly becomes payable. See *Kaimes's Rem. Decis. Ramsay con. Hog*, 6th July 1743, where the term of payment or day of payment is considered to be a synonymous expression with the last day of grace: and accordingly it is an established point in practice, that an acceptor cannot be sued upon a bill of exchange till after the last day of grace. Some doubt having arisen whether the same rule was to be extended to promissory notes in England, the question was lately decided in the affirmative, by a judgment of the Court of King's Bench. Hil. 1791, *Brown v. Harraden*. (4 Term, Rep. 148.)

It being thus a settled point, both in law and in mercantile practice, that the proper term of payment does not come, and that payment cannot be exacted, till the last day of grace; it follows, upon the general principles of law and reason, applicable to all prescriptions, that any limitation or prescription of such debts, founded upon the holder's forbearance to exact payment for a given time, ought only to be computed from that day. To make prescription current during the three days of grace would be contrary to the whole spirit of the law with regard to prescription; it [280] would be founding a penal consequence upon the forbearance of a creditor at a time when he had it not in his power to do otherwise.

The expressions used in the above-quoted clause of the statute 23 Geo. 3, appear to the respondents to have been chosen on purpose to leave no room for a doubt upon this subject. The six years are thereby declared to run "from and after the term at which the sums in the said bills or notes became exigible." Now it can hardly be supposed that the legislature understood a bill to be exigible whilst, according to the established practice and usage, payment thereof could not be exacted. On the contrary, there being, on account of the days of grace, a nominal and a real term of payment in the case of bills, the expression "from and after the terms of payment" appears to have been studiously avoided, as liable to some ambiguity; and the expression "from and after the terms at which the sums in the said bills or notes became exigible" has been selected and made use of for the very purpose of excluding the days of grace, so that the six years should only begin to run from the expiration thereof.

Accordingly, the House (though they reversed the other parts of interlocutors complained of) AFFIRMED so much of that of the 19th November 1793, "as found that the time requisite to completing the prescription in question, only began to run from the third or last day of grace, and therefore repelled the plea of prescription." (See MSS. Journal *sub anno* 1796.)

CASE 6.—Messrs. MACKENZIE and LINDSAY, Merchants, in DUNDEE,—*Appellants*; CLAUDE SCOTT, Corn Factor, in LONDON,—*Respondent* [19th December 1796].

[1 Scots R.R. 774.]

A factor, under a commission *del credere*, sells goods and takes accepted bills from the purchasers: These bills he indorses to a banker at the place of sale, and receives the banker's bill, (payable to the factor's order), on a house in London: This last bill the factor indorses and transmits to his principal, who gets the same accepted.—The acceptors and the drawer fail,—The factor is answerable for the amount of the bill; being personally liable, under his commission *del credere*, to satisfy his principal the price of the goods sold.

Previous to the month of November 1792, the respondent, who was a corn-factor in London, had agreed to purchase from the appellants a quantity of wheat for exportation; the price was to be paid as soon as the appellants furnished the respondent with the invoice and bill of lading of the cargo.

[281] His Majesty and the Privy Council having soon after prohibited the exportation of wheat, the appellants were disabled from performing their contract with the respondent. The quantity which the appellants had agreed to deliver to the respondent was 743 quarters, and the price (including a commission of  $2\frac{1}{2}$  per cent. charged by the appellants) amounted to £1713 10s. 10d.

The respondent, unwilling to throw upon the appellants the loss occasioned by the prohibition of the Privy Council, and believing that he might be able to obtain some compensation from government for that loss, resolved to complete the bargain, and admitted himself to be charged with the price.

The respondent afterwards gave directions to the appellants to make a re-sale of the wheat, which, after some delay, they accordingly did in the month of February 1793; and, in April following, they transmitted a state of the account of sales, from which it appeared, that, after deducting all charges, and a commission of  $1\frac{1}{2}$  per cent. *del credere*, (besides the commission of  $2\frac{1}{2}$  per cent. for their trouble in the purchase), the proceeds of the re-sale amounted to £1441 12s. 11d.

On March 18, 1793, the respondent wrote the appellants from London, "I am much surprised that you have not furnished me with the account of sales of the wheat you bought for me, and that you do not send me a remittance for the same."

The appellants wrote the following answer.—"Dundee, March 20, 1793. Our last respects to you were of the 28th ult. since which we have to acknowledge your sundry favours, the last upon the 11th instant.—We are happy to wait upon you with the enclosed draft of Messrs. Bertram, Gardner, and Co. upon Baillie, Pocock, and Co. of this date, at 75 days, for £1000 to account of your wheat re-sold by us, *which please pass to our credit*, and acknowledge receipt in course.—The wheat is sold at three months credit; but, as we wish you reimbursed of your outlay of money, *we have taken that upon ourselves, which must be more agreeable to you.*"

The bill remitted was of the following tenor:

"Edinburgh, 20th March 1793.—£1000 Sterling.

"Seventy-five days after date, pay this our first of exchange, to the order of Messrs. M'Kenzie and Lindsay, one thousand pounds sterling, value in account, which place to account, with or without advice from

Bertram, Gardner, and Co.

To Messrs. Baillie, Pocock, and Co. London.

Indorsed.—Pay to Claude Scott esq. or order,

M'Kenzie and Lindsay."

The respondent knew nothing of Bertram, Gardner, and Co. the drawers of this bill, nor of Baillie, Pocock, and Co. upon whom the bill was drawn. In fact, though they were apparently [282] different companies, carrying on business in different places, they were in reality one and the same company, consisting of the same partners, and carrying on the same business. But the respondent knew, that the appellants, in conducting their business, had not only charged the usual commission of  $2\frac{1}{2}$  per cent. for trouble, but also a commission *del credere* of  $1\frac{1}{2}$  per cent. more; the

nature of which last commission, when charged, (as the respondent contended), obliges the factor or mandatory to *pay the price of the goods sold*. The respondent farther saw, that the bill remitted in payment to him was taken payable to, and indorsed by, the appellants, a form which they had no occasion to adopt, if they were not antecedently bound for payment of the price, by selling upon a commission *del credere* and which, when adopted, naturally and legally implied that they guaranteed the remittance.

The respondent presented the bill as directed for acceptance, which was accordingly accepted; but, before it became due, Baillie, Pocock, and Co. the acceptors, stopped payment.

On the 22d of April, the respondent of this date wrote thus to the appellants: "I am extremely sorry to understand that the house upon which you remitted the bill for £1000 has stopped payment. I hope it will not affect the drawers, about which I shall be glad to hear from you per return."

The appellants, on the 27th, answered, "We have been favoured with all yours of the 1st, 8th, 15th, and 22d instant, the last by yesterday's post, which, with the others, have our attention. The stop which Messrs. Baillie and Co. have made, we are well assured, is not occasioned by any deficiency in the solvency of the houses, but owing to the stagnation of credit. It does affect the banking-house of Bertram and Co. by whom the £1000 bill was drawn, which we remitted you. They have suspended their payment in consequence of the predicaments of the London House. One of our banks here is deeply concerned with the Edinburgh House; and one of the partners yesterday assured us, they would pay every shilling, and have a reversion of £70,000. This gentleman was at Edinburgh, and had examined narrowly into their affairs. We enclose you a copy of their circular letter, which will satisfy you of their sentiments of the business, from which, and from every other information, we have not an apprehension of their perfect solvency. We were not much in the habits of doing business with the Edinburgh House; but our anxiety to remit you, and Messrs. Wilson, induced us to offer them the purchasers bills for the wheat sold, for the amount on London, at a time when our bankers here, and indeed every where, were turning very nice; the bill remitted Messrs. Wilson was for £2000, it must come back, and we will take it up, as we would not ask an indulgence from them; *but as it would be coming heavy upon us to take up yours for £1000 also, considering the goods and provincial paper which we are necessitated to hold from these tumultuous times; we would consider [283] ourselves obliged if you would keep the bill for a little time, until things come round, when we give you our word that we can and will relieve you of the advance; as soon as in our power conveniently to do so, we trust you will be satisfied.* We are concerned in none of the bankruptcies which have happened but this, and by it we cannot be losers."

The respondent rested perfectly satisfied from the nature of the original transaction, from the form and obligation of the bill remitted, explained and corroborated by the terms of the letter last recited, that he held the security of the appellants, as well as of the drawers and acceptors of the bill, for his payment, and that nothing could deprive him of payment but the insolvency of all concerned.

On May 9th the appellants wrote the respondent as follows: "We had the pleasure to write you the 27th ult. and are since favoured with yours of the 29th. Our W. L. is just returned from Edinburgh, where he went to attend a meeting of the creditors of Bertram and Co. the drawers of the bill remitted you of £1000, at which they exhibited a very satisfactory account of their affairs, shewing a reversion of £56,000. Messrs. Baillie and Co. the acceptors, is a house composed nearly of the same partners under a different capital.—Mr. Forrester, one of the partners acting at Edinburgh, is gone to London, to call a meeting of the bill-holders there, and lay before them a state of their funds, by which they will be perfectly satisfied of the solvency of the establishment. *We wish that you would take the trouble to attend this meeting, that you may receive every corroboration of the security you hold.*"

On the 13th the respondent wrote the appellants thus: "I duly received your esteemed favours of the 29th ult. and 1st inst. and pay proper regard to their contents. I thank you for the communication respecting the drawers and acceptors of the £1000 bill, and am very glad their affairs are so good. I will attend the meeting of the bill-holders, if I have notice of it, or can see it in the papers."

To this the appellants answered, under the date of the 17th, "We have your favour of the 13th, in which you do not say whether it will be agreeable to you to hold the £1000 bill, drawn by Bertram and Co. on Baillie and Co. or not, *until we can manage to take it up*, as both these houses have suspended payment.—*We told you before, and we beg leave to repeat, that no one event can take place to prevent our being able to discharge this and every other engagement we have.* We give you our word of honour on this, and that we will take up this £1000 bill from you at farthest in two months, if you will be good enough to hold it in the mean time, in which, besides our names, we are convinced you are well secured of payment.—After this representation, and when we mention that no bill above £200 will be discounted at present, by any bank in Scotland, you will easily perceive our difficulty to [284] provide for £1000.—*If this is not satisfactory, we will send you bills we have in our hands, due soon in Edinburgh, or we will ship wheat and barley to your consignment for the amount.* We request your positive answer in course, as no time is to be lost."

The respondent on the 21st wrote the appellants; "I have this day received your favour of the 17th, to which I reply, that I will hold the £1000 bill for two months, agreeable to your request.—I would have mentioned this in my last, but, as I did not object to what you requested, I took it for granted you would conclude I meant to keep the bill, but to be sure it would have been, but right for me to have said so."

To this the appellants answered, on the 27th, "Since we wrote you of the 17th, we have your sundry favours of the 13th, 20th, 21st; *the last agreeing to hold the £1000 bill for two months at our request, for which we esteem ourselves much obliged.* We are in hopes by that time the drawers may be able to take it up; but, if not, you may rely on our punctuality in relieving it."

After these repeated and positive engagements by the appellants to pay the sum in this bill, and after soliciting from the respondent a delay of two months, which he agreed to, recollecting too that the letter, by which the bill was remitted, expressly stated that the appellants had taken the three months credit upon themselves, the respondent was not a little surprised to receive the following letter from the appellants. "It was suggested to us a few days ago, that the bill drawn by Bertram and Co. on Baillie and Co. and remitted by us to you, in part proceeds of your wheat, before the purchaser's bills to us became due, ought not to revert upon us, because it subjected us to two risks at same time; whereas we were only bound by our *del credere* commission to guarantee the payments of the purchasers of your wheat. We think it candid to inform you, we were led from this hint to state the question to counsel, who, upon perusal, make answer, "The transaction is quite distinct from the sales, and the *del credere* cannot reach the drafts; for, if Mr. Scott got it accepted, and made no objections till the failure, he cannot have the vestige of a plea." This circumstance would never have occurred to us, but we shall make farther investigation into the fact, and in the mean time will be glad of your sentiments on it."

The respondent treated this defence in the manner that it appeared to him to deserve. He exposed the weakness of their attempt, to justify a direct breach of faith, by the suggestion of any adviser. He shewed the injustice of their conduct, in delaying still longer the payment of this bill, after the express stipulations they had made, and the concession they had obtained, upon the faith of punctual payment; and he demonstrated the absurdity of their proceeding, in setting up this defence, under the whole circumstances of the transaction.

In a letter dated the 8th of July, the appellants say, "We have just received your favour of the 4th current. The doctrine [285] we have adopted may be absurd, but it was not of our making, and it was with some regret we wrote you of the circumstance, considering the accommodation you proposed offering us. We did not suppose you would have suspected us of being influenced by any motive to gain time, other than we declared, which you must allow we have ever done openly in our correspondence with you."

The respondent, being advised that the appellants defence against payment was utterly groundless, was proceeding to take measures for enforcing payment, by a charge upon the bill. The appellants then brought the question into the Court of Session in Scotland, by offering a bill of suspension, which came in the course of the rolls in that court, before the Lord Justice Clerk, as Ordinary.

In the first place, the appellants insisted before that Court, that the nature of a

commission *del credere*, which they admitted to have charged, and to have received from the respondent, did not import any other guarantee or obligation by them than the solvency of the purchasers of the grain sold, and that this guarantee did not extend to the remittance of the money by them to the respondent, their employer. 2dly, That the circumstance of their taking the bill for the remittance, by Messrs Bertram, Gardner, and Co. payable to themselves, and indorsing that bill to the respondent, did not subject them to any obligation to which they would not otherwise, and independently of such indorsation, have been liable. And, 3dly, That the repeated acknowledgements and different engagements by them, in their letters to the respondent, to pay the bill in question, could have no effect, if they were not otherwise liable, either on the *del credere* commission, or on account of their having indorsed the bill; that these letters were written under a misapprehension of the nature and extent of their obligation; that they did not mean to impose any fresh obligation, but only meant to express their willingness to fulfil an obligation, which they supposed the law had already imposed upon them.

In answer to these arguments, the respondent, on the other hand, insisted, that upon each of the *three* grounds, noticed by the appellants, he was entitled to a judgment, awarding payment of the sum in this bill from the appellants.

And, first, with regard to the effect of a commission *del credere*, which the appellants charged and received, it is a point fixed in mercantile law and practice, that a person, acting upon such commission, is bound to pay his constituent, the seller, *the price of the subject sold, in the same way as if he were himself the purchaser of the thing sold.* In *Grove v. Dubois* (1 Term Rep. K.B. 112.), the effect of a commission *del credere* was discussed in the Court of King's Bench, and that Court decided that it was not merely a conditional undertaking and guarantee from the person taking it, that he would pay if some other person did not, but that it was an *absolute* engagement from him, and made him liable in the first instance; and the same doctrine was acquiesced in and acted upon in *Bize v. Dickason* (*id.* 285.). [286] This idea of a commission *del credere* was confirmed by the opinions of merchants, which were produced. In a letter dated August 24, 1793, Messrs. Booth and Co. considerable merchants in Liverpool, say, "We have always considered ourselves responsible for the bills we remit, when we charge a *del credere* commission, and when it has happened that any such bills have been returned for non-payment, we have, ever since we have been in business, immediately replaced them." Messrs. Corrie, Gladstones, and Bradshaw, an eminent company in Liverpool, give a similar opinion in these words: "Whatever bills we remit on account of the proceeds of grain or flour, consigned to us for sale, we guarantee the payment of, as we always charge the *del credere* commission, and such, we believe, to be the general practice here, at least we never knew of any instance to the contrary anywhere." The appellants contended, that if they had charged a separate *del credere* commission upon the remittance, as well as upon the sales, they would have been liable for the bill remitted; but that, as they charged only one *del credere* commission, they were not liable to guarantee the bill for the remittance. There is, however, no foundation in law or in practice for this distinction, and there is no instance of two separate commissions *del credere* being charged upon the same transaction.

2dly, Had the appellants been under no obligation of guarantee as to the remittance, they ought to have acted in a different manner from what they did: They should have directed the respondent to have drawn upon them for the price; or, if they chose to make the remittance by bill, payable to the respondent, they ought to have taken that bill directly payable to the respondent, without inserting their names; or when their names were inserted, they should in their letter accompanying the bill, or, as soon after as might be, have informed the respondent, that they were in no wise responsible for the bill remitted. Every one putting his name upon a bill knows, or is presumed to know, that by that alone, independently of all prior obligations, he renders himself responsible to the indorsee and holder of the bill.

3dly, The appellants' deliberate and repeated acknowledgements of the debt, and their specific obligation to pay this bill, not only remove any doubt upon the prior obligation under the guarantee, and under the indorsement, but afford a separate and clear ground for subjecting the appellants in payment. The appellants' letters contain the most earnest assurances, the most solemn engagement, that no one event



can take place to prevent our discharging this debt;" for doing which, they ask and obtain the indulgence of a delay for two months. Supposing it in any case doubtful, whether a man is or is not liable as a guarantee; or supposing the nature and extent of that guarantee to be uncertain, is not the deliberate acknowledgement, by the party himself, the best evidence that can be obtained or required? Is it not sufficient to remove all doubt, and explain all ambiguity in the original transaction; and [287] whatever might have been the nature of the original engagement, *eo ipso*, to constitute a legal claim?

Such were the arguments of the parties in the Court below; and on the 21st February 1794, the Lord Justice Clerk Ordinary pronounced the following interlocutor: "The Lord Ordinary having heard parties procurators upon the grounds of the charge, and reasons of suspension, repels the reasons of suspension, finds the letters orderly proceeded, and decerns, at the instance of the charger, and Alexander Young, writer to the signet, his attorney, finds the suspender liable in expences, and allows an account to be given in."

Upon a representation against this interlocutor, which was followed with answers, his Lordship, on the 14th January 1795, pronounced as follows: "Having considered this representation with answers, refuses the desire of the representation, adheres to the former interlocutor, and discharges any more representations."

The appellants having reclaimed by petition to the whole Lords against these interlocutors of the Lord Ordinary, their Lordships, on the 15th of the same month, pronounced the following interlocutor: "The Lords having advised this petition with the answers, they adhere to the interlocutor of the Lord Ordinary reclaimed against, and refuse the desire of the petition, and ordains the account of expences to be given into Court."

The appellants did not prefer any petition against this interlocutor, (which is a competent and usual and a proper step, before carrying a cause to the last resort;) but appealed to the House of Lords.

They introduce their *reasons* for urging the repeal of the interlocutors complained of by an *argument*, in which they stated the nature of the commission *del credere* in the following manner:

"*Del credere* is an Italian mercantile phrase, which signifies exactly the same as the Scotch word warrandice, or the English word guarantee; and when applied to the situation of a factor, such as the appellants were, it is understood in the following sense: A factor, who has *general* orders to dispose of goods for his constituent to the best advantage, is, like all factors, liable only to that degree of diligence which a prudent man adhibits in his own affairs, and consequently the factor is authorized to dispose of the goods according to the best terms which can be obtained at the time in the country; and if it shall appear that he has done so, and that he has sold his goods to persons in reputed good circumstances at the time, and to whom at that time he would have given credit in *his own affairs*, he will not be liable to his constituent although some of these persons should fail, and for such trouble the factor is generally paid by a commission of so much per cent. upon the goods sold, which in the present case was two and a half. According to the above practice, your Lordships see that the constituent runs all the [288] risk, and the factor is sure of this commission whether the event turns out favourable or not. Many merchants do not choose to run this risk, and to trust so implicitly to the prudence and discretion of their factor; and therefore the agreement called *del credere* was invented, by which the factor, for an additional premium beyond the usual commission, when he sells his goods on *credit*, becomes bound to *warrant the solvency* of the purchasers. This is the precise nature of the obligation and commission *del credere*, and this is the utmost extent to which the *del credere* obligation is understood to go. The moment the purchasers make good their payments to the factor, the warrandice, or *del credere*, is fulfilled, and he becomes entitled to the premium agreed upon on that account. The money then remains in the factor's hands, at the credit and at the order of his constituent. In order that the constituent may receive it, the natural mode for him is to draw upon his factor, who, if he refuses to honour such bills, will be liable in damages. Another way for the constituent to receive his money is, to desire the factor to remit it to him; but the factor has already fulfilled his *del credere* obligation by having guaranteed the solvency of the purchasers. If, therefore, the constituent desires the money to be

remitted to him, it is a *new* mandate altogether, which the factor sufficiently discharges by remitting to his constituent *good* bills, that is, bills on houses, in *good and universal credit at the time*; and the factor is not understood, in mercantile practice, to warrant the new payment of these remittances, unless he charges a *new* commission of *del credere*."

The argument then proceeded very artfully, and at great length, into a discussion on the liability of the appellants to guarantee the bill of Bertram and Co. and they insisted they were not liable, principally on the following grounds:

"When the wheat was sold for bills at two or three months date, the respondent expressed himself extremely anxious for a remittance. Now this could only be done by the appellants *discounting* the purchasers' bills; and the respondent's anxiously desiring a remittance must, in common sense and in law, be considered as a sufficient authority for the appellants doing so. The appellants found it impossible to get these bills discounted at Dundee; they then tried both the banks, and a number of the banking-houses, in Edinburgh, in vain. At last they succeeded with Messrs. Bertram, Gardner, and Company, from whom they obtained a bill upon London. The appellants were therefore placed in a peculiar situation at this period: They were under their *del credere* with respect to the purchasers' bills; and if they had not been paid when due to Messrs. Bertram, Gardner, and Company, who had discounted them, the appellants would have been unquestionably liable for such of them as were dishonoured; but this was an obligation which the appellants had taken upon themselves, and for which they had stipulated an adequate [289] consideration. But to suppose that while they were guaranteeing the *purchasers' bills* to Messrs. Bertram, Gardner, and Company, they were *at the same time* to guarantee the bills of *this house* to the respondent, was (the appellants contended) to suppose that they were to run a *double* risk for only *one* premium; as it is not pretended that either they charged, or the respondent offered them, any further *del credere* commission upon the remittance. And the appellants did insist, that no merchant would have done this and that the House would not find any mercantile practice or authority for it."

It does not seem necessary to follow the appellants through a tedious chain of fallacious reasoning, in which they took care to omit giving any answer to what in fact seems to have formed the whole strength of their adversary's case: namely, "That they (the appellants) being originally answerable for the payment of the acceptances which they took for the value of the corn sold by them, their parting with these acceptances on what ultimately proved to be a bad security, could by no means discharge them from their former liability."

The following are the reasons with which the appellants concluded their case (J. Scott, R. Dundas.)

1st, The *del credere* obligation applied to guaranteeing the sales of the wheat *only*. The remittance of the money is a transaction perfectly *different and distinct*. It is sufficient that the factor remit by the bills of a house in good and undoubted credit at the time. Such it has been admitted was the house of Bertram, Gardner, and Company. The appellants, had the respondent been on the spot when they were bound to pay the amount of the sales, would have paid him over the money, and thus there would have been an end of the transaction, and they still would have had the same commission of one and a half per cent. which is the usual charge for guaranteeing sales; but if, for the *accommodation* of the respondent, who had no person on the spot to receive it, they remitted him his money, *in the usual way in which it is remitted from Scotland to England*, it would seem contrary to every idea of justice that they should suffer, while it has been shewn that for this risk no premium whatever was given.

To the statement of the respondents, that the custom of the merchants of Liverpool and Bristol is to guarantee the bills by which they remit the produce of sales to their employers; and the reference made to letters to prove this practice; the appellants gave four answers:

1. The respondent has not thought proper to shew the letters written by him, to which those he refers to are answers. It does not therefore appear whether a fair state of the case was under the consideration of the merchants.

2. The answers, such as they are, seem rather to support the argument of the appellants; for they seem to import, that it is only when they receive a *del credere*

commission on the bills re-[290]-mitted, that they consider themselves responsible for the remittances.

3. The practice of Leith and Glasgow was referred to, as shewing that the *del credere* extended in this case no farther than to being responsible for the purchasers of the corn.

4. The respondent himself seems to have been sensible that the practice of merchants was against him, for he declined a reference to merchants of character.

2dly, The respondent's own sense of the transaction might be collected from his own letters, and his own conduct. When he received the remittance, he passed it to the credit of the appellants: He did not find fault with their remitting as they did; he retained the bill, knowing perfectly that Bertram, Gardner, and Company, who drew the bill, and Baillie, Pocock, and Company, *to whom the respondent presented it for acceptance*, were in unquestionable credit at the time. He gave credit for the full sum of £1000 in his accounts; thus taking the loss of the seventy-five days on himself, and proving the remittance was made for his accommodation, and at his risk: And, after obtaining the bill accepted, *he shuts his accounts with the appellants*: For in his answer to the appellant's petition, he stated, "An account of sales having been at last rendered (April 2, 1793), it appeared, that after deducting their own charges, they had over-remitted by £86 9s. 10d. For that sum they afterwards drew upon the respondent, *and their draught was duly honoured*."

3dly, The indorsement of the bill by the appellants could not operate against them in a question with the respondent their constituent. By the indorsement, which was a mere matter of form, they certainly could not be supposed to have come under any fresh obligation. With third parties, into whose hands the bill might have gone, the appellants, no doubt, could not have availed themselves of this objection; but in a question purely between the factor or agent, and constituent, it never can be held, that, by indorsing a bill as a factor, and for the accommodation of his constituent, *without receiving any value or consideration whatever*, he can be liable in recourse to the constituent.

4thly, The correspondence relied on by the respondent ought not to be brought against the appellants. The letters were not intended to constitute a new obligation. They must be taken as in reference to a supposed *antecedent obligation*; but if no such obligation existed, then the letters are out of the question. All that can be inferred from the letters is, that the appellants had mistaken a point of law. It is held both in Scotland and England, that a mistake of this kind, or an error *juris*, cannot hurt the party committing such mistake.

The respondent offered (W. Adam, J. Bayley) the following short reasons for confirming the interlocutors complained of:

1st, The general nature and effect of a commission, *del credere*, on the sale of goods, is, that the person accepting and acting under [291] that commission makes himself *absolutely*, in the first instance, *liable for the payment of the price of such goods*.

2dly, It is, at any rate, clear, from the whole circumstances of this case, that such was the nature and extent of the guarantee undertaken by the appellants.

3dly, The appellants, by indorsing the bill remitted to the respondent, did, *eo ipso*, subject themselves in payment, and the whole circumstances of the case do corroborate the obligation upon them, as indorsers of this bill.

4thly, The appellants' deliberate acknowledgements and repeated engagements, in their letters of correspondence, afford both a separate and corroborative ground for concluding against them.

5thly, The appellants have been guilty of a gross fraud and breach of faith, in soliciting and obtaining from the respondent a delay of payment, under an express assurance, "that no event whatever would prevent their discharging this debt;" and then, after enjoying the benefit of that delay, resisting payment upon such frivolous and vexatious grounds.

And it was accordingly ORDERED and ADJUDGED, that the appeal be dismissed; and that the interlocutors therein complained of, be affirmed, with £100 costs. (See MSS. Jour. *sub ann.* 1796.)

## PURCHASOR.

CASE 1.—RICHARD SMITH,—*Appellant*; SIR THOMAS DOLMAN,—*Respondent*  
[19th January 1708].

[Mews' Dig. xiii. 1841.]

A. contracts for the purchase of an estate, and is let into possession. The estate being greatly incumbered, A. pays off some of the incumbrances. Great delay is used on the part of the vendor in clearing other incumbrances, and making good the title; but the purchaser shall not for that reason be discharged from his contract.

ORDERS of Lord Keeper Wright affirmed.

By articles of agreement between the appellant and respondent, dated the 27th September 1695, the respondent, in consideration of £9500 covenanted that, on or before the 28th day of November following, he would convey to the appellant and his [292] heirs, a clear estate of inheritance in the manor of Enderby, and other lands in the county of Leicester, freed and discharged of all incumbrances; and that the appellant should receive the rents and profits from Michaelmas then next; in consideration whereof, the appellant covenanted, that he would pay the respondent £5000 on the said 28th of November, and the remaining £4500 on Midsummer-day following; and that he would pay interest for the whole £9500 at the rate of £5 per cent. from Michaelmas then next, until the same should be paid in manner and form aforesaid.

The appellant was accordingly put into possession of the estate, at the time limited by the articles; but, finding that it was greatly incumbered, and that the respondent, notwithstanding his repeated promises, was dilatory in discharging those incumbrances, the appellant thought fit to satisfy such of them as had come to his knowledge, amounting, with charges, to £6955. And afterwards, upon discovering still farther incumbrances, he, in Trinity term, 1699, exhibited his bill against the respondent in the Court of Chancery, for a specific performance of the articles; or in default thereof, to be reimbursed what he had so paid, with interest and costs, and to be discharged from his purchase.

On the 24th of February 1701, the cause was heard before the Lord Keeper Wright; who decreed, That the defendant should, by the 1st day of Michaelmas term then next ensuing, perform the said articles, and clear all the incumbrances affecting the said estate; and, in order thereto, it was referred to a Master to enquire and state what incumbrances the plaintiff had discharged, with the charges thereof, and also what were still remaining on the estate; and it was ordered, that such charges, together with costs, should be allowed in part of the purchase-money; and, upon the defendant's clearing the incumbrances, and making the plaintiff a good title by the time aforesaid, the plaintiff was to pay the remainder of his purchase-money with interest; but, in default thereof, the defendant was decreed to repay the plaintiff what he had so paid in discharging incumbrances, and the charges thereof, with interest for the same at £5 per cent. and also his costs, after discounting the profits of the estate, which the plaintiff had received.

The Master, by his report of the 24th of July 1704, certified, that there remained unsatisfied incumbrances on the estate, to the amount of £23,140, besides those paid off by the plaintiff, which, with charges, amounted to £6955. And, by another report of the 16th of November 1706, the Master certified, that there remained due to the plaintiff for what he had so paid, with interest and costs, over and above what he had received by the profits of the estate, £6437. By a third report, dated the 15th of February 1706, the remaining unsatisfied incumbrances were certified to be £9117; and, by a fourth report of the 9th of May 1707, the Master certified, that the estate was still liable to a recognizance of £4000 entered into by the defendant's father.

[293] The defendant having filed a bill, and obtained a decree, touching this recognizance; an order was made on the 12th of July 1707, that the plaintiff should

stand in the place of the defendant, and have the benefit of that decree; and, that the plaintiff should proceed in his purchase, and come to an account for what of the purchase-money remained unpaid, making allowances according to the decree, and allowing thereof the salary of a receiver, who had been appointed in October 1706.

On a re-hearing of the cause, as to this last order on the 1st of May 1708, it was varied; by directing the defendant forthwith to procure a discharge of the said recognizance, or that so much, as the Master should think fit to answer the costs of so doing, should be deposited in his hands out of the purchase-money, for that purpose. And by two subsequent orders, of the 19th of July and 13th of October 1708, the plaintiff was ordered to pay £5302 16s. being what was computed as the remainder of his purchase-money and interest.

From this decree, and all the subsequent orders and reports, the plaintiff appealed; insisting (N. Lechmere, J. Pratt), that as the respondent had not cleared the estate from incumbrances, either within the time limited by the articles, or the decree, nor within the times allowed by several subsequent orders; the appellant ought to have been absolutely discharged from the articles, and have had the money he laid out towards clearing the estate refunded, with interest and costs; and not have been held in suspense, and involved in an expensive enquiry, for so many years together; during all which time, the appellant was totally disabled from settling, selling, or otherwise disposing, either of the land or money, nor could he be called the certain owner of either. That by the articles, the appellant was to have a conveyance free from all incumbrances whatsoever; and yet, the recognizance of £4000 was still a legal charge on the estate, and the decree made relative thereto had not so cleared the title, as that the appellant ought to be decreed to purchase under it. That it was unreasonable to charge the appellant with interest of his purchase-money, from the time mentioned in the articles, there having been 13 years spent in an expensive delay, before the respondent had made himself capable of selling a clear estate; and this delay ought not to turn to the appellant's prejudice, for the profits of the estate during that time were not an equivalent for so many years interest of the purchase-money. That the appellant conceived himself aggrieved in the manner of computing the interest, as well of the purchase-money to be paid by himself, as of the sums he had advanced in discharge of incumbrances which ought not to have been computed as between mortgagor and mortgagee, but by a clear allowance of interest to the respondent on the purchase-money, from the time of payment stipulated by the articles; and by a like allowance of interest to the appellant, on the several sums advanced by him, from the times of advancing the same respectively; the different mode of compu-[294]-tation, amounting in the whole to about £500, to the appellant's prejudice. And though it should be thought reasonable to hold the appellant to his articles, and to the payment of interest as already computed, yet there could be no reason to charge him with interest for the time that a receiver was appointed, and who had accordingly received the rents from Michaelmas 1705; because the appellant could receive no more than the bare profits, and was in no way capable of making any advantage thereof; and because the very appointment of such receiver was occasioned by the great delay and sole default of the respondent.

On the other side it was contended (S. Harcourt, S. Cowper) that the Master's computation of interest was according to the constant usage of the Court; and that the appellant had been allowed interest, for all his expences in taking in the incumbrances, and drawing the conveyance, which he ought to have borne out of his own pocket; but that report being inrolled, could not be altered, and therefore the respondent was forced to submit to it. That as to the receiver, he was appointed at the appellant's nomination, and was the same person who managed the estate for the appellant before such appointment; but as there was some ground for appointing a receiver, while the matter of the incumbrances remained undetermined, the Court thought fit to charge the respondent with his salary; and he had accordingly discounted it, out of what was coming to him from the appellant. That in the course of 13 years, the appellant had never been disturbed in the possession of the premises, or in the receipt of the rents, nor had any demand ever been made upon him, under pretence of any incumbrance whatsoever; neither was it now even pretended by the appellant, that there remained a single incumbrance affecting

the estate in question, except the recognizance; as to which it plainly appears that the appellant was in no danger; and that the respondent having been decreed to pay all the appellant's costs of suit, he could not evince that he had been aggrieved in any one instance whatever.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and that the five several orders, and also the several reports made pursuant thereto, complained of in the said appeal, should be affirmed (Jour. vol. 18. p. 608.)

[295] CASE 2.—Lord Viscount FAUCONBERGE, et Ux.,—*Appellants*; RICHARD FITZGERALD, and others,—*Respondents* [27th February 1730].

J. S. seised in fee, settled his estate in 1712 to the use of himself for life, remainder to B. *in tail*, but with power of revocation by any writing attested by three witnesses. In 1715, J. S. by deed, attested by two witnesses only, reciting that he was indebted, as in schedule annexed, conveyed his estate to W. B. and W. S. and their heirs, *in trust to pay his said debts by the profits, mortgage, or sale, and after payment thereof to pay the overplus, and recover such part as should be unsold, to him the said J. S. or such other person, and for such uses, as he by any writing, signed and sealed by him, attested by two witnesses, should direct.* J. S. died without issue, but left B. and C. the daughters of two sisters, his heirs at law. The deed of 1715 was kept private till after the death of W. S. the surviving trustee, in 1724, and was then laid before counsel, who directed that the heir of W. S. should assign the legal estate to the trustees in the deed of 1712, which was done. Afterwards in 1726, upon a treaty of marriage between Lord Fauconberge and B. a marriage settlement was prepared, by the same counsel as counsel for Lord Fauconberge, who made a settlement on B. in consideration of the great estate in land which he was to have with her. The surviving trustee in the deed of 1712, joined in this marriage settlement. C. brought a bill, claiming a moiety of this estate of J. S. as coheirress with B. for that the deed in 1715 was a revocation of the deed in 1712. Lord Fauconberge pleaded that he was a purchaser under the deed of 1712, without notice of that in 1715, and that the settlement made by him on B. was in contemplation of that settlement in 1712; and that the surviving trustee in that settlement was a party to the marriage settlement; and that though the *purchase was not of the legal estate, but the trust only*, that will make no difference, according to Wilker and Bodington's case, 2 Vern. 599. and that neither will it differ the case, though there was no actual conveyance; for as the trustees in the deed of 1712 always acted under that deed for B. that trust shall subsist as to himself who is a fair purchaser, and that he shall not be affected by *constructive* notice to his counsel, as having been advised with on these two deeds in 1724; for that it must be intended, that at the time of the counsel's being concerned for him, which was in 1726, he had forgot that he had ever seen this deed of 1715, there being an interval of two years between his first seeing it and his being counsel for Lord Fauconberge. And for these reasons the Court held that this could not be notice to his Lordship. Lord Chief Baron Reynolds (who assisted the Lord Chancellor) held that Lord Fauconberge could be a purchaser of no more than B. had, as no actual conveyance was made to him. The Master of the Rolls said, that to be a *purchaser in the notion of equity, there must be an actual contract, and a consideration paid*; and therefore, if at the time of the marriage the deed of 1712 stood revoked, the trustees should be seised only of a moiety for the use of B. and consequently Lord Fauconberge can be a purchaser of no more. Lord Chancellor decreed a moiety of the estate, and an account of the rents and profits to C. since the death of J. S.

DECREE of Ld. King, C. AFFIRMED.

The above is literally copied from 2 Eq. Ab. p. 677, 8.—The statement in

p. 674, is merely that "A conveyance to different uses is an effectual revocation."—The case turned as well on the construction of the powers in the deed of 1712, as on the question of *notice*. The rule is, that "notice to the counsel or attorney of the party is notice to the party himself; but this notice must be *in the same transaction*." See *Coote v. Mammon*, *ante*, title Notice, case 2 [5 Bro. P. C. 355].

Fitzgibbon's Rep. 207; Viner, vol. 5. p. 518. note to ca. 12; Lilly's Pract. Conv. 391; 2 Eq. ca. ab. p. 674. ca. 12: 677. ca. 3.

William Fowler, esq. deceased, had two sisters, Dorothy and Magdalen; Dorothy married Mr. John Grove, who had issue by her Thomas Grove, esq. the respondent Rebecca's father; and Magdalen [296] married one Casey, who had issue by her a daughter named Mary, who married John Betham, and they had issue a daughter, the appellant Lady Fauconberge. William Fowler being unmarried, and having no child, and seised in fee of the manor of St. Thomas, in the county of Stafford, and several lands and hereditaments there and in several other counties, of £2300 per ann. he, by lease and release, dated the 2d and 3d of July 1712, as well for settling the said manors and premises in his name and blood, to the several uses, trusts, and purposes, and in such manner as therein after limited; "with liberty nevertheless, to and for him the said William Fowler, freely and clearly, at his will and pleasure, to dispose of, change, or alienate, the said manors, hereditaments, and premises, or any part thereof, for any estate or estates whatsoever, as he should think fit, and to revoke, recall, and make void all and every the use and uses, trusts, limitations, and appointments thereby raised, limited, and appointed, mentioned and declared concerning the same;" as also in consideration of 5s. conveyed to the respondent Lord Aston, (then the Honourable Walter Aston, esq.) Thomas Giffard, esq. and the respondent Charles Fowler, and their heirs, all the said manor and premises, to the use of himself for life, without impeachment of waste; remainder to the trustees, for 500 years, upon the trusts therein after declared; remainder to the heirs of the body of the said William Fowler; remainder to the said John Betham for life, without impeachment of waste; remainder to the trustees, for the life of the said John Betham; remainder to his first and other sons by the said Mary, in tail male; remainder to all and every the sons of the said Mary Betham in tail male; remainder to the eldest son of the said Thomas Grove, which should be living at the time of failure of such issue male of John Betham, for life, without impeachment of waste; remainder to the trustees to preserve contingent remainders; remainder to the first and other sons of such eldest son of the said Thomas Grove in tail male; remainder to all other the sons of the said Thomas Grove; remainder to the appellant Lady Fauconberge, (then Catherine Betham), the daughter of the said John Betham, for life; remainder to the trustees to preserve contingent remainders; remainder to the first and other sons of Catherine in tail male; remainder in like manner to all other the daughters of John Betham on the body of Mary; remainder to Dorothy, the eldest daughter of the said Thomas Grove for life; remainder to the trustees to preserve contingent remainders; remainder to the first and other sons of the said Dorothy Grove in tail male; remainder to all other the daughters of Thomas Grove successively in tail male; remainder to the right heirs of the said William Fowler for ever.

These several remainders were limited to the several persons aforesaid, on his, her, and their taking successively the surname of Fowler, and writing themselves and calling their children by that and no other surname; and the persons to whom the said daughters should severally marry, were also to take on them in [297] like manner the surname of Fowler, and call their children by that name.

The 500 years term was upon trust, that the trustees should, out of the rents and profits of the premises, pay to the said Dorothy Groves, sister of the said William Fowler, £300 per ann. and to the said Thomas Grove her son £200 per ann for their several lives, clear of taxes; and also thereby, or by sale, mortgage, or demise thereof, for the 500 years, or any part thereof, to raise all such sums as the said William Fowler should owe at his decease; and also all such sums as he, by his last will, or any other deed or writing executed under his hand and seal, in the presence of two or more witnesses, should give and appoint to be paid, or charge the premises with, to any person or persons whatsoever; but if the person next in remainder,

expectant on the term, should pay all the said debts, annuities, and monies, so to be devised or appointed, then the term was to cease.

And in the indenture of release, were contained the following provisos, viz.

1. A proviso or power for the said William Fowler, from time to time, by any deed or writing under his hand and seal, to be signed and duly sealed and delivered in the presence of two or more witnesses, to demise, lease, limit, or appoint the said manors and premises, or any of them, to any person or persons whatsoever, for any term or terms whatsoever, for so much yearly rent as the said William Fowler should think fit, and with such other conditions and agreements, as the said William Fowler should please.

2. A proviso, that if the appellant Catherine, or any other daughter of the said John and Mary Betham, or Grove, eldest daughter of the said Thomas Grove, or any other daughter of the said Thomas Grove, who, according to the said limitations, ought to inherit the premises, should marry any person, without the consent of the trustees, or the survivors of them, or should marry any person who should be a protestant, and not of the communion of the church of Rome; that then and immediately after such marriage, all the estates before created and appointed for the benefit of such person, so marrying, should cease and be void.

3. And another proviso in these words, viz. "That it shall and may be lawful to and for the said William Fowler, at any time or times during his natural life, at his will and pleasure, to grant, sell, or demise the hereby granted premises, or any part thereof; or by any deed or writing under his hand and seal, or by his last will and testament in writing, signed, sealed, delivered, and published in the presence of three or more credible witnesses, to revoke, repeal, and make void all, every, or any the use and uses, estate and estates, trusts and limitations, before raised, created, limited, or appointed; and to declare and limit the same, or such other new uses, as shall seem most meet and convenient to the said William Fowler; and then and from [298] thenceforth, the estates and uses before limited and appointed, and so revoked and repealed, to cease and determine and be utterly void, as if the same had never been made, limited, and appointed; and that the said William Fowler shall and may dispose of the same premises, and every part and parcel thereof, to such other person and persons, use and uses, as he shall think fit, any thing before mentioned to the contrary in any wise notwithstanding."

By other indentures of lease and release, dated the 25th and 26th of September 1715, made between the said William Fowler of the one part, and John Tombs, doctor in physic, and Edward Ward, gent. of the other part; reciting, that the said William Fowler did really stand indebted to the several persons named in a schedule thereunto annexed, in the several sums therein mentioned; he, as well for better securing the said debts, and more speedy payment thereof, and in consideration of 5s. as also for other good causes, conveyed to the said John Tombs and Edward Ward, and their heirs, the said manors and premises; upon trust, that they or the survivor of them, or the heirs and assigns of such survivor, should, out of the rents and profits of the premises, or by mortgage or sale thereof, or by any other ways as to them should seem meet, raise so much money as should be sufficient to pay all the debts mentioned in the said schedule, with such interest as should be due, to the several persons therein named, over and above the several annuities, rents and rent-charges in the said schedule mentioned, wherewith the same premises stood charged, and pay the same in full discharge of the said debts and interest; and after payment thereof, and their own charges being satisfied, that "they should pay the overplus thereof (if any) and re-convey such part of the premises as should remain unsold, to the said William Fowler, or to such person and persons, and to such use and uses, estate and estates, as the said William Fowler should, by any deed or writing under his hand and seal, attested by two or more credible witnesses, limit, direct, and appoint the same."

This indenture of release was attested only by two witnesses, and remained in the custody of Ward the trustee till his death.

By another indenture, dated the same 26th of September 1715, executed by all the said three parties, reciting the lease and release of the 25th and 26th of September 1715; it was declared, that it should and might be lawful for the said William Fowler, at any time or times thereafter during his life, at his will and pleasure, by any deed or writing under his hand and seal, attested by two or more witnesses, or



by his last will in writing, attested by three or more witnesses, to revoke, repeal, and make void, all or any of the trusts and estates in the said indenture of release of the 26th of September 1715, raised, created, limited, and appointed of the said premises, and every part thereof; and to declare, limit, and appoint the same to such other use and uses, as should seem most meet and convenient to him; and that from thenceforth, the trusts [299] and estates so revoked and repealed, should cease and be void, as if the same had never been created, limited, or appointed; and that it should and might be lawful for the said William Fowler, to dispose of the same premises, or any part thereof, to such other person and persons, use and uses, as he should think fit.

On the 24th of January 1716, William Fowler died without issue; and having made no appointment or disposition of the estate, after the execution of the deeds of 1715, the trust of the whole estate descended to his heirs at law; but the deeds of 1715, being not then discovered, John Betham, who married Mary the daughter of Magdalen Casey, taking advantage thereof, immediately upon the death of William Fowler entered on the estate, and received the profits during his life.

In November 1719, this John Betham died without issue male, leaving Mary his widow, and the appellant Catherine his daughter: whereupon the widow took administration to him, and possessed his personal estate; and by the connivance, or permission of the said Edward Ward, who all along acted as agent for that family, she, as guardian to her said daughter, received the rents of the real estate till her death, which happened about July 1725.

In 1721, John Tombs, one of the trustees in the settlement of September 1715, died; and in November 1724, Edward Ward, the surviving trustee in that settlement, also died. Soon after whose death, Christopher Ward, his son and administrator, found among his father's writings, the said deeds of September 1715; and apprehending them to be of consequence to the family, he brought them up to London, to the respondent Lord Aston; who desired Mr. Ward to go with him to Mr. Pigott, to advise upon those deeds on behalf of the appellant Catherine; and Mr. Pigott, having read the same, seemed much dissatisfied, apprehending them to be to the disadvantage of the appellant Catherine and her family; and finding, on enquiry, that Edward Ward had survived Dr. Tombs, he said, that by these deeds the trust estate was vested in the heir at law of Edward Ward, and that he apprehended Lord Aston and Mr. Fowler had no power to act further as trustees under the settlement of 1712; for that as the said William Fowler had a power of revocation in the first settlement, these deeds of 1715 would be deemed a revocation of the same; and thereupon asked Christopher Ward, whether he believed his eldest brother Edward would assign his trust to Lord Aston and Mr. Fowler? Who answering, that he certainly would, Mr. Pigott desired him to prepare a proper deed for that purpose.

Accordingly, by lease and release dated the 20th and 21st of August 1725, the said Edward Ward the son, conveyed the premises to the respondents Lord Aston and Mr. Fowler, and their heirs, upon such trusts as he the said Edward Ward might have held the same.

In the year 1726, a treaty was set on foot for a marriage between the appellants; on which occasion, Mr. Pigott was counsel for Lord Fauconberge, and Mr. Ward was counsel for the Lady [300] and the respondents the trustees; and by lease and release dated the 1st and 2d of August 1726, reciting the intended marriage, in consideration thereof, and of the great estate in land to which the appellant the Viscountess was entitled, and which was therein mentioned to be settled on her, and the issue of her body to be begotten; and for settling a jointure on her if she survived the appellant the Lord Viscount, in bar of her dower; his Lordship conveyed certain manors and lands therein mentioned, to trustees for the benefit of the appellant the Viscountess, and the issue of the marriage; with a power thereby reserved to himself, to revoke all the uses in this settlement, with consent of the trustees, except the provision for the Viscountess.

On the 5th of August 1726, the marriage was had; and thereupon the appellant Lord Fauconberge entered upon the estate in question, and received the arrears and growing rents thereof.

Thomas Grove being one of the coheirs of William Fowler, and as such entitled to a moiety of the said estates, subject to Fowler's debts, according to the settlement of 1715, the respondent Fitzgerald, in the year 1727, entered into a treaty with him

for a marriage with the other respondent Rebecca his only child ; and in consequence thereof, by articles of agreement dated the 2d of February 1727, between the said Thomas Grove and the respondent Mr. Fitzgerald, reciting, that the said Thomas Grove, in coparcenary with Lady Fauconberge, was well entitled to an undivided moiety of the said William Fowler's real estate, and that a marriage was shortly to be had between the respondents Richard and Rebecca : In consideration of the intended marriage, and for other considerations therein mentioned, Grove covenanted to convey all his undivided moiety of the said estate to the uses therein mentioned. And after the marriage was had, Grove, in performance of this covenant, by lease and release dated the 28th and 29th of February 1727, conveyed his undivided moiety of all the said manors and premises to trustees and their heirs, to the intent that the said Thomas Grove and Rebecca his wife might, during their lives and the life of the survivor, receive a rent-charge of £350 per ann. clear of taxes ; and subject thereto, to the use of the respondents Richard Fitzgerald and his wife, for their lives and the life of the survivor ; remainder to the trustees to preserve contingent uses ; remainder to their first and other sons in tail male ; remainder to their daughters as tenants in common in tail ; remainder to the said Thomas Grove and his heirs.

On the 3d of April 1728, the respondents Fitzgerald and his wife exhibited their bill in Chancery, against the appellants and the Lord Aston, Charles Fowler, the said Thomas Grove, who was the administrator *de bonis non* of William Fowler, and the said Edward Ward, son and heir of Ward the surviving trustee, for a discovery of the said settlements, and all other writings relating to the estate, and to have their title to an undivided moiety thereof established ; and for an account of the rents and profits thereof from the death of William Fowler, and also of his personal estate. [301] and that the trusts created by him might be executed ; and that after the payment of his debts, the parties who had the legal estate might join in making proper conveyances of a moiety thereof, according to the respondent's marriage settlement.

To this bill the appellants put in a plea and answer ; and as to so much of the bill, as sought to impeach their title to any of the estates which were formerly the inheritance of William Fowler, or of any share thereof, or to have an account of the rents and profits, or any relief concerning the same ; they jointly pleaded the settlement of the 2d and 3d of July 1712, and also the settlement of August 1726, made on their marriage. And by their answer said, that before their marriage, or making the settlement of the appellant the Viscount's estate, they had not any notice of the deeds of September 1715, nor till about eleven months after their marriage : and insisted, that the settlement of September 1715, being attested only in the presence of two witnesses, could not in any sort amount to a revocation of any of the uses or estates, created or appointed by the settlement of July 1712. And that in case Mr. Pigott, who was counsel for the appellant the Viscountess, in preparing the marriage settlement, had notice of the settlement of 1715, it was as counsel for the respondents the Lord Aston and Mr. Fowler. And the appellant the Lord Viscount did by his answer insist, that he was a purchaser, or in the nature of a purchaser, during the joint lives of him and his said wife, of all the estates of the said William Fowler, by virtue of his marriage and the settlement by him made.

On the 17th of December 1728, the plea was argued before the Lord Chancellor King ; when the same was ordered to stand for an answer, with liberty to except to any thing therein, save as to matters of account ; and the benefit of the plea was saved till the hearing of the cause.

The respondents replied, and the cause being at issue, witnesses were examined on both sides, and publication having passed, the cause was heard on the 6th and 8th of December 1729, before the Lord Chancellor, assisted by the Master of the Rolls, and the Lord Chief Baron Reynolds ; who, after having taken time to consider, concurred in opinion, and on the 12th of June 1730, unanimously declared, that the deed of July 1712, was revoked by the deed of September 1715 ; and that on the death of William Fowler, the estate in fee, subject to the incumbrances contained in the schedule annexed to that deed, descended to his heirs at law Thomas Grove and Mary Betham ; and that the moiety belonging to Mary Betham was then descended to and vested in the appellant the Lady Viscountess Fauconberge, in fee : and that the respondents, Mr. Fitzgerald and his wife, were entitled to the other moiety belonging to the said Thomas Grove, according to the uses of the deed of the 29th of February

1727. And it was referred to the Master, to take an account of the rents and profits of the estates contained in the said settlements of 1712 and 1715, received by the appellant the Lord Viscount; and also an account [302] against all parties, of the personal estate of William Fowler; and likewise an account of the debts and incumbrances on the estate, and what was due thereon, and to enquire into the reality of the debts, and whether any and which of them had been paid, and by whom, and out of what. And the personal estate of William Fowler was, in the first place, to be applied towards payment of the said debts; and if that were not sufficient, that the residue thereof should be satisfied out of the said rents and profits; and if those should not be sufficient, then a sale was decreed of a sufficient part of the real estate, with the approbation of the Master, to satisfy the remainder of the said debts. And the residue of the lands unsold were to be divided between the respondents Mr. Fitzgerald and his wife, and the appellants, and a commission was to issue for that purpose; and after such commission and partition, the respondents the Lord Aston and Mr. Fowler should (subject to the annuities contained in the schedule annexed to the indenture of September 1715), convey one moiety to the appellant the Lady Viscountess and her heirs, and the other moiety to such uses and trusts as were mentioned in the deed of February 1727. And if there should be any surplus profits remaining in the hands of the appellant the Lord Viscount, he was to retain one moiety thereof to himself, and to pay the other moiety to the respondent Mr. Fitzgerald; and so far as the appellant the Lord Viscount had paid the £200 per ann. to Thomas Grove, so far he was to have a deduction for the same out of the plaintiff's moiety; and the rents in arrear in the tenants hands, and the growing rents and profits till such sale and partition, were to be paid, one moiety to the respondents Mr. Fitzgerald and his wife, and the other moiety to the appellant the Lord Viscount. And all deeds and writings relating to the real estate, were to be brought before the Master on oath, and after the partition made, either party was at liberty to apply to the Court for directions touching the delivering back of such deeds. And the bill, as against the Lord Aston and Mr. Fowler, was dismissed with 40s. costs, but without prejudice to the then plaintiffs, or the appellants bringing any new bill for an account of the rents and profits of the estate; and the defendant Ward was to join in the conveyance, if desired.

From this decree Lord and Lady Fauconberge appealed; and on their behalf it was argued (C. Talbot, W. Hamilton), that his Lordship having settled a great estate upon his Lady and the issue of that marriage, every way adequate to the whole estate of Mr. Fowler, upon the credit and in consideration of Mr. Fowler's estate being settled on her, and not having notice of the release of September 1715, he ought to be considered as a purchaser under Mr. Fowler's settlement, of the benefit of the limitations therein contained to Lady Fauconberge, and the issue of the marriage: And that Lord Aston and Mr. Charles Fowler, the trustees in the settlement of 1712, having, in support of that settlement, obtained a conveyance from the heir of the surviving grantee in the release of 1715, ought to be considered as trustees for the appellants; and therefore a court of equity ought [303] not to take away the legal estate from them, in favour of the respondents Mr. and Mrs. Fitzgerald, and in prejudice of the appellant Lord Fauconberge, an innocent purchaser. That the lease and release of September 1715, being executed in the presence of two witnesses only, ought not to be construed a revocation of the settlement of 1712. For the clause in which the power of revocation was reserved was one entire sentence, and the circumstances with which William Fowler thought fit to have his revocation of so solemn a settlement attended, were applicable to every method of executing that power; it was unreasonable therefore to imagine, that he intended an express revocation should not be good, unless those circumstances were observed, but that an implied revocation should take place, though unattended by any of them. That the construction contended for by the respondents, supposed the first part of the proviso (to grant, sell, or demise any part of the premises) to be a distinct sentence, and a different branch of power, unconfin'd to the ceremony of execution in the presence of three witnesses, and to enable Mr. Fowler, by a grant, which required neither signing or attestation, but only sealing and delivery, to revoke the whole settlement; but those words, if taken as a distinct sentence, were incomplete, and the construction put upon them was neither consistent with the intention of the proviso itself, or with

several other clauses in the deed. For it would render the greatest part of the power which followed these words, nugatory and useless; because there was scarce any thing, which, by the subsequent part of the clause, he was empowered to do under the restrictions therein limited, but what he might in effect do by those previous words, without any restriction at all. Further: The clause for raising such sums out of the estate, as Mr. Fowler, by will or deed executed in the presence of two witnesses, should appoint, and the power of leasing, by deed or writing under hand and seal, executed in the presence of *two* witnesses; had in vain directed those ceremonies to be observed in the execution thereof, if, by the respondents construction, Mr. Fowler might do both, without observing either of those ceremonies: And it was impossible to conceive, that by the words, "grant, sell, or demise," he intended to reserve a general power of demising the premises, even for the longest term of years, without any signing or attestation of such lease; when, by the clause inserted for that particular purpose, he had expressly confined his power of leasing, even for one year, to the ceremony of signing such lease in the presence of two witnesses. On the contrary, it seemed to be Mr. Fowler's intent, not only to reserve a power of revocation, but also to confine the execution of it to particular ceremonies, in order to ascertain what act of his should or should not be deemed a revocation of the settlement, which he had so deliberately made; and the ceremony of attestation by three witnesses, being with propriety applicable to the whole proviso, and consistent with all the other parts of the deed, it seemed to be a natural construction that it should extend to the whole clause.

[304] In aid of these arguments it was said, that there was the less reason to consider the deeds of 1715, as a revocation of the settlement of 1712, because they were executed at a time when Mr. Fowler might think it proper to execute some conveyance to protect his estate; and he seemed industriously to have avoided the solemnity of three witnesses, lest that should operate as a revocation of the settlement of 1712, which it did not appear he had any intention to vary. But if the deeds of 1715 should be deemed to be any revocation of the settlement of 1712, yet they could not be a total revocation; because it was admitted, that those deeds operated only as an implied revocation, by reason of their inconsistency with the settlement of 1712, and therefore were no further a revocation, than such inconsistency extended: Now the release having conveyed the premises, in trust to raise money for paying the debts mentioned in a schedule thereunto annexed; and afterwards to reconvey to Mr. Fowler, or such persons and uses as he should appoint, without saying to William Fowler or his heirs, or limiting the estate in default of appointment, which was the case that had happened; it was apprehended, that the release of 1715, was no further inconsistent with the settlement of 1712, than as to the particular uses specified in that deed, and consequently, as to the rest of the estate, did not revoke the settlement of 1712; and that under these circumstances, a court of equity ought to restrain it from operating any further, than to satisfy the particular purpose.

To all this it was answered (P. Yorke, T. Lutwyche), that there could be no pretence to make Lady Fauconberge a purchaser, neither was there any purchase made by Lord Fauconberge, or any conveyance, or agreement for a conveyance; and without some of these circumstances, pleas of this kind have never been allowed in courts of equity. That this was a case the less proper for such a plea, because the appellants had no legal title, nor any legal incumbrance to protect their supposed equity: the legal estate being in the trustees, and the only question being, for whom they are trustees: If the right to the trust appeared to belong to the respondents, it was apprehended, a court of equity could not, contrary to that right, compel the trustees to convey to the appellants; and if the court would not compel an execution of the trust to the respondents, the consequence would be, putting the estate absolutely in the power of the trustees themselves, who might at any time recover the possession by ejectment. That it appeared from the whole tenor of the settlement of 1712, that William Fowler intended to retain an absolute power, notwithstanding that settlement, to dispose of the whole estate at his will and pleasure, by such conveyances as he should think fit; without confining himself to do it in the presence of any number of witnesses, or with any particular circumstances. This intention was shown by the introductory part of the deed being interwoven with the consideration, and pursuant thereto he took care to have the third proviso inserted in the body of the deed:

by which it was made lawful for the said [306] William Fowler, at any time during his life, at his will and pleasure, to grant, sell, or demise the premises, or any part thereof: And the same proviso concludes with these general words, that the said William Fowler shall and may dispose of the premises, and every part and parcel thereof, to such person and persons, use and uses, as he shall think fit, any thing before mentioned to the contrary notwithstanding. That this last sentence was independent of the preceding branches, and the different powers reserved to Mr. Fowler by this deed, were neither repugnant or useless; for as some things therein contained, were of such a nature as might make him desirous to keep it secret; so it was plain he intended to have it in his power to defeat that settlement, by conveying the estate to uses, different from the uses thereby limited, without being under the necessity of referring to it, or taking any notice of it. And this construction was the more reasonable, inasmuch as powers reserved to the owner of an estate, have always been liberally expounded, so as to answer his intention, as being part of his ancient right and dominion over the estate. That William Fowler having, by the deeds of 1715, conveyed the fee and inheritance of the whole estate to Dr. Tombs and Mr. Ward, upon trusts and for uses utterly inconsistent with those of the settlement of 1712, this latter conveyance must consequently be a compleat revocation of the former; the legal estate being vested in new trustees, who could be seised thereof upon no other trusts than the new ones: And Mr. Fowler having made no subsequent appointment of such part as should remain unsold, after the particular purposes were answered, a trust must therefore necessarily result for the benefit of him and his heirs, according to the established rules both of law and equity; consequently, there could be no foundation for a court of equity to controul or abridge the operation of the deeds of 1715, by construing them to be only a revocation *pro tanto*, merely to disinherit one of the coheirs at law. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

After hearing counsel on this appeal on Friday the 26th of February, the following question was proposed to the Judges, viz. "Whether the deed of 1715 be a revocation of the deed of 1712; and if so, whether the said deed of 1715 be a total revocation, or only a revocation *pro tanto*?" And the Judges having, on the next day, delivered their opinions *seriatim* upon this question, it was ORDERED and ADJUDGED, that the appeal should be dismissed; and the decree therein complained of, affirmed\*.

(Jour. vol. 23. p. 624.)

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[306] CASE 3.—THOMAS RYDER, and others,—*Appellants*; EARL GOWER, and others,—*Respondents* [8th May 1766].

[Mews' Dig. xiv. 1381. The practice of opening the biddings was abolished, except in cases of fraud or improper management of a sale, by the Sale of Land by Auction Act, 1867 (30 and 31 Vict. c. 48), s. 7.]

Where a man bids for an estate sold under a decree of the court of chancery, and is allowed by the Master to be the purchaser, and the report is absolutely confirmed, and a deposit made; yet, upon special circumstances, the court will open the bidding.—There is no rule subsisting, or ever has subsisted, to prevent the court from exercising its discretion in opening biddings, but the practice rests wholly upon the circumstances of the case, and the discretion of the court.

ORDER of Lord Chancellor Northington AFFIRMED.

On the 22d of December 1749, John Earl of Gower made his will; and thereby (amongst other things) gave to his wife, the respondent Countess Dowager Gower, an annuity of £1000, in lieu of dower, and to be chargeable on all the lands in his will

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\* In a manuscript note on this case it is said, that after hearing the opinion of the Judges upon the question, it was proposed to *reverse* the decree; and that the question being put, it was resolved in the negative: Contents 22; Non-contents 13.—But no such question or division appears in the Journal.

mentioned, of which the manor and estate of Grindon was part. He then devised the trustees and their heirs, his manors, lands, and hereditaments, charged with the said annuity, and subject also to the payment of several sums of money therein given to his daughter Elizabeth Countess Waldegrave, in trust, to sell the same, and to apply the money, first for payment of debts and incumbrances affecting the estates, and of the just debts he should owe at his death, and which his personal estate would not reach to pay; then to raise and pay £16,000 for the portions of his younger children; and to invest the surplus money (if any) in the purchase of lands, to be settled on his sons and brothers successively in such manner, and with such remainders over, as therein mentioned; and he appointed Mary Countess Dowager Gower, Henry Pelham, Bapst Leveson Gower, and Robert Barber, executors.

On the 24th of December 1754, the testator died, leaving the respondent Countess Dowager Gower his widow, and the respondent Earl Gower, his eldest son and heir at law, and the respondent John Leveson Gower, his only younger child, who thereupon became entitled to the £16,000 directed to be raised by his father's will.

In October 1760, a bill was filed in the court of chancery, for the purpose of carrying the trusts of this will into execution; and on the 14th of June 1763, the case was heard, when the respondent Earl Gower, the testator's heir at law, admitting his father's will, it was ordered, that the same should be established, and the trusts performed; and an account of the testator's personal estate was directed to be taken, and of his debts, funeral expences and legacies; and an account was also to be taken of the rents and profits of the testator's real estates devised in trust, and of the money raised by sale of any parts thereof, which was to be applied [307] in satisfaction of debts, funeral expences, and legacies remaining unpaid: And in case the same should not be sufficient, it was further ordered, that the trust estate remaining unsold, or so much thereof as should be sufficient to satisfy the debts, funeral expences, and legacies remaining unpaid, should be sold to the best purchaser, to be allowed of by the Master, and the money applied for that purpose; and it being admitted, that the respondent Earl Gower had, out of his own money, paid several of the testator's debts, it was ordered, that he should be admitted to stand in the place of such creditors so paid of, and receive a satisfaction for the same out of the testator's estate.

In pursuance of this decree, the Master proceeded to take the accounts directed: and it appearing necessary to sell the trust estates, the Master proceeded to a sale thereof; and (amongst others) of the manor of Grindon, in the county of Stafford and of several farms, lands, and cottages within the manor; and in order to the sale a particular of the estate was left with the Master, stating the names of the several tenants, and the annual rents paid by each of them, amounting in the whole to £632 8s. 7d.

Under this particular, the estate was put up to sale before the Master, on the 17th of January 1765; who by his report, dated that day, certified, that the appellant John Davenport was the best bidder for it, at £27,500. But on the 19th of February following, and before the Master's report was confirmed, an order was made by the Lord Chancellor Northington, on the application of one Thomas Bell, who offered to give £28,300 for the estates, being £800 more, to refer it back to the Master, to allow of a better purchaser, and the person who should be allowed the best bidder by the Master's next report, was to deposit £1500 in the bank, subject to the order of the court.

Accordingly, on the 22d of April 1765, the estate was again put up to sale, before the Master, when Thomas Mytton, esq. on behalf of the appellant Ryder, having bid £28,500, the Master, by his report, dated that day, certified Mr. Mytton, on behalf of Mr. Ryder, to be the best bidder at £28,500.

This report was confirmed unless cause, by an order dated the 13th of April 1765: and no cause being shewn, the order was, on the 13th of May following, made absolute: and on the 13th of August 1765, Mr. Ryder, the purchaser, paid into the bank in the name of the accountant general £1500 as a deposit, pursuant to the directions of the order of the 19th of February.

After the last mentioned order was made, the parties interested in the estates discovered, that their agents were mistaken as to the value of it, by having relied upon an old survey, whereby they were valued at £632 per ann. or thereabouts; but that they were worth to be let double the rent mentioned in that survey, from whence the particular was prepared. The respondent Earl Gower therefore was advised, to

make application to the court (on an offer made [308] of £2000 more for the estate than Mr. Ryder had given) that the £1500 paid into the bank by him, as a deposit, might be paid back to him, with interest at £4 per cent. from the time the same was paid, and that it might be referred back to the Master to approve of a better purchaser.

The respondents Earl Gower and Lord Trentham accordingly moved the court of chancery for that purpose: and in support of the application, the affidavits of William Bill, John Chadwick, Daniel Lownds, William Smith, Richard Willock, and William Ratcliff, were read. By the affidavit of William Bill it appeared, that the particular left with the Master, before whom the estate was put up to be sold, was made from a map, or particular, taken by the order of John late Earl Gower, upwards of 30 years ago; and that he delivered the original map to the appellant John Davenport. And by the affidavit of the others it appeared, that they were well acquainted with the several farms, lands, grounds, mill, and premises at Grindon, advertised to be sold under a decree of the court of chancery, in the several holdings of Simon Fletcher, and 45 other persons, all named in the affidavit, and in the particular left with the Master, as also with the several cottages in the parish of Grindon, within the manor or lordship of Grindon, in the holding of six persons in the affidavit named, and that there were several cottages, or encroachments, part of the manor and estate, not mentioned or taken notice of in the particular of sale left with the Master, and which were in the holding of Richard Amables, and 20 other persons named in the affidavit; which last mentioned cottages or encroachments (21 in number) were not taken notice of in the particular for sale; and that they had been well informed and relieved, one part of the estate was then let, or agreed to be let, by the last bidders for the estate, for upwards of £1250 per ann. nett rent; and the other part, not then set to their knowledge, was, to the best of their judgment and belief, worth, to be let by the year, a nett sum of £300 and upwards.

The affidavits read on behalf of the bidders, were made by the appellants Thomas Mytton, John Davenport, and William Hambleton, and one William Kirkland. The appellants Mytton and Hambleton said, they were purchasers each of a fourth part of the manor and estate of Grindon, and that the particular of the estate left with the Master, as they understood and believed, comprehended the whole estate of John late Earl Gower, at Grindon, except some cottages, or encroachments, which, or the greatest part, they believed, were in the course of last summer levelled or thrown open by Chadwick, Lownds, Radcliff, and others, freeholders within the manor. That since the report of the sale was made absolute, and the deposit of £1500 paid, they had been at very great trouble, and their expences on account of the purchase amounted to several hundred pounds. Mytton said, that the abstract of the title to the estate was not delivered till the 3d of December last, and the objections his counsel made thereto not removed till lately. That being told in September, last by John Davenport, who was also concerned in the purchase, that he had been informed by Thomas Gilbert, esq. who was principally concerned for Earl Gower, that the title of the Grindon estate was unexceptionable, and the purchase money much wanted, he set about raising his share, and for that purpose called up from interest a very large sum, and also borrowed on account of the purchase, and had for some time paid interest for a considerable sum of money, which monies he had ready to complete his purchase. Hambleton said, he had engaged his share of the purchase money, and was ready to pay the same, and should be a great sufferer by paying interest, if the purchase was not soon compleated; and both Mytton and Hambleton said, that since the deposit was made, they and the other parties concerned with them in the purchase, not knowing there was any survey of the estate, procured, at a considerable expence, proper people to survey, measure, and plan the whole of the estate comprised in the particular, and verily believed the quantity of land, exclusive of commons, naked rocks, fences, roads, incroachments on the waste liable to be thrown open by the freeholders, and rivers, did not amount to 1800 acres. Hambleton said, that the survey taken by the directions of the late Earl Gower, comprehended every piece, field, and close belonging to the Earl's estate at Grindon, except the encroachments on the waste made since that survey was taken; and that since the estate was contracted for, one, if not two leases of considerable value were determined by the death of tenants, who held for their lives: That the tenants having received notice from the respondent Baptist Leveson Gower, to quit their respective farms, and no person on behalf of the

Gower family offering to let the estate, or any part thereof, and the rest of the purchasers intending to pay their purchase money, and move to be let into possession from Lady-day next, they did, about Christmas last, make conditional agreements for part of the estate, to prevent the same from being untenanted: That the survey of the estate had not been taken, nor had he or the rest of the purchasers concerned themselves in the management of the estate, till possession had been obtained from the court, had they not met with the countenance and assistance of the Gower family. The appellant Davenport, by his affidavit, said, that the appellant Ryder was a trustee for him and the appellants, Mytton, Hambleton, and Taylor, and that some time after the report was made absolute, and the deposit made, he was well informed, that several of the tenants publicly declared, they would continue on their respective farms one year after the purchasers were let into possession, and were determined to plow a large quantity of the lands in their respective holdings, which would have injured them very much, as they were lands more properly adapted to pasturage and grazing: that thereupon he applied to Thomas Gilbert, esq. principal agent for Earl Gower, for his advice and assistance how to act, who promised to do all in his power to assist him in quieting the tenants, and forwarding him in [310] the purchase; and for that purpose, particular notices to every tenant to quit on Lady-day next, were signed by the respondent Baptist Leveson Gower, under the direction of Mr. Gilbert.

On the 19th of February 1766, the motion came on before the Lord Chancellor Northington, who, upon hearing counsel for all parties, ordered, that the £1500 paid by Mr. Ryder into the Bank, as a deposit for the estate in question, should be paid back to him, and that the Master should compute interest on the £1500 at £4 per cent. from the 13th of August last; and also take an account of all costs, charges, and expences of every kind, which Mr. Ryder or his principals had been put to, concerning the purchase of the estate; and on payment of such interest, costs, charges, and expences, that Mr. Ryder should be discharged from his purchase; and it was ordered, that the respondent Earl Gower should be considered as standing a creditor on the estate, for what he should pay on account of opening the bidding; and the counsel for Anselm Beaumont, esq. bidding in court £2000 more for the estate, it was referred back to the Master to approve a better purchaser, and that the person who should be reported the best bidder, by the Master's next report, should deposit £3000 in the bank, with the privity of the accountant general, subject to further order.

From this order the appellants appealed, contending (F. Norton, E. Willes), that they were fair, honest, and open purchasers in a court of equity, depending on the supposed practice of the court; viz. that when persons are reported and confirmed the best purchasers of estates, without any fraud or contrivance, they are not to be discharged and disappointed; and many applications to open biddings have been rejected by the court, though much greater sums in proportion have been offered, than what was proposed to be given in the present case. That the affidavits filed on the part of the respondents, were fully answered by those filed on behalf of the appellants; so that there was no foundation arising from evidence, to support an extraordinary order to their prejudice. The pretences urged in favour of the respondents, that they were not sufficiently acquainted with the value of an estate lying near the noble respondent's mansion house and chief residence, or that the same had been sold too cheap, seemed to have but little weight; since the particular under which the estate was sold, appeared to have been made with great care and attention by the respondents agents, and without the privity or participation of the appellants; and though it had been examined and attacked with the utmost art and industry by their irritated tenants, yet little or no error had been pointed out in it. That the appellants were purchasers at a very extraordinary price, having agreed to give no less than 45 years purchase on the present rents; the purchase money amounting to £28,500 for an estate, which, so lately as the year 1735, was sold at the rate of £15,000, including an advowson worth £150 a year: Therefore, and as no fraud, collusion, or management appeared, or was even suggested against them, they ought to [311] have the benefit of their contract. And it would be hard to deprive them of it, on account of a contingent accidental advantage, arising by an event subsequent to their purchase, viz. the death of one or more of the tenants who had leases, after the contract was made, and so near being compleated; and especially, as they could not have got discharged from their bidding, if, upon a nearer view of the estate, they had found the bargain



too dear. That if, in this case, there had been an agreement signed by the parties, which is not stronger than a report absolutely confirmed, a court of equity would have compelled a specific performance of such agreement, though a greater sum might be afterwards got for the estate; especially, when the agreement had been in part performed, and so long acquiesced under. That the payment to the appellants of interest at £4 per cent. and their costs, charges, and expences, was no satisfaction or reparation for the loss and disappointment they would sustain, if the purchase was discharged; as the large sum of money by them agreed to be paid for such purchase, was partly called in from good securities at £5 per cent. and other part borrowed for at least a year certain, with the privity of the respondents agent. That the appellants had rode many hundred miles, and been put to very great and extraordinary trouble in this business, during the last twelve months, besides the risque attending the remittance of so large a sum of money, from a remote part of the country to London; so part whereof came within the allowances directed to be made by the order appealed from.—That the infancy of the respondent Lord Trentham had been mentioned as an argument for opening this bidding; but it ought to have no weight, the court of chancery being the general guardian of all infants, in the numerous suits depending in that court, touching their persons and estates; and it would be a dangerous distinction, to make use of infancy in that court, to defeat purchasers under decrees made for the benefit of infants. That the credit of future sales of estates, to be made under the authority of the court of chancery, seemed to be greatly involved in the present question; for if these biddings were to be frequently opened, after persons are confirmed the best purchasers, on a supposed advantage to the vendors, the publick, already too much deterred by the expence, delay, trouble, and uncertainty attending these sort of purchases, would be discouraged from buying at all under decrees of the court of chancery, which would be of the most dangerous consequence to poor creditors, in whose behalf these sales are generally directed.

On the other side it was insisted (C. Yorke, W. de Grey), that the order appealed from was consistent with the practice of the court, which, in many instances, and under various circumstances, opened biddings after the Master's report has been confirmed. In the case of *Price v. Moxon*, in June 1754, an order was made to open the bidding, after the report was confirmed and a deposit made. In *Hooper v. Jewell*, in 1758, a like order was made by the Master of the Rolls. And on the sale of Lord Carmouth's estates, the biddings were [312] opened after the reports were confirmed, upon an advance in price only. And there is no rule subsisting, or ever has subsisted, to prevent the court's exercising its discretion in opening biddings; but the practice rests wholly upon the circumstances of the case, and the discretion of the court. That mistake, ignorance of the real value of property, and hardships in bargains, are grounds on which courts of equity refuse their aid, to enforce private contracts by decree. In the present case, the ground of the mistake in the agents appeared; and the noble family being strangers to the real value of their estate, the infancy of the respondent Lord Trentham, the inequality in the price, and the offer of £2000 more, were just grounds why the Court should interpose to open the bidding for the estate in question. That the order was guarded with every circumstance of justice and equity of which these cases were capable, having provided a compensation to the bidders, not only for their costs, but for all their charges and expences of every kind, together with interest for their deposit.

But two objections were made, I. That the respondent Baptist Leveson Gower signed the notices to the tenants to quit, and that Mr. Gilbert, the Earl's agent, was desirous of expediting the purchase. II. That since the estate was contracted for, one, if not two leases of considerable value were determined, by the deaths of the tenants, who held the same for their lives.

As to the first objection, the signing of notices to the tenants to quit, who had threatened to commit waste by ploughing, was for the interest of all parties, whether the purchase was compleated or not. And the desire of the Earl's agents to have the purchase compleated, before they had discovered the nature of the bargain, could not make the contract reasonable, which was originally unreasonable.—And as to the other objection, it proved that the estate was worth more than it was let at, otherwise no benefit would arise by the death of tenants, who were tenants at rack rents; but

this complaint must have appeared frivolous, if the affidavit had stated, as the fact was, that one of these tenants held at £7 per ann. and the other at £7 9s.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed. (Jour. vol. 31. p. 386.)

[313] CASE 4.—ARTHUR BAILLIE,—*Appellant*; WILLIAM CHAIGNEAU, and others,—*Respondents* [15th February 1779].

[Mews' Dig. xiv. 1381. See note to preceding case, *sup.* p. 1097.]

Purchasers under the decree of a court of equity are materially injured, if all the orders relative to the sale are not certain and uniform; and therefore the court acts properly in refusing to open a sale, where the applications are frivolous and litigious, and grounded only on the affidavit of the owner; and especially, where the value of the estate is but little more than will satisfy the incumbrances upon it.

ORDERS of the Irish Chancery AFFIRMED.

John Palmer, Thomas Palmer, and Thomas Hurst and Frances his wife, were seised as tenants in common of the lands of Killbride, in the county of Carlow; and each of them duly demised his undivided third part of the said lands to Arthur Baillie, the appellant, his executors, administrators, and assigns, for the term of 21 years, at the separate yearly rents of seventy pounds; and in each of the leases was contained a covenant on the lessor to renew for 21 years, at the end of every 21 years, for ever.

The appellant being possessed of the premises by virtue of these demises, did grant and assign the said leases and lands in mortgage to John Clarke, for securing £2500 and interest; which mortgage contained a borrowing clause, upon the strength of which the said John Clarke lent the appellant the further sum of £4000.

The appellant, and the said John Clarke, by deed, dated the 15th of August 1770, reciting the foregoing circumstances, and in consideration of £6500 paid by Sir Henry Cavendish baronet, did, according to their respective interests in the said lands, grant and assign the same, and all their terms and interests therein, and the benefit of renewal thereof, to the said Sir Henry Cavendish, for securing the payment of the said £6500, and lawful interest; and the appellant executed a bond in the penalty of £13,000, as a collateral security for the said mortgage, with a warrant of attorney to confess judgment on the bond.

The appellant, the said John Clarke the elder, his brother-in-law, and John Clarke the younger, a son of John the elder, and Thomas Gough, son-in-law to Clarke the elder, were indebted to the respondent William Chaigneau in the principal sum of £3000, secured to him by their joint bond, with warrant of attorney, for confessing judgment thereon.

On the 10th of June 1771, the appellant, by deed of mortgage, in consideration of the £3000 due upon the said bond and warrant, and in consideration that the said last-mentioned bond was delivered to him cancelled, did grant and assign the said leases and lands, and all his equity of redemption, estate, and interest therein, to the respondent William Chaigneau, subject to the mortgage to [314] Sir Henry Cavendish, and subject to redemption on payment of the said sum of £3000, with lawful interest. And by deed of assignment dated the 3d of November 1771, Sir Henry Cavendish assigned to the respondent John Keogh, for full and valuable consideration, the said mortgage executed to him for £6500, with all interest due thereon.

The appellant having neglected to pay the respondent William Chaigneau his mortgage money, or the interest thereof, or to pay the said mortgage debt due to the respondent John Keogh, or the interest thereof; and the respondent William Chaigneau being apprehensive that the premises were a scanty security for the said debts, exhibited his bill in the court of exchequer in Ireland, on the 10th of October 1772, against the appellant and the respondent John Keogh, praying an account on the foot of the said mortgages made to the respondent John Keogh and himself, a fore-

closure of the equity of redemption, and a sale of the mortgaged lands for payment of the principal, interest, and costs, due to the respondents Keogh and Chaigneau, according to the priority of their respective demands.

The respondent Keogh answered the bill, and swore, that Sir Henry Cavendish assigned his mortgage to him; that no part of the principal or interest due on the foot of the mortgage so assigned was paid; and that there was then due thereon, for principal and interest, £7605 and costs; that he believed the premises were a scanty security for the debts due to him and the respondent Chaigneau, and that he the respondent Keogh was desirous to have the mortgaged lands sold for payment of the money due to him.

The appellant having been duly served with subpoena, to appear and answer the said bill, appeared thereto; but, in order to give all the delay in his power, suffered process of contempt, to a sequestration, to issue against him for want of an answer.

On the 22d of February 1774, the cause was heard; when it was decreed, That the bill should be taken as confessed against the appellant; and it was thereby referred to the chief remembrancer, or his deputy, to take an account of what was due to the respondents Keogh and Chaigneau, respectively, on the foot of their mortgages, for principal, interest, and costs.

In pursuance of this decree, the chief remembrancer made his report, which was, by order, absolutely confirmed. And on the 2d of July 1774, the cause was finally heard on the report; and it was then ordered and decreed, That the appellant should, within three months from the date of the decree, pay to the respondent Keogh, £7793 5s. 5d. reported due to him, with interest for the same from the time of confirming the report until paid; and should also pay to the respondent Chaigneau £3358 6s. 3d. reported due to him, with interest from the time of confirming the report until paid, together with the costs: or in default thereof, that the appellant's equity of redemption should be for ever foreclosed, and that the chief remembrancer should set up and sell by publick cant, to the highest and fairest bidder, the mortgaged lands, or a [315] competent part thereof, for payment of the principal, interest, and costs, due to the respondents Keogh and Chaigneau.

The appellant not having paid the sums so decreed to the respondents, or any part thereof, the chief remembrancer, on the 29th November 1774, which was upwards of four months after the decree, gave notice, by publick advertisement, that he would, on the 16th day of December then next, set up and sell, by publick cant, to the highest bidder, the appellant's interest in the lands; which sale, for want of bidders, was, by subsequent advertisements, adjourned to the 6th of February 1775.

The appellant, in pursuance of a scheme formed by him to delay the sale, and in the mean time to receive the rents and profits to his own use, without either paying the head landlords, or any part of the principal and interest due to the respondents Chaigneau and Keogh, on the 21st of February 1775, applied to the court to postpone the sale until the first day of the then next Easter term; and in support of the motion, filed an affidavit, sworn by himself, on the 27th of January then last, wherein (amongst other things) he thought fit to swear, That George Finey, of the city of London, esquire, nephew of the appellant, had lately promised to pay off and discharge the debts due to the respondents Chaigneau and Keogh; and that, by a letter received from Finey a few days before, he promised to come to Ireland some time in the then next month, and bring money with him to pay off and discharge all the said demands; and that he believed the same would be paid before the first day of the then next Easter term: and he also swore, That he did not mean to give any unnecessary delay in paying the respondents their said demands. Accordingly the court thought fit to postpone the sale until the third day in the then next term.

Two days previous to the day appointed for the sale by the last adjournment, the appellant by his counsel moved the court to postpone the sale until the then next Easter term. Whereupon it was ordered, That the sale should be postponed for a week, and that the appellant should be at liberty to make his motion for that purpose in the mean time.

On the 11th of February 1775, the motion came on, when it was ordered, That it should stand over until the first of the eight days after the then present Hilary term, and that all things should remain as they were in the mean time. Accordingly, on the 21st of the same month, the motion to postpone the sale was again brought on,

when it was ordered, on debate, that the lands should be again set up to be sold, the third day in the then next Easter term.

In pursuance of these orders, the sale was from time to time adjourned; and to gain further time, the appellant, on the 23d of May 1775, again applied to the court to postpone the sale; and, in support of this application, filed an affidavit, sworn by himself, wherein he set forth, among other things, That since the last order, he used his best endeavours to raise the several sums of money decreed to the respondents Chaigneau and Keogh; that his nephew [316] George Finey, who promised to advance money to him, had then lately come over to Ireland, and had been at the appellant's house, and viewed the mortgaged lands; and on such view had been fully satisfied with the sufficiency of the security; that Finey had informed him, he had a sum in the funds in England, sufficient to enable him to discharge the sums decreed as aforesaid; and that the reason he did not bring over the money to Ireland, according to his promise to the appellant, was on account of some doubt which the trustees named in the will of Abraham Whittaker, of London, deceased, had, whether the fortune of Penelope, one of the daughters of Whittaker, the wife of Finey, vested immediately in Finey on his marriage, on account of her having not attained her age of 21 years; and that before an opinion could be had on a case laid before Mr. Maddocks, an eminent barrister in London, in order to satisfy the trustees, Finey was under a necessity of setting out to Ireland, upon material business. That his friend Finey had come to Ireland, and had shewn him a letter from his law agent, with a copy of the case laid before Mr. Maddocks, with his opinion, that the fortune of Penelope did immediately vest in Finey on his marriage with her; and gave him the most solemn assurances, that he would immediately return to England, and fulfil his promise of advancing money to pay off the respondents' demands.

On this affidavit the court ordered the sale to be postponed for a week; and on the first of June following the appellant again applied to the court to postpone the sale until the first day of the then next Michaelmas term, and in support of this motion filed another affidavit, That his friend Finey was then at his house, and that as soon as Finey could settle his business in Ireland, he would return to England, and would advance him the money necessary to pay the respondents' demands, and that the appellant, in order to expedite matters, would accompany him to London.

The court, upon this application, ordered, That upon the appellant's paying half a year's interest upon the whole sum decreed, by the first day of the then next term, and the arrear of rent due to the head landlords in a month, that the sale should be postponed for a month; and if the principal, interest, and costs, decreed to the respondents, should not be paid by that time, that the lands should be peremptorily set up to be sold, the respondents' attorney agreeing that such sale should not be confirmed until the first day of the then next Michaelmas term.

On the 28th of June 1775, the appellant again applied to the Court to postpone the sale, and obtained an order that the same should be postponed until the then next motion day. But the appellant lay by until the last of the eight days after Trinity term, and just as the court was rising, got his counsel to move to have his notice saved, which was accordingly done; and which was in effect an injunction against the respondents' proceedings until the then next Michaelmas term.

After two other orders for postponing the sale, the lands were, on the 24th of December 1775, sold to Robert Browne, esquire, but [317] this sale was not confirmed; and upon application of the respondent Chaigneau's counsel, the lands were directed to be again set up to be sold.

Several other applications were made, and orders obtained, for postponing the sale, grounded upon various affidavits made by the appellant himself, touching the value of the lands, and his expectation of raising money to discharge the incumbrances. At length, on the 16th of June 1777, the respondent Sir Nicholas Lawless was reported the best bidder, at the sum of £15,000. But before this report was absolutely confirmed, the appellant made several attempts for a re-sale; and on the 21st of November 1777, obtained an order that the lands should again be set up to be sold, on the first Monday in the then next Hilary term; and that if no person should on such sale bid more than the sum bid by Sir Nicholas Lawless, and make a deposit, the sale made to him should stand confirmed without further motion.

Accordingly on Monday, the 26th of January 1778, the lands were put up to sale in

the presence of several persons, but no one bid more than what had been bidden by the respondent Sir Nicholas Lawless, and therefore his purchase stood confirmed.

The appellant however made one more attempt to obtain another sale, and on the 20th of February 1778, applied to the Court for that purpose; but after full debate, the motion was refused. He therefore thought proper to appeal from the several orders directing the sale of these lands, but it does not appear that any case was printed for him, or any reasons assigned in support of the appeal.

On the part of the respondent Sir Nicholas Lawless, it was said (J. Madocks, E. Hilliard) to be of the highest consequence to the suitors of a court of equity, who may have their property directed to be sold by a decree, that such sales should be attended with some degree of certainty; for if continual and expensive litigation is to be the attendant upon a purchase under a decree in equity, no one who has any regard to the welfare of himself, his family, or his property, will become a purchaser: That, during the period of uncertainty, whether a bidder for an estate, sold in equity, is to be deemed a purchaser or not, he is materially injured by the orders of the court, if they are not uniform and certain, as thereby the state of his property is rendered precarious, and prevented from being subservient to many useful family purposes: The length of time elapsed since the respondent Lawless first became the purchaser in June 1777, was a far greater period than should be allowed to any vendor in the appellant's situation, even under the most equitable indulgence: And, that the various applications of the appellant since the decree, to postpone and avoid a sale, strongly pointed out the motives of his conduct; and his not producing any other evidence than his own affidavit, of the many assertions he made as to the value of the mortgaged premises, and other circumstances, which he might have done with great ease, if those assertions were true, [318] clearly evinced the grounds whereon those applications (and particularly that of the 20th of February 1778) were founded.

For the respondents, the mortgagees, it was said (J. Dunning, J. Lee), That all the said orders were agreeable to the rules and practice of the Court of Exchequer, and grounded upon the principles of equity; nor was it suggested by the appellant in what respect they were irregular or improper. That the order of the 30th of June was made upon the appellant's motion, and in his favour. That there was not any ground to indulge the appellant in a further sale, inasmuch as he already had full as much indulgence as was apprehended to be consistent with the rules of equity, and the dignity of the court; and any further extension of it would be injurious to the credit of securities by mortgage, and to the credit of sales under the decrees of the courts of equity in Ireland; such indulgence must be at the expence and hazard of the respondents; and the appellant had throughout the proceedings in this cause exhibited such a scene of litigation, and practised such shifts for delay, as have been rarely known in any cause, and rendered him by no means an object of favour. That, although it was now four years since the appellant first applied to postpone the sale of the mortgaged premises, under an allegation that he should soon be able to raise money to pay off the money due thereon, to the respondents Chaigneau and Keogh, yet the appellant had not yet been able to raise money for that purpose; and, from the fall in the value of land, the mortgaged premises were already become a scanty security for the money due thereon; and the respondents, the mortgagees, were greatly injured by being so long kept out of the monies due to them on their securities.

After hearing counsel on behalf of the respondents, (none appearing for the appellant), it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the orders therein complained of affirmed, with £200 costs. (MS. Jour. *sub anno* 1779. p. 236.)

[319]

## RECOVERY.

CASE 1.—JOHN MARTIN,—*Plaintiff*; JOHN STRACHAN, and another,—*Defendants* (in Error) [17th April 1744].

[Mews' Dig. vii. 33, 48 (*Martin d. Tregonwell v. Strachan*).]

Where a common recovery is suffered of an estate tail, the recoveror acquires an absolute estate in fee simple, derived out of the estate tail; so that if a tenant in tail, by purchase under a marriage settlement, made by his ancestor *ex parte materna*, with the reversion in fee by descent, *ex parte materna*, suffers a common recovery to the use of himself in fee, this estate will descend to his heirs general, *ex parte paterna*: for the recovery does not lie in the reversion in fee, but a new estate is thereby acquired *by purchase*, which is totally different from the old estate tail.

See 5 Term Rep. K. B. 104. *Roe d. Crow v. Baldwre & al.* where the above rule is confirmed, and extended to copyhold as well as freehold lands.

The report in Strange is briefly and confusedly stated: for the judgment of Lord Chief Justice Lee, see 5 Term Rep. K. B. 107, etc. in *n.*—See also the notes in Nolan's edition of Strange's Reports, 1179, etc.

JUDGMENT of the Court of K. B. AFFIRMED.

Strange 1179. 1 Wils. 2, 66.

The plaintiff brought his ejectment in the court of king's bench, for one messuage, three gardens, three orchards, 20 acres of land, 20 acres of meadow, 20 acres of pasture, and 1000 acres of wood, with the appurtenances, in Milton Abbas, in the county of Dorset. To which the defendants appeared, and entered into the common rule to confess lease, entry, and ouster, and pleaded not guilty; upon which issue was joined.

In Michaelmas term, 1728, the cause was tried at bar, and the jury found a special verdict to the effect following; viz.

That upon the 13th of August 1639, John Tregonwell was seised in fee of divers manors, messuages, lands, tenements, and hereditaments, in the county of Dorset, of which the premises in question were parcel; and that he had issue two sons, John and Thomas; and on the 4th of October 1650, died seised of the premises. After whose death the same descended to John, his eldest son, who entered and was seised thereof, and had issue John, his son; and being so seised, on the 6th of December 1667, died, after whose death the premises descended to John, his son; and he the said John, the grandson, entered and was seised, and had issue two daughters, Mary and Katherine, and no other issue. That on the 3d of June 1680, by indenture quadrupartite of that date, made and executed between him, by the name of John Tregonwell of Milton Abbas, in the county of Dorset, esquire, and Jane his wife, of the first part, Francis Lutterell of Dunstar Castle, and Mary, the eldest daughter of the said John Tregonwell, of the second part, John Jones and Thomas Sidersin of the third part, and Peregrine Palmer, Thomas Palmer, John Harding, and Samuel Pitt, of the [320] fourth part; the said John Tregonwell did covenant with the said Francis Lutterell and his heirs, that the said John Tregonwell and Jane his wife would, before the end of Trinity term then next, levy a fine *sur consueance de droit come ceo*, etc. with proclamations to the said Jones and Sidersin, or their heirs, of all those farms called Delcomb Farm, Windmill-Ashes, Huish Farm, Lushcombe Farm, and Chestcomb, *alias* Churcomb Farm, and of all lands, tenements, and hereditaments thereto belonging, and of all manner of tithes of the said premises, and of the manor of Milton Abbas, and of all rents of assize thereto belonging, and of the coppice woods, containing 1600 acres, and of the impropriate parsonage rectory of Milton Abbas, the impropriate tithes of Wooland, the impropriate tithes of Widcomb, of Holworth, and also of a portion of tithes in Milbourne St. Andrews; to make the said Jones and Sidersin tenants in a precipe for suffering a recovery; which, when suffered, was declared to be as to the farm of Delcomb, with the appurtenances, and all manner of tithes arising out of the same, to the use of the said John Tregonwell and his heirs, till an intended marriage between the said Francis Lutterell and Mary Tregonwell should be solemnized; and after that marriage, to the said Francis Lutterell for his life: remainder

o the said Mary Tregonwell for her life.—As to the mansion house of Milton Abbas, and the appurtenances, to the said John Tregonwell for life; remainder to Jane Tregonwell for her life; remainder, if the said marriage took effect, to Francis Lutterell and Mary, his intended wife, for their lives and the life of the longest liver of them.—And as to Delcomb Farm, after the limitations to the said Francis Lutterell and Mary Tregonwell; and as to the said mansion house, and its appurtenances, after the limitations to the said John Tregonwell and Jane his wife, Francis Lutterell and Mary Tregonwell, to the said Peregrine Palmer, Thomas Palmer, John Jones, John Iarding, Thomas Sidersin, and Samuel Pitt, and their heirs, to support contingent remainders; and then to the use of the said Peregrine Palmer, and the other trustees, heir executors, etc., for 200 years; then to the use of the first and every other son of the body of the said Francis Lutterell and Mary in tail male; remainder to all and every the other son and sons of the said Mary in tail male; remainder to Katherine Tregonwell, youngest daughter of the said John Tregonwell for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the body of the said Katherine in tail male; remainder to the daughter and daughters of the said Mary and Francis in tail; remainder to the other daughter and daughters of the said Mary in tail; remainder to the daughter and daughters of Katherine in tail; remainder to the right heirs of the said John Tregonwell.—And as to the said farms, called Windmill-Ashes, Huish and Lushcomb, with their appurtenances, and all manner of tithes arising out of the same, to the said John Tregonwell and Jane his wife, for their lives, and the life of the longest liver of them, remainder to Katherine for life; remainder to such person as should be her husband at the time of her death, for life; [321] remainder to trustees to support contingent remainders; remainder to the trustees and their executors for 200 years; remainder to the use of the first and every other son of the body of Katherine in tail male; remainder to the said Mary Tregonwell for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the said Mary in tail male; remainder to the daughter and daughters of Katherine in tail; remainder to the daughter and daughters of Mary in tail; remainder to the right heirs of the said John Tregonwell in fee.—And as to the manor of Milton Abbas, rents of assize hereto belonging, the farm of Chestcomb, *alias* Churcomb, the parsonage of Milton Abbas, tithes of Wooland, Widcomb, and Holworth, and the portion of tithes in Milourne St. Andrews, to the said John Tregonwell for his life; remainder, as to one half hereof, if the said marriage should take effect, to Francis Lutterell for life; remainder to Mary, his intended wife, for life; remainder to trustees to support contingent remainders; remainder to trustees for 200 years; remainder to the first and every other son of the said Francis and Mary in tail male; remainder to all and every the other son and sons of the body of the said Mary in tail male; remainder to Katherine Tregonwell for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the said Katherine in tail male; remainder to the daughter and daughters of the said Mary and Francis in tail; remainder to all other the daughter and daughters of the said Mary in tail; remainder to the daughter and daughters of the said Katherine in tail; remainder to the right heirs of the said John Tregonwell in fee.—And as to the other half thereof, after the death of the said John Tregonwell, to the use of the said Katherine for life; remainder to him, who should be her husband, at the time of her death, for life; remainder to trustees to support contingent remainders; remainder to trustees for 200 years; remainder to the use of the first and every other son of the body of the said Katherine in tail male; remainder to the said Mary for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the body of the said Mary in tail male; remainder to the daughter and daughters of the said Katherine in tail; remainder to the daughter and daughters of the said Mary in tail; remainder to the right heirs of the said John Tregonwell.—And as to the 1600 acres of coppice, to the said John Tregonwell for life; remainder to Jane his wife, or her to receive £100 per ann. for life; remainder as to one half thereof, if the said marriage should take effect, to the said Francis Lutterell for life; remainder to Mary or life; remainder to trustees to support contingent remainders; remainder to trustees for 200 years; remainder to the first and every other son of the body of the said Francis and Mary in tail male; remainder to Katherine Tregonwell for life; re-

remainder to trustees to support contingent remainders; remainder to the first and every other son of the said Katherine in tail male; remainder to the daughter and daughters of Mary and Francis in tail; remainder to all other the daughter and [322] daughters of the said Mary in tail; remainder to the daughter and daughters of Katherine in tail; remainder to the right heirs of the said John Tregonwell; remainder, as to the other moiety, after the death of the said John Tregonwell to Katherine for life; remainder to trustees to support contingent remainders; remainder to trustees for 200 years; remainder to the first and every other son of the said Katherine in tail male; remainder to Mary for life; remainder to trustees to support contingent remainders; remainder to the first and every other son of the said Mary in tail male; remainder to the daughter and daughters of Katherine in tail; remainder to the daughter and daughters of Mary and Francis in tail; remainder to all other the daughter and daughters of Mary in tail; remainder to the right heirs of the said John Tregonwell.

That a fine was levied, and a recovery suffered accordingly, to the uses in the said indenture mentioned.

That on the 10th of December 1680, Francis Lutterell and Mary Tregonwell were married; and that he entered on such parts as were limited to him, immediately after the solemnization of the said marriage, and became seised thereof for life. That on the 10th of January 1680, Jane, the wife of the said John Tregonwell, died, and on the 29th of the same month he also died; whereupon the said Francis Lutterell and Katherine Tregonwell, according to their several rights, entered into the respective parts of the premises which were, by the said indenture, limited to them respectively after the decease of the said John Tregonwell and Jane his wife, and were seised. That on the 11th of August 1683, Katherine died an infant, unmarried and without issue; and thereupon the said Francis and Mary entered into such part of the premises, as were limited to the said Katherine, and became seised.

That Mary had issue one son, who died in the life-time of his mother, an infant without issue; and two daughters, Mary and Frances, and no other issue: That Mary, the eldest daughter, in the year 1700, married Sir George Rook, by whom she had George Rook, her only son; and that Sir George and his wife were dead.

That the said Frances, the youngest daughter, in 1705, married Edward Ash, esquire, and was still living.

That Francis Lutterell, on the 4th of August 1690, died seised, leaving Mary his wife surviving; who, on the 5th of August 1690, entered on the premises and became seised.

That the said Mary, the widow, on the 1st of January 1701, married Sir Jacob Banks, a Swede, and had issue by him two sons, John and Jacob, both born in England; and on the 11th of March 1703, the said Mary died seised.

That on her death, John Banks, the eldest son, entered and was seised, pursuant to the said indenture, fine and recovery; and on the 27th of March 1725, died without issue.

That all persons prior in the limitations of the said indenture to Jacob Banks, the brother of John, were dead before John; and all the terms were surrendered and extinguished before the death of John Banks. That on the 20th of January 1724, Sir Jacob Banks [323] died; and on the 28th of March 1725, Jacob, the only brother of John, entered and was seised *ex parte materna*.

That the said Jacob Banks by indenture, dated the 11th of June 1725, did bargain and sell the premises to John Glass, his heirs and assigns, to make him tenant of the freehold, that a common recovery might be had against him; which recovery was to be and enure to the use of the said Jacob Banks, his heirs and assigns.

That this indenture was duly inrolled within six months, and the recovery was suffered accordingly; that the premises in question were parcel of those comprised in the said recovery: And that afterwards, the said Jacob Banks was seised, and on the 27th of February 1737, died seised without issue.

That Thomas Tregonwell, the youngest son of John Tregonwell, first above named, and only brother of John Tregonwell, who was eldest son and heir of the first named John Tregonwell, had issue John his son; that on the 20th of May 1655, Thomas Tregonwell died; and John, his son and heir, had issue John, and died; and that John, the grandson of Thomas, had issue Thomas Tregonwell, the lessor of the plaintiff, and on the 1st of June 1730, died, leaving him his son and heir.



That Lawrence Bengston Banks, an alien, had issue by Christina his wife, an alien, he before named Sir Jacob Banks, and three daughters, Brita, Ingri, and Anna Christina; Brita married one Peter Bohmgreen, an alien, and had issue by him four daughters; viz. Maria Christina, Brita, Christina, and Margareta, all aliens, and died leaving no other issue.

That Ingri was married and had issue, whose names were unknown to the jurors, all aliens, and died leaving such issue living in Sweden. That Anna Christina was dead, without issue. That Maria Christina, the eldest daughter, and Brita, the second daughter of Brita by Peter Bohmgreen, were both living; and that Christina, the third daughter of Brita by Peter Bohmgreen, had issue aliens, whose names were unknown to the jurors, and was dead. That Margareta, the fourth daughter, married John Strachan, born an alien, and had issue the defendant John Strachan, their son, born in London the 17th of March 1707; and that Margareta died in February 1726, leaving him her only son.

That John Strachan, the father of the said defendant, by an act of the 12 Will. 3, was naturalized; and that the defendant was a natural-born subject.—The verdict then concluded to the judgement of the court.

This special verdict was twice argued in the court of king's bench, in Hilary term, 1742, and the court being unanimous in their opinion, gave judgement for the defendants.

To reverse this judgement, a writ of error was brought in parliament; and on behalf of the plaintiff in error, who claimed *ex parte materna*, it was argued (D. Ryder, N. Gundry), that the rule of law is clear, that the estate of one dying seised by descent *ex parte materna*, can descend to none but the heir *ex parte materna*; it being founded on natural [324] justice, that an estate should go to the blood and family from whence it came; where the owner himself has not thought fit to give it away from him. That this estate was originally the inheritance of Jacob Bank's mother and her ancestors; and therefore, if there had been no interruption in the course of descent, it must now descend to the plaintiff. That the only interruptions insisted on, were the settlement of 1680, and the recovery and deed of uses in 1725. As to the former, it was only a temporary interruption of the possession, by the particular or partial estates carved out of the fee, the inheritance being still left to descend *ex parte materna*; and whenever those particular estates should determine, whether by the death of the parties, or by bar or extinguishment of them, the possession would return to the old inheritance again. And as to the latter, the recovery and deed of uses only determined and barred the particular estates, and consequently let the fee into possession in the same condition and quality as when in reversion; and therefore could not alter the nature of the ancient use, or the descendible quality of it. That this is clearly the case where a fine is levied by tenant in tail, who has the reversion in fee in himself; it having been settled, that such a fine extinguishes the estate tail, and lets the old reversion into possession: Nor is there any material difference between a fine and recovery, for so far as their respective powers reach, they are both universally held to be bars of the particular estates, and conveyances of their own inheritance in fee.

It is objected, that a recovery not only bars the estate tail, but the remainders also. But that distinction is totally immaterial, because it affects only the extent of the bar or extinguishment, not the manner in which those instruments operate. It proves the recovery to be a bar or extinguishment of the estates tail, both in possession and remainder, but does not prove it to be less a bar or extinguishment of either; and the bar or extinguishment of both by the recovery, as much lets in the reversion in fee after both, as a bar or extinguishment by fine of one, lets in the reversion in fee dependent on that one only. That this distinction could not be applicable to the case of a recovery by tenant in tail, with an immediate reversion in fee in himself; and it would be extremely difficult to maintain, that in such a case, the use would be the old one, and go *ex parte materna*; but that in the present case it was a new one, only because there was an intermediate remainder in tail, which was equally, and but equally, barred with the estate tail in possession. Or, if that should be admitted to be no material point of distinction, it would be as hard to maintain, that if tenant in tail with reversion in fee in himself, descending *ex parte materna*, bars the estate tail by a fine, the resulting or declared use in fee to himself would be the ancient use, and

go *ex parte materna*; but that if the same tenant in tail bars the same estate tail by a recovery, the resulting or declared use would be a new use, and go *ex parte paterna*. That it was apprehended, no case would be cited to [325] warrant this distinction; and if not, reason and equity pointed out, that they ought both to have the same effect.

It is also objected, that a recovery is the proper conveyance of a tenant in tail with remainders over, and therefore operates as a grant from him; and that the recoverer comes in under him in the *per* as his grantee, and therefore as a purchaser. But this would be to make the recovery operate, not as a bar to the particular estate tail in possession and remainder, which is the sense and language of all the books: but as a bar to his own reversion in fee, which is absurd. Nor indeed is a recovery, in any other sense, a grant from the tenant in tail, than as it is a common assurance, by which he may bar those particular estates, and acquire or convey the fee simple in possession: But it is not less such an acquisition, if he gets it by barring the particular intermediate estates, and letting his own fee into possession, than if it could be said to be a grant of the estate tail itself to himself in fee. But whatever might be the case, where the estate tail in possession, together with the remainder or reversion in others, include the whole inheritance; yet where the tenant in tail in possession has also the reversion in fee, the recovery operates as a conveyance of the reversion, and a bar of the intermediate estates. A recovery is not a sort of conveyance more proper to bar remainders, than a fine is to bar an estate tail alone; nor can the recoverer come more under the tenant in tail, or his estate, or be more properly a grantee from him of his estate tail, than the conusee of a fine is under the conusor; and yet in this latter case, that notion clearly does not prevent the estate tail from merging in the fee.

It is however further objected, that the estate tail is continued and enlarged by the recovery: But this is at best a very inaccurate manner of speaking, if not unintelligible or absurd; since an estate tail cannot continue longer than the issue *per formam doni*, and a fee simple cannot with any propriety be called an enlarged estate tail. The only reasonable sense of such expressions is, that the tenant in tail, by exercising the power which the law has given him of barring the estates tail, has become possessed of the absolute fee in possession; but in this sense it is no otherwise an enlargement of his estate, than a surrender of tenant for life to the remainder-man in fee, is an enlargement of the remainder-man's estate; and is therefore more properly an enlargement of the fee simple by sinking the particular estate, than an enlargement of the particular estate which is absolutely destroyed. Nor does this manner of considering the recovery, in the least injure the absoluteness of that power which the law gives the tenant in tail over the estate; because he acquires as much this way as the other, with this advantageous circumstance, that it keeps the estate in its natural channel; and prevents the act done for one purpose only, from enuring to another which the party never thought of, and which if he had, he might and probably would have avoided.

In support of the judgment it was contended (F. Chute, R. Henley), that Jacob Banks being tenant in tail under the settlement of 1680, by purchase and [326] not descent, the rule of descent relied on by the plaintiff in error, was only applicable where the person, whose estate is in question, was at the time of his death seized by descent; and no way affected or influenced the present question, if Jacob Banks acquired the fee by suffering a recovery as tenant in tail by purchase. That a tenant in tail is considered in law as possible owner of the whole fee, viz. that the remainders and reversions are in his power by suffering a recovery, which is the act of tenant in tail, and takes its effect out of the estate tail, in right of which alone he is impowered to suffer such recovery; as he thereby acquires, in judgement of law, an absolute and pure fee against the remainder-men and reversioner, although the reversion were in a stranger: Whereas by a fine, the estate tail is only extinguished and barred as against the issue in tail, but as to the remainder-men or reversioner it subsists, notwithstanding that act, as a base, or determinable fee on failure of issue. It was therefore apprehended, that by the recovery, which removed all restraints and limitations ensuing or dependent after the estate tail; the fee so acquired by Jacob Banks proceeded out of the estate tail, and took its effect to the use of the person so enabled in law to suffer the same, as the result of his power in virtue of the estate tail which was gained by settlement, i.e. by purchase; and consequently, the remainders and

reversions, which subsisted before the recovery, were alike extinguished and put to an end by force and operation of such recovery. That if the estate tail, as to the issue only, is considered as barred by a recovery, and the old estate in fee or reversion, subject to the estate tail, is let in and takes place, as contended for by the plaintiff: the consequence and inconvenience thereof would be, that in that case every estate in the kingdom, of which a recovery is suffered by a tenant in tail, seised also of the reversion in fee, would still remain liable as assets by descent, to the specialty debts of the ancestor from whom it descended; (for the estate tail while it subsists, and the base fee gained by force of a fine, suspends the remedy so long as there is issue, and therefore preserves the debt); and this form of conveyance, invented and long used to strengthen the title of possessors who are tenants in tail, would be a means of destroying such intention, and would revive old demands to the ruin of many families.

AFTER hearing counsel on this writ of error, the judges (who attended according to order) were directed to deliver their opinions on the following question; viz. "Whether upon the death of Jacob Banks, the estate in question did by law descend to his heir on the part of the mother or not?" And the judges having taken time to consider, the lord chief justice of the common pleas delivered their reasons at large, and concluded with their opinions, "That the estate in question, upon the death of Jacob Banks, did not descend to his heirs on the part of the mother." Whereupon it was ORDERED and ADJUDGED, that the judgment given in the court of king's bench should be affirmed, and the record remitted; and that the plaintiff in error should pay to the defendants in error, £10 for their costs in the house. (Jour. vol. 26. p. 363. 368.)

[327] CASE 2.—JOHN LEYBURN WITHAM,—*Plaintiff*; GEORGE LEWIS, (on dem. EDWARD Earl of DERBY),—*Defendant* (in Error) [26th April 1744].

The awarding of a writ of seisin, on a recovery, with its execution and return by the sheriff, must appear upon record; and if a writ of execution be not found in a special verdict, it cannot be presumed by the court; and a *venire facias de novo* shall not be awarded.

Lord Kenyon, in the case *Goodright d. Burtenshaw v. Rigby*, 5 Term Rep. K. B. 177—181, observed that this had always been considered as a strange case; a writ of seisin never being in fact executed.—See also stat. 14 Geo. 2. c. 20.

JUDGMENT of the court of K. B. AFFIRMED.

Strange 1185. 1 Wils. 48.

The Earl of Derby brought his ejectment in the name of George Lewis, the defendant in error, against the plaintiff in error, in the court of king's bench, for a messuage and lands in Witherstack in the county of Westmorland: Whereupon issue being joined, the cause was tried at the assizes held at Appleby in the year 1739, by a jury of gentlemen, when a special verdict was found to the effect following; viz.

That King Henry VII. being seised in fee, in right of his crown, of the manor of Witherstack, of which the premises in question were parcel, on the 25th of February, in the fourth year of his reign, by letters patent granted the said manor and the premises in question to Thomas Stanley, then Earl of Derby, and the heirs male of his body.—That by virtue of this grant, Earl Thomas entered and was seised; and had issue George Lord Strange, who died in the life-time of his father, leaving issue Thomas.—That Earl Thomas the grantee, died seised, whereby the premises in question descended to his grandson Thomas Earl of Derby.—That this Earl Thomas entered and was seised of the premises in question, and in Hilary term, 5 Hen. VIII. suffered a common recovery; wherein James Bishop of Ely, Hugh Bishop of Sodor and Man, and other great persons were demandants, and the said Thomas Earl of Derby tenant; who vouched to warranty one Thomas Fish, the common vouchee; and that such proceedings were thereupon had, that judgement was given, that the said Bishop of Ely and others the demandants, should recover their seisin of the premises in question against the said Thomas Earl of Derby, the grandson; and that the said Thomas Earl of Derby, the grandson, should have of the lands of the said Thomas Fish, of the value, etc. and that the said Thomas Fish

should be amerced.—That after the said common recovery, Earl Thomas the grandam entered into the premises, and was seised thereof as the law requires; and had issue male of his body Edward, his eldest son, and afterwards died so seised; whereby the premises descended to his said son Edward, then Earl of Derby, who entered [328] and was seised thereof as the law requires.—That the premises in question descended from him in a lineal descent to Ferdinand Earl of Derby, who entered and was seised, and died so seised without any issue male of his body, in the life-time of his brother William; but that he left three daughters, Ann, Frances, and Elizabeth.

The jury further found, that divers disputes and differences arising between Earl William and the daughters of his brother Ferdinand, concerning the estates of the family; to compose those differences, an act of parliament was made, 4 Jac. I. by which, *inter alia*, it was enacted, That Earl William, for his life, and after his death James, his son and heir apparent, and the heirs male of his body; and in default of such issue, the second, third, fourth, fifth, sixth, and seventh sons of Earl William, and the respective heirs male of their respective bodies successively; and in default of such issue, Sir Edward Stanley, during his life, and after his decease, his first, second, third, fourth, fifth, sixth, and seventh sons, and the heirs male of their respective bodies successively; and in default of such issue, Edward Stanley of Bickerstaff during his life; and after his decease, his first, second, third, fourth, fifth, sixth, and seventh sons, and the heirs male of their respective bodies successively, should and might from thenceforth hold and enjoy the premises in question.—That in this act there was contained a power for Earl William, Sir Edward Stanley and Edward Stanley respectively, after they should be in the actual possession of the estates to them limited, to make jointures for their respective wives, or eldest sons wives; and also a proviso, which saved all rights, interests, reversions, etc. to the crown, in the same manner and form, and to all intents and purposes, as if that act had never been made.—That the premises in question, were parcel of the estates by the said act settled.—That after the death of Earl William and James his son, the premises in question descended to Earl Charles, grandson of Earl William.—That Earl Charles, in consideration of £131:19s. by feoffment, and bargain and sale inrolled, both bearing date the 20th of January 1653, and by fine with proclamations, levied in Michaelmas term 1654, conveyed the premises to John Leybourn in fee, who entered and was seised; and under whom the plaintiff in error claimed title.—That Earl James the son, and Earl Charles the grandson of Earl William, died without issue male.—That Sir Edward Stanley, in the said act of parliament mentioned, was also dead without issue.—That Edward Earl of Derby, the lessor of the plaintiff in ejectment, was heir male of the body of Edward Stanley of Bickerstaff, also mentioned in the said act: and by the death of James Earl of Derby, in the year 1735, became and was heir male of the first named Thomas Earl of Derby, the grantee of the crown.—That Earl Edward, on the 17th of January 1738, made an actual entry into the premises in question, claiming the same as his estate and freehold; and afterwards, on the 19th of the same month, demised the same to the said George Lewis, who entered and was possessed thereof: And upon these [329] facts, the jury submitted the matters of law to the judgement of the court.

Upon the trial of this cause, the recovery suffered 5 Hen. VIII. was given in evidence, and no objection was then made to it; as the only doubt which occasioned the finding of the special verdict was, whether the entry of the defendant in error was lawful or not; and this depended upon the general question, whether, notwithstanding the recovery, the feoffment and fine of Earl Charles in 1653, who then sold the estate to the plaintiff's ancestor, made a discontinuance or not; for if it did, the entry of the defendant in error was taken away.

On his behalf it was insisted, that the feoffment and fine in 1653, did not discontinue his remainder, for that the reversion of the estate being ultimately in the crown, protected it from such discontinuance.—But to this it was answered, that it did not; because a reversion in the crown, to prevent a discontinuance, must be a reversion immediately dependent on the estate tail attempted to be discontinued, which this was not; for by the recovery, 5 Hen. VIII. the old estate tail was barred, and turned into a fee simple, descendible to Earl Thomas, and his heirs general, as long as there were heirs male of the said Earl subsisting; and the reversion thereby left in the crown, became only a mere possibility of reverter, after the determination

of such qualified fee; and of consequence, not within the protection of 34 Hen. VIII. which extended only to estates tail *then* subsisting, which this was not: For that statute only says, that no feigned recovery *hereafter* to be had against tenant in tail of lands, whereof the reversion or remainder *at the time* of such recovery had, shall be in the king, shall bind, etc.

And as to the estate tail created by the settlement which was confirmed by the act 4 James I. it was only a partial estate tail, created out of the fee simple gained by the recovery; and the reversion being left in the crown by that act, in the same plight it was before, it was in no sort dependent upon, or connected with the estate tail then created; but left to depend, as it did before, on the fee simple gained by the recovery; and which might possibly subsist many generations, after all the estates tail created by that act were spent: And therefore, the fine and feoffment in 1653, made a discontinuance of the remainder limited to the defendant in error; as they could not, nor did, in any manner affect the reversion of the crown, between whom and the remainder in tail, there was no privity or dependence.—But upon this point, though argued three several times, the court gave no opinion.

For, upon arguing the case, the counsel for the defendant in error started a new objection; namely, that no writ of execution or entry of the recoverers, appeared upon the special verdict; and as it was not found, it could not be presumed; the recovery therefore was not good, and of consequence the Earl's entry was lawful: And the court being of that opinion, gave judgement for the earl upon that point only.

[330] But to reverse this judgement, the present writ of error was brought; and on behalf of the plaintiff in error it was insisted (R. Crowle, B. Craster), that the judgement was erroneous, and that the writ of execution, though not expressly found, ought to have been presumed from the exemplification of the recovery itself, as found; its antiquity of above 230 years; its being entered upon the rolls; the dignity and quality of the parties to it; and a fresh entry of Earl Thomas, expressly found to be made after such recovery; and likewise from the impossibility of any other proof of *actual* execution. For it is well known, that amongst the rolls of the recoveries of that and the preceding reigns, the award of the writ of execution is not entered or indorsed upon one in twenty of them, as has been usual of later years; and upon search in the proper offices, where the writs of execution themselves, of recoveries in those early times, ought to be filed; not one of such ancient writs is to be met with. That if any objection had been made to the recovery on this account, at the time of the trial, the court would and ought to have directed the jury to find the execution of it, from the antiquity of the exemplification itself; and the possession of the defendant and his ancestors agreeable to it: And if so, it was difficult to give a reason, why the courts of law should not draw the same legal conclusions; and make the like reasonable implication from facts themselves, which they would direct a jury upon their oaths to do. That the execution of this recovery ought further to be presumed, from the sale by Earl Charles in 1653, and the acquiescence of his two sons, Earl William and Earl James successively, for near fourscore years together; and from the fatal consequences which might attend this judgement: For if this doctrine should be established, that the judges ought not to presume execution at this distance of time, it might shake the titles to great part of the property in this kingdom, which probably may depend on the validity of ancient recoveries, suffered before the statute of 34 Hen. VIII. And if a jury, for any reasons peculiar to themselves, should think proper to insist upon evidence to support such ancient recoveries, which, for the above reasons, appears impossible to be laid before them; all property might be subjected to an arbitrary, and perhaps corrupt determination of a jury, without any redress whatever; as no attainr, or other remedy against them, would in such case lie. That the presumption now contended for, was further aided by the length of possession, transmitted from ancestor to heir, and so expressly found by the jury, in a series of quiet, peaceable, and uninterrupted enjoyment for the compass of near 100 years together.

But admitting that the court of king's bench ought not, in strictness of law, to have presumed the writ of execution, as the jury had not expressly found it; yet it was apprehended to be at most but an imperfect verdict, and that therefore no judgement should have been given thereon; but a *venire facias de novo*, i.e. a new trial, ought to have been awarded; but which the court, on motion, refused.—The objections to

this motion were, that a [331] *venire facias de novo* is only grantable, where the verdict is so imperfect, that the court cannot give a compleat judgement upon it; or where the jury are guilty of misbehaviour, in not finding according to their duty: And it was apprehended, that both these reasons concurred in the present case. For 1st, If it was the office of the jury to have found the fact of execution one way or the other, and not to have submitted that question to the court, because the court cannot legally presume either way; they misbehaved in not doing part of their duty, and therefore the record, in this particular, should have been sent back to them. And 2dly, If compleat justice could not be done to the parties upon this record, no compleat judgement could be given upon it; and the whole merits of this case depending upon the question, whether execution was awarded or not; as the jury had not, with certainty, found either way, but submitted it as a question to the court; and admitting that the court could not, in strictness of law, presume there was execution, with what justice could they determine there was not? When it must be undoubtedly admitted, that the reasonable presumption lay the other way. It was therefore hoped, that these reasons would be found to conclude strongly in favour of a new trial, to ascertain this fact one way or the other; and that therefore the judgement of the court of king's bench would be reversed.

On the other side it was contended (T. Bootle, W. Wynne), that the judgement was right, and ought to be affirmed; because it did not appear, that any writ of seisin was ever awarded upon this common recovery; or that the same was ever carried into execution by writ of seisin, or otherwise: For until a writ of seisin is awarded, executed, and returned, (all which must appear upon record, and cannot be presumed), it is not a perfect recovery, and operates nothing; nor is any new estate gained to the recoverer, or any use raised thereby, or the former estate altered or changed: And so it was determined on a question upon this very recovery, so long ago as in the reign of King James I. The consequence is, that Earl Thomas, notwithstanding this recovery, still continued tenant in tail, and the reversion remained in the crown, undisturbed or altered. Upon this, the court of king's bench principally founded their judgement; and supposing that judgement right upon this point, the rest of the points insisted on by the plaintiff in error, were apprehended to be immaterial.

But supposing this recovery had been carried into execution, it could not bar discontinuance, or alter the reversion in the crown; but that reversion continued just the same, as if no such recovery had been suffered. For it is a rule in law established beyond doubt, that a recovery suffered either before or since the statute 34 Hen. VIII. cannot bar, discontinuance, or alter a reversion in the crown. And this being so, then whether the recovery had, or had not, any effect upon the estate tail, from the time of suffering it to the 4th of James I. was quite immaterial to the present question: because by the act then passed, the estate was entailed [332] upon the heirs male of this noble family, with a remainder over to the sons of Edward Stanley of Bickerstaff, the ancestor of the defendant in error, in tail male: And it has been determined, that this very act was no more than a legislative settlement of the estate, according to the agreement of the parties; and deriving the several limitations out of the old estate tail, but still leaving the reversion in the crown. Besides it is plain, that at the time of making that act, the old estate tail under the grant of Hen. VII. was understood to be still subsisting, because, upon the death of Earl Ferdinand without issue male, the estate came to William, his younger brother; whereas if there had been any ground to say, that a qualified fee was gained by the recovery of 5 Hen. VIII. the daughters of Earl Ferdinand would have been entitled. Taking it that Earl Charles, who made the feoffment in 1653, and levied the fine in 1654, was only tenant in tail under the settlement made by the act, with the reversion in the crown; then that feoffment and fine could be no discontinuance, or bar to the title of the defendant in error; because the estate then in Earl Charles being of the gift of the crown, and the reversion still in the crown, it could not be barred or discontinued by fine or feoffment, being within the protection of the statute 34 Hen. VIII. cap. 20. And this was also determined upon the construction of this very act of parliament, upon a fine levied by Earl Charles of another part of the estate thereby settled, and entailed in the same manner as the estate in question.

But supposing this estate not under the protection of the statute 34 Hen. VIII. yet, as the defendant in error claimed in remainder, as heir male of the eldest son

of Edward Stanley of Bickerstaff, after failure of issue male of Earl Charles, who levied the fine, and not through him; the fine or feoffment could be no bar or discontinuance of his estate, which he so claimed in remainder, or take away his entry; his title not accruing till the death of the last Earl James, who did not die till the year 1735, and consequently he was well entitled to the premises in question.

After hearing counsel on this writ of error, the two following questions were put to the judges; viz. "1. Whether sufficient matter is found in the special verdict, whereupon the common recovery of Trinity term, 5 Hen. VIII. can be adjudged or taken to be a compleat valid recovery? 2. If not, whether by law, a *venire facias de novo* ought to be awarded in this case?" And the lord chief justice of the common pleas having delivered the unanimous opinion of the judges upon both questions in the negative, and given their reasons at large; it was thereupon ORDERED and ADJUDGED, that the judgement given in the court of king's bench should be affirmed, and the record remitted: And it was further ORDERED, that the plaintiff in error should pay to the defendant in error, £10 for his costs in the house. (Jour. vol. 26. p. 373. 377.)

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[333] CASE 3.—THOMAS BROOME, *Plaintiff*; SAMUEL SWAN,—*Defendant*  
(in Error) [2d May 1766].

If a writ of *summoneas ad warrantizandum* be returnable on a Sunday, and the vouchee dies on that day, the recovery is void; because Sunday being a *dies non juridicus*, judgement could not possibly have been given until the Monday following, consequently the judgement must have been given after the death of the vouchee: And as a common recovery pursues the forms of a real action, it is of absolute necessity that the vouchee against whom the judgement is obtained, should be living on the day when such judgement is given by the court, for otherwise the judgement is erroneous.

JUDGEMENT of the Court of K. B. AFFIRMED.

3 Burr, 1595. 1 Blackstone's Rep. 496. 526.

In Easter term 1750, a common recovery was suffered, wherein Thomas Broome was demandant, George Green, tenant, and Edward Swan, the second son of Samuel Swan the common ancestor, and Edward Swan the younger, his son, were vouchees; the recovery was of the manor and divers lands and tenements in Lea, otherwise Lee, in the parish of Bradbourn in the county of Derby; and the writ of summons to summon the vouchees, was returnable from Easter day in one month.

On the 23d of April 1762, Samuel Swan, the grandson of Rowland, the third son of Samuel the common ancestor, brought a writ of error to reverse this recovery, returnable in the court of king's bench.

In this writ of error he alledged, that Samuel Swan the common ancestor, by his will, dated the 2d of January 1683, gave the manor, lands, and tenements, whereof the recovery was suffered, to Samuel Swan his son, for life; and after his decease, to the first son of the body of his said son Samuel, and to the heirs male of the body of such first son; and for want of such issue, to the 2d, 3d, 4th, 5th, 6th, 7th, and all other the son and sons of the body of his said son Samuel, lawfully to be begotten, and to the heirs male of the body and bodies of every of the said sons, the elder of such son and sons, and the heirs male of his body, being ever preferred before the younger of such son and sons, and the heirs male of his body; and for want of such issue, to Edward Swan his second son, for life, and after his decease, to the first son of the body of the said Edward, and to the heirs male of the body of such first son; and for default of such issue, to the 2d, 3d, 4th, 5th, 6th, 7th, and all other the son and sons of the body of the said Edward, and to the heirs male of the body and bodies of such son and sons, the eldest of such son and sons, and the heirs male of his body, being ever preferred before the younger and the heirs male of his body; and for want of such issue, to Rowland Swan his third son, for life, and after his decease, to the first

son of the body of the said Row-[334]-land, and to the heirs male of the body of such first son; and for default of such issue, to the 2d, 3d, 4th, 5th, 6th, 7th, and all other the son and sons of the body of the said Rowland, and to the heirs male of the body and bodies of such son and sons, the eldest of such son and sons, and the heirs male of his body, being ever preferred before the younger, and the heirs male of his body.

Soon afterwards, the testator died without altering his will, leaving issue his said three sons, Samuel, Edward, and Rowland. In 1742, Samuel the eldest son died without issue, and Edward the second son became thereupon entitled to an estate for life in the premises. This Edward had two sons, namely, Samuel and Edward; Samuel died without issue in 1749, so that Edward his brother became the first remainderman in tail of the devised estate, and joined with his father Edward in suffering this recovery.

In 1757, Edward Swan the elder died, and in 1758, Rowland the third son of the testator died, leaving Samuel the present defendant his eldest son; who, if not barred by the recovery, was entitled to an estate tail in the premises.

The error assigned was error in fact; viz. that Edward Swan the younger, the vouchee, died before the judgement given in the recovery; and this fact was, that the writ of summons was returnable on Sunday the 13th of May, and that he died on that day.

Upon this assignment of error, it would have been necessary to have gone to trial, to have the fact found by a special verdict; but as this would have been attended with expence to the parties, and was totally unnecessary, as the day of the return of the writ of summons appeared by the record, and as it was admitted by both sides, that the day of the return of the writ was on a Sunday, and that Edward Swan the younger, the vouchee, died on the same Sunday: An application was therefore made to the court of king's bench, in Easter term 1764, who made a rule by consent of all parties, and their counsel and attornies, that the assignment of error already made should be waived; and that the errors should be assigned as follow, to wit, "in this, that the day of the return of the writ of summons was on Sunday, the 13th day of May, in the year of our Lord 1750, on which said 13th day of May, the said Edward Swan the younger died, without issue male of his body, to wit, at the parish of Bradbourn in the said county of Derby, and that so the said judgement was erroneous; and that thereupon the defendant in error should in pleading deny that there was any error, either on the record or proceedings aforesaid, or in giving the said judgement. And by the like consent it was further ordered, that no advantage should be taken on either side of any informality in assigning the error aforesaid; but that each side should be bound by the judgement of the court thereon, as though it had been expressly assigned, that the said Edward Swan the younger died before rendering the said judgment, and as though on a proper issue thereon, the day of the return of the writ of summons and [335] the time of the death of the said Edward Swan the younger, as above admitted, had been found by a special verdict."

The plaintiff in error, agreeable to this rule, assigned for error, that the day of the return of the writ of summons was on Sunday, the 13th day of May 1750, on which said 13th day of May, the said Edward Swan the younger died, without issue male of his body, and so the judgement was erroneous. And the defendant in error denied, that there was any error in the proceedings or judgement.

In Trinity term 1764, the case came on to be argued, when the court was pleased to order, that it should stand over to be further argued in the next term. And accordingly, in Michaelmas term 1764, it was argued again, when the court unanimously gave judgement for the plaintiff in error, and that the judgement in the recovery should be reversed.

To reverse this judgement, the present writ of error was brought; and on behalf of the plaintiff it was insisted (C. Yorke, J. Glynn), that Edward Swan the younger being alive on the day he was called to appear, and did appear by his attorney, that is to say, on the return day of the writ of summons to warranty, to which day the judgement in the common pleas must necessarily relate; must be alive when the judgement was given against him, and therefore the recovery was good. That this position follows from the reasons and authorities of legal relations of judgements; viz. that the term being considered in law as one day, judgements in general relate to, or in law are supposed to be given, and receive a construction as if they had been.



given on the first day of the term, and that is the essoign day. But in particular cases where the term, by the proceedings in it suffers a division, as in the present case by the summons to warranty, the judgement relates to the essoign day of that return; on which day it was admitted by this record, that Edward Swan the younger was alive.

It is however objected, 1. That the essoign day was Sunday, on which day the court never sits, and so cannot be supposed to have given judgement on that day, or that the judgement here given can relate to that day. 2. That the court never did sit on a Sunday, nor could sit on that day, because forbid by several canons, which were adopted by the common law.

To the first objection it was answered, that courts formerly commenced all law business on the essoign days, which were Sundays or festivals, and so might pronounce judgement on those days. The authorities in the books are many and uniform, that the judgements given in term time, all bear relation to that day, whether a festival or not; and the reason is the same where the process is returnable in the middle of the term, to force the relation to the essoign day of that return. That the entry in the present case, which says, *at which day comes here, as well the said Thomas in his proper person as the said George, by John Glasse his attorney, and the said Edward being summoned, etc. likewise comes, etc. and afterwards departs in contempt of the court*, was also an estoppel to say [336] that the judgement was not given on that day, or that it was given on any day before, or even after that day.

As to the other objection, it was said, that the very canons prohibiting, were evidence of the fact of sitting on a Sunday; and it was further proved by the returns of the writs, all which were formerly on festivals; and in the year 1763, nine returns out of seventeen were on a Sunday, as appears by the almanack of that year. That it would be strange for the king, by his writ, to order the parties to appear on a day on which no court was or could be held, if they were not to sit on that day. Besides, the many cases of testing and returns of writs, adjourning terms, casting or warranting essoigns, etc. all which were equally objects of the canon law, prove the fact of courts actually sitting on Sundays. As to the canons, they could only have the same force as in other cases, when adopted; viz. to subject to spiritual censures, but not to invalidate the act; like to the canons against holding fairs on a Sunday, which was also prohibited by statute, under temporal penalties; but the contract was binding, till at last by another statute the contract was made invalid. But as no act extended in words to the present subject, therefore, it was not against the common law for the court to sit and pronounce judgement on that day; or by construction or intendment of law, the judgement as given in this case, as the entry imported, the court must intend that it was given on that day. If the canon law had been adopted, i.e. incorporated into our law, and if in after times, the legislature had thought it necessary to forbid judgements having relation to the essoign days, they would then have changed the returns of the writs; for it is now necessary to take out the writs returnable on the general return days, and the greatest part of these are Sundays; and as they must be considered as common days of return, and as the judgements necessarily relate to these days and no other, if Sundays are to be for this purpose taken as *dies non juridici*, then most of the judgements given in term must necessarily be bad, as bearing relation to that illegal day; and thus the return days would remain as so many snares for error. But it may be presumed, the legislature did not thus consider it; and thought the returns and relations of law might still remain, though they knew that the courts in decency only sat on Mondays, and that the legal relation to Sunday of the judgement given on Monday, could be no violation of the sabbath, and would still preserve private rights. For the profanation of the sabbath was the only object of the legislature; but it never intended to interfere with private rights.

On the other side it was said (J. Hewitt, W. Blackstone), that a common recovery, though now become a usual mode of conveyance, must necessarily be attended with all the ceremonies and solemnities of an actual suit at law; and if those are wanting, the conveyance by recovery is as defective as a will devising lands, to which there are only two subscribing witnesses. That as the recovery pursues the forms of a real action, it is of absolute necessity that the vouchee against whom [337] the judgement is obtained, should be living on the day when such judgement is given by the court,

for otherwise such judgement is erroneous. That though in all cases the judgement shall relate as far back as can be permitted by the facts appearing on the record, yet no fictitious relation shall presume what is in itself impossible. In the present case, the writ of summons being returnable on Sunday, the 13th of May, the judgement in the recovery was not, nor could be given till Monday the 14th of May; for though many nominal return days of writs were very anciently fixed upon Sundays, yet both by law and practice, courts of justice cannot now sit upon a Sunday, but the business appointed for that day is and always must be dispatched on the Monday immediately following. As therefore the vouchee died on Sunday the 13th, the day preceding the judgement, the judgement was given against a person not *in esse*, and consequently was totally erroneous. That it was not sufficient to say the vouchee had done every act necessary to be done by him, that he had executed the deed to make a tenant to the precipe, had acknowledged the warrant of attorney, and had thereby compleated in substance every thing requisite to this particular mode of conveyance; for no warrant would empower an attorney to appear in the name of another, after the death of his principal. The vouchee, it was acknowledged, intended to perfect this conveyance, but died before he could accomplish it; and whether he died a day or a month too early, was quite immaterial. Every act done by him, might have been done in the month of September, previous to a recovery intended to be suffered in Michaelmas term; and yet it would not be contended, that if such a vouchee had died in October, the recovery could have been perfected in the subsequent term. It was therefore hoped, that the judgement of the court of king's bench, reversing the judgement in the recovery, would be affirmed.

After hearing counsel on this writ of error, the judges were directed to deliver their opinions upon the following question; viz. "Whether the recovery is good or erroneous, the return day of the writ of summons being on Sunday the 13th of May, on which day Edward Swan the younger died?" And the lord chief baron of the court of exchequer, having conferred with the rest of the judges present, acquainted the house, "That they all agreed in their opinion, that the recovery was erroneous." Whereupon it was ORDERED and ADJUDGED, that the judgement of the court of king's bench should be affirmed; and that the record should be remitted, to the end such proceeding might be had thereupon, as if no such writ of error had been brought into the house. (Jour. vol. 31, p. 372.)

[338] CASE 4.—THOMAS MEREDYTH, and others,—*Appellants*; HENRY LESLIE, and others,—*Respondents* [17th February 1767].

[Mews' Dig. vii. 20.]

- A. is tenant for life, with remainder to trustees to preserve, etc. remainder to his first and other sons in tail male, remainder to his daughters in tail general, remainder to the heirs of his body; with remainders over. A. suffers a recovery with single voucher, being himself tenant to the writ. This recovery is not good to bar the remainders over; nor is it cured by the Irish act of 21 Geo. 2. c. 11. which is formed pretty much upon the plan of the English acts of 10 and 11 Will. 3. c. 14 and 14 Geo. 2. c. 20.

DECREE of the Irish Chancery REVERSED.

A recovery suffered with a double voucher would have been a good bar: because as the tenant in tail would then have come in upon the voucher, he would have been barred of all the estates and interests which were ever in him. See Cruise on Recoveries.

Charles Meredyth, esquire, grandfather of the appellant Thomas Meredyth, being seised in fee of several lands in Newtown, Clonegarraha, Carlanstown, Balgieth, Irishtown, Garristown, Scurlogstown, and Roristown, in the county of Meath, and having one son Henry by a former wife, previous to his marriage with his second wife Judith Savage, sister of the right honourable Philip Savage, by articles, dated the 27th of February 1766, made between himself of the one part, and the said Philip Savage of the other; in consideration of the then intended marriage, which soon

after took effect, and of £1000, Judith's marriage portion, and of his natural love and affection for his son Henry, the said Charles Meredyth covenanted to stand seised of the said several premises, to the use of himself for life, and after his decease, to the use of Judith for her life; and after her decease, to the use of his son Henry for life; remainder to the first and other sons of Henry in tail male; remainder to the heirs of the body of Henry; remainder to the first and other sons of the said Charles to be begotten on the body of the said Judith successively, and the respective heirs of their bodies; remainder to the heirs of the body of Charles, with other remainders over.

Charles Meredyth had issue of this marriage one son, named Thomas, who was father of the appellant Thomas Meredyth.

By indenture tripartite, dated the 22d of September 1701, between the said Charles Meredyth, and Henry Meredyth his eldest son and heir apparent, of the first part, the said Philip Savage and Henry Luther, esquire, of the second part, and Henry Wybrants, esquire, of the third part; it was witnessed, that in performance of the said articles, and for other the considerations therein mentioned, they the said Charles and Henry covenanted, that Charles Meredyth and Judith his wife, and Henry Meredyth, would, before the end of Michaelmas term then next, levy a fine and suffer a re-[339]-covery of the lands and hereditaments comprised in the said articles, to the use of Charles Meredyth for his life; and after his decease, then as to the lands of Balgieth and one moiety of Carlanstown, with the appurtenances, to the use of Judith Meredyth for her life, for her jointure, and in satisfaction of dower; remainder (after the death of Charles and Judith, as to the whole premises) to Henry for life; remainder to trustees to support the contingent remainders, remainder to the first and other sons of Henry, in tail male; remainder to his daughters in tail; remainder to the heirs of the body of Henry; remainder to Thomas Meredyth, the son of Charles by Judith, for life; remainder to the first and other sons of Thomas in tail male; with several remainders over. And a power was reserved to Charles, to charge the lands with £1000.

This settlement was duly executed by Charles and Henry Meredyth, and by the trustees Philip Savage and Henry Luther; and pursuant thereto, a fine was levied, and a recovery suffered in Michaelmas term 1701.

Charles Meredyth and Henry his eldest son, by lease and release, dated the 1st and 2d of May 1706, granted and released to William Partington and his heirs, the towns and lands of Scurlogstown and Clonnegarrah, part of the above-mentioned premises, subject to a proviso of redemption, on payment of £636 19s. 4d. with lawful interest, on the 1st of May 1711.

Charles Meredyth died in the year 1710, leaving Judith his widow, and two sons, Henry by the first marriage, and Thomas by the second, and no other issue; and upon his death, Judith his widow entered upon the lands of Balgieth, and one moiety of Carlanstown, settled upon her in jointure, and so continued till her death in 1738: And Henry his eldest son entered into possession of all the other estates, not limited in jointure to Judith.

In Trinity term 1715, Henry Meredyth suffered a recovery, with single voucher, of all the lands in Newtown, Clonnegarrah, Carlanstown, Irishtown, Balgieth, Scurlogstown, and Roristown, in the barony of Kells, and county of Meath; but of none in Garristown: And by his will, dated the 27th of June 1715, he devised all his real estate, without mentioning particulars, subject to several debts, legacies, and annuities, to his brother Thomas for life; remainder to Charles Meredyth, the appellant Thomas Meredyth's elder brother, in fee, and soon after died without issue.

By the record of the above recovery it appeared, that the writ of entry was brought in the name of Thomas Marley, against Henry Meredyth himself, as tenant of the freehold, who vouched the common vouches of the court; and that judgement was thereupon given, that Thomas Marley should recover against Henry Meredyth, and that Henry Meredyth should have value of the lands of the common vouches. That a writ of seisin was awarded on such judgment, returnable from the day of the Holy Trinity, in three weeks; and that it was executed on the 1st of July 1715.

At the time this recovery was suffered, Judith, the widow of Charles, was seised of the freehold, and in actual possession of the [340] lands of Balgieth and a moiety of Carlanstown, limited to her in jointure; and the mortgage to Partington of

Scurlogstown and Clonnegarrah was then also subsisting, consequently, the legal freehold of those mortgaged lands remained in Partington.

Thomas Meredyth, the appellant Thomas's father, became entitled, upon his brother Henry's death, to all the premises in possession, except the jointure land of Balgieth; and one moiety of Carlanstown, under the articles of 1676, and the settlement of 1701. And upon the marriage of his eldest son Charles (afterward Dean Charles) Meredyth, with Letitia Vesey, Thomas and Charles, by lease and release dated the 9th and 10th of February 1729, in consideration of the marriage, and of a portion of £2000, conveyed most of the lands comprised in the settlement of 1701, and also several other lands in the county of Meath, whereof one or other of them was seised in fee, to the following uses: As to part of the premises, that if Letitia survived Charles Meredyth, she should thereout receive £200 a year in satisfaction of dower; and subject thereto, to the use of Thomas Meredyth for life, remainder to Charles Meredyth for life, remainder to the first and other sons of Charles by Letitia in tail male; remainder to the other sons of Charles in tail male; remainder to Thomas Meredyth and his heirs: And as to the rest of the premises, to the use of Thomas Meredyth for life; and that if Catherine his wife should survive him, she should have £300 per ann. during her life, payable in manner therein mentioned; and subject thereto, to the use of Charles Meredyth for life; remainder to his first and other sons by Letitia in tail male; remainder to Thomas Meredyth and his heirs; with power to Thomas of charging the premises, by deed or will, with such portions for his daughters and younger sons as he thought proper, with the consent of the trustees therein named; and if Charles should outlive his father, to charge the premises with £100 per ann. as an addition to Letitia's jointure: And it was agreed, that if it should be found expedient, fines and recoveries should be levied and suffered by the parties, to enure to the uses before declared, and strengthen and confirm them. And a power was given to Thomas, to charge the premises, by deed or will, with £3000 for such purposes as he should think fit.

No fine, however, was levied or recovery suffered by Thomas or Charles Meredyth, either before or after the execution of this deed; nor did Thomas Meredyth, or the trustees, ever consent to the charging the lands by Charles, pursuant to the power given him.

Thomas Meredyth died in January 1731, leaving Dean Charles Meredyth his eldest son, the appellant Thomas his second son, and other children, whereby Dean Charles became seised of the lands comprised in the articles of 1676, and settlement of 1701, except those limited in jointure; and also of several other estates of his father's. But Thomas before his death made his will, dated the 17th of November 1731, whereby, in pursuance of his power, he charged the settled estates with £3000, of which he gave £1000 [341] to Thomas his second son; who, together with the other younger children, received the several portions given to them by their father's will.

In February 1738, Judith, the widow of Charles, died; having continued in the possession of her jointure lands until the time of her death.

Dean Charles Meredyth having three daughters, Catherine, Jane, and Judith Letitia, but no son; and being seised in fee of some lands in the county of Meath, not comprised in the settlement of 1701, and also possessed of a considerable personal estate, by his will, dated the 15th of November 1746, directed his debts to be paid by sale of his personal estate (except such part thereof as he should otherwise dispose of) so far as that would go; and if the money arising therefrom should not be sufficient, he empowered his executors to raise the deficiency, together with the portions and legacies thereby given to his daughters, by mortgage or sale of the whole or any part of his real estate in the county of Meath; and then devised to Letitia his wife £100 yearly during her life, over and above the £200 rent charge provided for her by his marriage settlement, and payable in the same manner: and he also gave her a sum of £150, to be paid by his executors immediately after his decease, with several parts of his personal assets. He gave his daughter Catherine £4000, appointing her, instead of interest, £120 a year till marriage or full age: to his daughters Jane and Judith Letitia £3000 a piece; appointing each of them, instead of interest, £100 a year till marriage or full age; and to all three he gave £50 each for mourning; to his brother the respondent Henry Meredyth he gave

£500, to Charles Birch £30, and to William Downy and George Lynch £10 each; and he devised to his brother the appellant Thomas Meredyth, and his heirs for ever, all his real estate in the county of Meath, (without particularising any), subject to his debts and the above jointure, portions, and legacies, with interest; and appointed him and his brother Henry executors.

By Dean Charles's death in July 1747, without male issue, the appellant Thomas Meredyth his brother, as next remainderman in the articles of 1676, and settlement of 1701, became seised of the lands of Newtown, Clonegarraha, Carlanstown, Balgieth, Irish Town, Garristown, Scurlogstown, and Roristown, thereby limited to him; and as devisee of Dean Charles, he became also seised of the lands of Norbinstown, Kilbegg, Alcock's and Betagh's Land in Kilbegg, in the county of Meath, whereof Dean Charles was tenant in fee; and in Hilary term 1749, he suffered a recovery of the lands of Balgieth and Carlanstown.

In April 1749, Letitia, the widow of Dean Charles, together with Catherine, Jane, and Judith Letitia, their children, filed a bill in the court of chancery in Ireland, against the appellant Thomas Meredyth and others; praying, that the value of Dean Charles's real and personal estates, and of the incumbrances affecting them, and his debts, funeral expences, and legacies, might all be ascertained; and that the plaintiffs might be decreed to their [342] respective legacies, portions, and maintenances, given them by his will.

The appellant Thomas Meredyth, by his answer, insisted on the remainder limited to him by the articles of 1676, and settlement of 1701; whereby, upon Dean Charles's death without male issue, he became entitled, as next remainder-man in tail, to the lands comprised therein, which were therefore not subject to the plaintiffs demands; and he further insisted, that the lands of Balgieth and a moiety of Carlanstown, were limited to Judith Meredyth for her life for her jointure, and that she did not join in making a tenant to the precipe, in the recovery suffered by Henry. And that Charles Meredyth the elder, and Henry had, by lease and release dated the 1st and 2d of May 1706, mortgaged the lands of Scurlogstown, Clonegarraha, and part of Newtown, to William Partington for £636 9s. 4d. and that the mortgagee had not joined in making a tenant to the precipe in the said recovery; and consequently, that the recovery suffered by Henry in 1715, had not barred the remainders limited by the settlement of 1701, under which he claimed.

From the time of putting in this answer no further proceedings were had in the cause till the 1st of February 1753, when the plaintiffs amended their bill; but again forbore proceeding till the year 1755.

The respondent Catherine, Dean Charles's eldest daughter, in August 1753, married the respondent Henry Leslie; and Judith Letitia, the Dean's third daughter, in May 1754, married the respondent William Brownlow; Jane the second daughter died in March 1754, and by her will appointed the respondents Henry Leslie and Henry Meredyth her executors.

Letitia Meredyth widow, and the respondents Henry Leslie and Catherine his wife, William Brownlow and Judith Letitia his wife, on the 17th of July 1755, filed a bill of revivor, but proceeded no further: And Letitia the widow died in January 1756, having by her will appointed the respondents William Brownlow and Henry Meredyth her executors.

The appellant Thomas having suffered a recovery of the lands of Balgieth and Carlanstown, and being indebted to Thomas Gleadow in £2202 8s. 8d. and to the appellant Nathaniel Clements in £1260 14s. 6d. for securing those sums, by indenture dated the 12th of January 1756, demised these lands to Gleadow for 500 years; subject to redemption, on payment of the said £2202 8s. 8d. to Gleadow, and £1260 14s. 6d. to Clements, with interest: And Thomas Gleadow having afterwards filed a bill of foreclosure, and obtained a decree for sale of the mortgaged premises, the appellant Edward Gleadow purchased them under that decree, in trust for Thomas Gleadow and the appellant Clements.

In July 1755 the respondents Henry Leslie and his wife, and William Brownlow and his wife, filed an amended bill, making Thomas Gleadow and the appellant Edward Gleadow parties, who were not so to any of the former bills; and by a subsequent [343] amendment, on the 6th of August 1762, they made the appellant Nathaniel Clements a party; which amended bill stated the mortgage made by the

appellant Thomas Meredyth to Thomas Gleadow, of the lands of Balgieth and Carlanstown, and the sale of those lands to the appellant Edward Gleadow, under the decree of foreclosure obtained by Thomas; and prayed, that the former bills and proceedings might stand revived, and that Thomas Gleadow and the appellant Edward Gleadow might account for such part of the rents of the said lands as they had received.

The appellant Thomas Meredyth put in his answer to this last bill on the 11th of May 1762, and Thomas Gleadow and the appellants Edward Gleadow and Nathaniel Clements also severally answered, insisting on the mortgage of Balgieth and Carlanstown, and the sale to the appellant Edward Gleadow, in trust for Thomas Gleadow, and the appellant Nathaniel Clements, whereby they were become entitled to those lands, which were not subject to the respondents demands.

The cause was heard by the lord chancellor of Ireland, on the 11th, 15th, 16th, 18th, and 23d of February 1765, when his lordship was pleased to decree, that the respondents Henry Leslie and Catherine his wife, in right of Catherine, were entitled to the sum of £4000, in the pleadings mentioned, together with a maintenance of £120 a year for Catherine, from the death of her father Dean Charles Meredyth, to the time she attained 21, and from thence to interest for the said sum of £4000: and that the respondent William Brownlow, in right of Judith Letitia his wife, who died pending the suit, was entitled to the sum of £3000 in the pleadings mentioned, together with a maintenance of £100 a year for Judith Letitia, from the death of Dean Charles Meredyth her father, to the time of her intermarriage with Brownlow, and from thence to interest of the said sum of £3000; and that the respondents Henry Leslie and Henry Meredyth, as executors of Jane Meredyth, spinster deceased, were entitled to the sum of £3000, in the pleadings mentioned, together with a maintenance of £100 a year for Jane, from the death of her father Dean Charles Meredyth, to the time she attained 21, and from thence to interest of the said sum of £3000; and that the respondents Henry Leslie and William Brownlow, as executors of Letitia Meredyth deceased, were entitled to the arrears of a jointure of £200 a year, and to the annuity of £100, devised to her by the will of her husband, which were due at the time of her death; as also to the sum of £150, bequeathed to her by the said Dean Charles Meredyth, with the legal interest thereof from his death; the said Letitia having by her will devised the same to the respondents Henry Leslie and William Brownlow: And that the said several sums should be charges upon all the lands and premises in the pleadings mentioned; and proper accounts were directed to be taken of what was due in respect thereof. And it was further ordered, that the master should take an account of the assets of the said Charles Meredyth, and of his debts, and of such debts and incumbrances as affected his real estate; and also an account of what the appellant Thomas Meredyth made, or without wilful default might have made, of the lands and premises, from the death of the said Charles Meredyth: And that the master should also take an account of what the appellants Gleadow and Clements received, or without wilful default might have received, out of the lands of Balgieth and Carlanstown, from the time that they or either of them got into the possession thereof.

From this decree the present appeal was brought, and on behalf of the appellants it was argued (J. Glynn, A. Forrester), that the apparent intent of the articles of 1676, made upon the marriage of Charles Meredyth the grandfather, with Judith his second wife, was, upon failure of Henry his son by his first wife and his issue, to provide for the sons of this second marriage; who were therefore to be considered as purchasers for a valuable consideration. These articles gave an estate for life only to Henry, with remainders to his first and other sons, and then inaccurately introduced a limitation to *the heirs of his body*: But by the known rule of construing marriage articles, this general limitation could never be suffered to give him a power of defeating the sons of the second marriage, who were, equally with himself, the objects of those articles; and if a bill had been brought for carrying them into execution, the court of chancery would have considered these general words as importing only a farther limitation to Henry's other sons, and to his daughters in tail, and would have directed a settlement accordingly, for answering the manifest intent of the articles. So far indeed the settlement of 1701 properly pursued that intent, by interposing an estate to trustees, and their heirs, for preserving contingent remainders.

between the life estate of Henry, and that limited to his sons and daughters in tail; but when, after those estates, it limited another to *the heirs of the body* of Henry, it not only departed from, but contradicted the articles; which, as it was made after marriage, it certainly could not do, and did not mean to do, notwithstanding this slip of the person who drew it; for the settlement was expressly stated to be made in *complement and performance* of the articles, and if it was a performance, it could not give Henry a power of defeating the remainder limited to the appellant Thomas Meredyth's father, which the articles never intended. But admitting the remainder in tail, limited to Henry by this settlement of 1701, to be good, yet it was never executed in him, by reason of the interposed estate to trustees for preserving the contingent remainders; which being itself an estate of freehold vested in them, prevented Henry's life estate from consolidating with his remainder in tail; it being clear, that an intervening estate of freehold prevents a remainder in tail from executing in him who has the precedent estate for life; and no less so, that the trustees had not a *contingent*, but a *vested* estate of freehold in them; for otherwise, the appointing them would be idle and fruitless, as their estate might be barred by fine or recovery, and so the contingent uses remain without support. The estate of such trustees arises out of the residuary interest left in the grantor, after the limitation of a life estate to the [345] grantee; enabling them to enter for the forfeiture or alienation of the tenant for life, and passes to them as an immediate legal freehold, for answering the purpose of their appointment. From these incontestable principles it was plain, that Henry Meredyth, under the settlement of 1701, took an estate for life only, with an intervening estate of freehold to the trustees, for preserving the contingent limitations to his sons and daughters, and an *unexecuted* remainder in tail to himself; and if so, it was no less plain, that his recovery with single voucher only, did not bar that remainder, nor consequently the subsequent ones limited to Thomas his brother, and his first and other sons; since no recovery, with single voucher, bars any other estate than that of which the tenant in tail (admitting for the purpose, Henry to have been such) is actually seised in possession of, at the time of the recovery being suffered.

But further: The four denominations of Balgieth, and the moiety of Carlanstown, Scurlogstown, and Clonnegarrah, were unaffected by Henry's recovery in 1715, upon another and no less clear principle. The two first were held in jointure by Judith his father's widow, till 1738, and the two last were mortgaged in fee to Partington; so that the legal freehold of none of them was in Henry when he suffered the recovery. Neither Judith Meredyth or Partington joined in the recovery, and consequently there neither was or could be a legal tenant to the precipe. Here could be no presumption admitted, of a surrender of their estates for making an effectual tenant to the precipe, so as to bring this recovery within the aid of the Irish acts of 4 Geo. I. c. 10. and 21 Geo. II. c. 11. formed pretty much upon the plan of the English acts of 10 and 11 Will. III. c. 14. and 14 Geo. II. c. 20. those acts supposing the recovery to be suffered by one who had sufficient power of doing so, even in the case of purchasers for valuable consideration, and quieting possession after the time there prescribed, notwithstanding any error or defect in such recovery. But those provisions by no means applied to the present case; for Henry Meredyth had no estate of freehold in the lands held in jointure by Judith, nor in those conveyed to Partington, and consequently had no power to suffer a recovery of either. Where the person has power of suffering a recovery, the above acts let in a presumption, that *omnia rite et solemniter acta*. This is *praesumptio juris et de jure*. But where there is a defect of power, no such presumption is admissible; and especially in a case like the present, where presuming that Judith surrendered her estate, would be presuming a manifest absurdity; viz. that a jointress should join in an act *possibly* prejudicial to her own interest, but *certainly* destructive of that of her own children, provided for them by her marriage settlement.

On the other side it was contended (C. Yorke, F. Norton), that though the estate tail was not executed in Henry Meredyth, so as to merge the estate for life, by reason of the interposing estate of freehold limited to trustees to support the contingent remainders, yet he was entitled [346] at the time of the recovery to the estate tail in remainder, as well as to the estate for life; therefore it was not a void, but a valid recovery, being excepted by virtue of the proviso in the statute of 14 Eliz. out of the

enacting clause in that law, which avoids recoveries suffered by tenants for life, to the prejudice of those in remainder or reversion. That as to the lands in jointure to Judith Meredyth, and in mortgage to Partington, it must, after such a length of time, be presumed that there was a proper tenant to the precipe; and that some deeds were executed, though not now appearing, by which the freehold of these lands was vested in Henry, previous to his suffering the recovery. And this presumption was fortified by two circumstances: 1st, That these lands were limited both by the will of Henry Meredyth, and the deed of 1729, to Thomas Meredyth in possession, without taking any notice whatever of Judith Meredyth. 2d, That the lands of Balgieth were demised by Thomas Meredyth to Garnet. Which circumstances shewed, that some other provision must have been made for Judith, though the deed by which it was made did not appear. That this recovery was acquiesced in, and considered as sufficient by all the family. If it had not, it was in the power of Thomas Meredyth the elder, and of his son Charles, or of Charles alone after the death of his father, to have suffered a recovery which could not have admitted of a doubt; and the appellant Thomas ought not now to be permitted to controvert it, as he received £1000 under the deed of 1729, and did many acts to confirm it. Besides, by the statute of 4 Geo. I. no writ of error can be brought to reverse a voidable recovery, after 20 years; and the statute of 21 Geo. II. meant to fix a time for establishing void recoveries, as had been before done by the former statute for such as were only voidable; and consequently by the latter of these statutes the present recovery was established.

As to the objection made by the appellants Gleadow and Clements, that they were purchasers for a valuable consideration under a decree, and without notice; it was said, that the settlement of 1729, was registered, which was notice to everybody; and that the appellant Gleadow, though his answer was evasive, in effect admitted notice; for he knew that Dean Charles Meredyth was the reputed owner of the estate, he knew of his will, he consulted counsel upon the title, and in a settled account he charged the appellant Thomas Meredyth with £200, as executor of his brother; and that the proceedings upon the bill to foreclose, pending the suit which the respondents had instituted, appeared to have been a fraudulent contrivance between the appellants Meredyth and Gleadowe to strip the respondents of their right.

And as to another objection, that the daughters of Dean Charles Meredyth were merely volunteers, it was answered, that there was no provision whatever made for them by the deed of 1729, except the power of charging the estate, thereby reserved to their father, of which he was a purchaser, by making himself tenant for life, and subjecting the estate to his mother's jointure, and a [347] sum of £3000 for the portions of his brothers and sisters. That the daughters had nothing but what they were entitled to under their father's will, and must have starved if they had not been supported by their relations; the appellant Thomas never having supplied them with a shilling, though he had been all along in the possession of the whole estate, under the will of their father.

After hearing counsel on this appeal, the judges were directed to deliver their opinion upon the following questions; viz. "A. tenant for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to his daughters in tail general, remainder to the heirs of his body, with remainders over. A. suffers a recovery with single voucher, being himself tenant to the writ. Q. Whether this recovery is good, to bar the remainders expectant upon the estate tail of A.? Or, whether it is cured by the Irish act of 21 Geo. II.? If the recovery be good upon the first question, then Q. Whether upon the facts disclosed in this case, the lands in jointure to Judith, and in mortgage to Partington, passed thereby?" Whereupon the lord chief justice of the common pleas, having conferred with the judges present, delivered their unanimous opinion, that the recovery with single voucher did not bar the remainders over, and was not cured by the Irish act of 21 Geo. II. It was therefore ORDERED and ADJUDGED, that the decree should be reversed; and that the respondent's bill, so far as it sought to charge the lands comprised in the settlement of 1701, with a jointure and legacies, under the will of Charles Meredyth, should be dismissed. (Jour. vol. 31. p. 484.)



## REHEARING.

Duchess of HAMILTON,—*Appellant*; EDWARD MANBY, and others,—*Respondents*  
[19th March 1733].

[Mews' Dig. xi. 616. See R.S.C. 1883; Ord. 58 r. 1.]

A decree was made *ex parte* against A. to pay one moiety of a sum of money said to be due from A. and B. to C. upon a stated account between C. and B. but to which A. was neither party or privy. Some years passed before A. knew of this decree, but on being informed of it, he applied by petition, to have the cause re-heard. This was refused, and the petition dismissed; but, on an appeal, the order of dismissal was reversed, and the Lord Chancellor (King) was directed to re-hear the cause.

The Lady Charlotte Orby was one of the sisters and coheirs of Charles Earl of Macclesfield; the appellant was the only daughter and heir of Lady Elizabeth Gerard, another sister and [348] coheir of the said earl; and John, Elrington esq. was the eldest son and heir of Lady Ann, another sister and coheir.

The Lord Mohun having got into possession of the real estates of the said earl, in the counties palatine of Chester and Lancaster, and dying on the 12th of November 1712, Sir Thomas and Lady Charlotte Orby, immediately upon his death, and without the direction or privity of the appellant, employed Richard Vernon, an attorney at law, to get possession of the said estates: And accordingly, on the 25th of November 1712, Vernon got possession of the Cheshire estate, and on the 29th of the same month, he got possession likewise of the Lancashire estate.

Some time afterwards, Sir Thomas and Lady Charlotte applied to the appellant, to join with them in granting a power to Mr. Vernon, to recover the possession of the said estates, and to receive the attornment of the tenants; pretending, that the appellants joining with them therein, would have an influence over the tenants, and be of service to them, and they brought a letter of attorney with them ready engrossed for the appellant to execute, dated the 6th of December 1712, telling her it was but a thing of form; and accordingly, at their pressing instance, she executed the same, though Mr. Vernon was then an entire stranger to her, whereby he was authorised to get the possession, though he had really got possession before, and to take the attornment of the tenants.

Sir Thomas and Lady Charlotte having got possession, received the rents of the estates, till the Lady Mohun, devisee of Lord Mohun, recovered possession by ejectments; which suits Mr. Vernon defended, by the direction of Sir Thomas and Lady Charlotte Orby, and they were afterwards ordered, by some decree, to account for the mesne profits, with which the appellant did not intermeddle, nor was she any party to the suit in which such order was made.

Mr. Vernon, some time afterwards, delivered to Sir Thomas his bill of fees and disbursements and other charges, amounting to £2327 0s. 6½d. who settled and allowed the same, without applying to the appellant, or acquainting her therewith.

On the 24th of May 1718, Sir Thomas and Lady Charlotte brought their bill in chancery against the appellant and Mr. Vernon and his under-agents, praying that the appellant might pay a moiety of the charges which Sir Thomas had paid, and of Vernon's bills, and other expences concerning the premises; pretending that she had agreed to pay a moiety thereof, and praying against Vernon and his under-agents, an account of the rents and profits of the premises received by them.

The appellant, by her answer, denied that she had agreed to pay a moiety of the said charges, or that she was ever asked to pay any part thereof, during the whole time of transacting the affair, or that she paid Vernon any money on account, or was privy to the stating of any accounts, or ever owned herself obliged to pay any share thereof.

[349] Mr. Vernon, by his answer, said, that he was, upon the very day of the death of Lord Mohun, employed by Sir Thomas alone; and was, for many years before, his agent in all his other affairs, as well as his intimate friend, and was not

employed by the appellant; and that in eleven days after, he got possession of both the estates; and for four years together, he was employed in defending the possession by Sir Thomas and Lady Charlotte alone, who promised him great rewards, but did not say that he was ever employed by the appellant; but that Sir Thomas and Lady Charlotte's counsel advised, that the appellant's and Mr. Elrington's names ought to be put into the proceedings, and they were made parties accordingly.

On the 30th of June 1719, the cause was heard before his honour the master of the rolls (*ex parte* as against the appellant, and without her being actually privy thereto), who declared, that Mr. Vernon's account, signed by Sir Thomas, was not so considered by the parties, that it ought to stand in all events, and that the bill delivered to the appellant was not intended to give a sanction to the said account, but to let the appellant see what a great expence it had been, and to induce her to comply with paying her proportion of such expence; and therefore decreed the account to stand, with liberty for the plaintiff Sir Thomas and the appellant to falsify and surcharge the same. But the *items* therein allowed by Sir Thomas, for Vernon's fees and disbursements for business done, were to stand as between Sir Thomas and Vernon; but as between Sir Thomas and the appellant, the master was to see what of such *items* were reasonable, and to make an allowance thereof accordingly, and decreed the appellant to pay a moiety thereof to Sir Thomas. And it was further ordered, that the master should take a general account between Sir Thomas and Vernon, from the time of the stated account; and the said Vernon's under-agents were also to account before the master. And the master was likewise to take a general account between Sir Thomas and the appellant, and all parties were to be examined on interrogatories, and the master was at liberty to report any matter specially. And it was further ordered, that what upon the said accounts should appear to be due from either party to the other, the party from whom any balance should be found due, should pay the same to the party to whom the same should be certified to be due: But as to the interest of what upon the said several accounts should appear to be due from any of the parties to the other, the court reserved the consideration thereof, and also of the costs of the suit, till the master should have made his report.

On the 12th of February 1719, this decree was made absolute against the appellant *ex parte*, and without her knowledge. And in May 1720, Sir Thomas left his charge against the appellant before the master, amounting to £1333 17s. 11d. but did not proceed thereon: In 1724 he died, having made his will, and appointed Lady Charlotte executrix, who, on the 15th of July 1724, brought her bill of revivor, but did not proceed any further; and [350] on the 5th of April 1727, she died intestate, having married the respondent, who, on the 9th of February 1731, brought his bill of revivor, and revived the cause.

There were no proceedings before the master on the decree, from the beginning of Hilary term 1723, till the 23d of June 1732, when the respondent took out a warrant; and, on the 7th of November following, he left the said stated account with the master: Whereupon the appellant caused the pleadings and proceedings to be enquired after, and as soon as she could obtain the same, which was not till the 7th of December 1732, she caused them to be considered; and, conceiving that she was aggrieved by the said decree, she appealed therefrom to the lord chancellor King, praying that the cause might be heard before his lordship.

This petition being heard on the 15th of March 1732, his lordship was pleased to refuse to hear the cause, and dismissed the petition.

The duchess therefore appealed from this order, insisting (J. Willes, T. Lutwyche), that the decree being erroneous, the cause ought to be reheard; for that by the decree, the account stated by Sir Thomas Orby and Mr. Vernon was to stand, with liberty for Sir Thomas and the appellant to surcharge or falsify the same; whereas it ought not to stand at all against the appellant, she being neither party or privy to the stating of it; nor having had any copy of it till after it was stated, and therefore she ought not to be any way affected by what was transacted between Sir Thomas and Vernon only. That the appellant was no way concerned in Mr. Vernon's fees and disbursements, having never promised or agreed to pay the same, or any part of them; and yet she was decreed to pay a moiety of what Sir Thomas had paid, or was liable to pay for such fees and disbursements. But if the appellant was liable to pay any

part of them, yet being but one of the three coheirs, she ought not to have been decreed to pay a moiety. That the master was directed to take a general account as between Sir Thomas Orby and the appellant, whereas there was no account depending between them, nor was any such general account prayed by the bill. It was therefore hoped, that the said order would be reversed, and that the lord chancellor would be directed to hear the cause.

On the other side it was said (D. Ryder, T. Burdus), that though the appellant was now pleased to give all possible delay against carrying the decree into execution, yet she acquiesced under it for above 13 years, and never complained of it from the 30th of June 1719, until the 2d of February 1732. And as a court of equity is not bound to grant a rehearing merely for asking it, this long acquiescence afforded the strongest reason for refusing it. That it would be of the most pernicious consequence to the suitors of the court of chancery, if causes wherein decrees had been so many years made, such subsequent proceedings had, and so long acquiesced under, were permitted to be reheard, when by the deaths of parties many material deeds and papers might reasonably be supposed to be lost or mislaid; and more especially where, as in the present case, the [351] party had so wilfully neglected to make a defence; for otherwise, no suitor would ever know how to act with safety under such decrees, nor would it be possible, without almost endless trouble and expence, ever to carry them into execution.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of should be reversed; and that the lord chancellor should hear the cause, upon payment of such costs, and upon such terms, as the court of chancery should think fit. (Jour. vol. 24. p. 383.)

## REMAINDER.

CASE 1.—JOHN PARKHURST, and others,—*Plaintiffs*; JOSEPH SMITH, (on dem. of J. DORMER, esq.),—*Defendant* (in Error) [23d February 1740].

An estate was limited (after several precedent estates for life and in tail) to the use of A. for 99 years, if he should so long live, and from and after the death of A. or other sooner determination of the estate limited to him for 99 years, to the use of trustees and their heirs during the life of A. in trust to preserve contingent estates, etc. and for that purpose to make entries and bring actions, etc. but to permit the said A. to receive the rents and profits, etc. during the term of his life; and after the end or other sooner determination of the said term, to the use of the first and other sons of A. successively in tail male, with divers remainders over. By the expiration of all the preceding estates, A. came into possession of the lands limited to him for 99 years; and having a son, he, together with that son, when he came of age, levied a fine of the lands to make a tenant to the precipe, and suffered a recovery of the same, in which the son was vouched. The son died without issue, and afterwards A. died, without leaving any other son. The next surviving remainder-man made his actual entry within five years: and upon a question whether the fine and recovery had barred his remainder, it was held that it had not; there being no freehold in the tenant against whom the recovery was had; the freehold being in the trustees during the life of A.

JUDGEMENT of the Court of K. B. AFFIRMED.

This point depended entirely on the question whether the *freehold* was in the trustees *during the life of A.* or not? For if it was, the recovery was not well suffered for want of a good tenant to the precipe, and consequently did not bar the remainder; but if the trustees had not the *freehold*, then it was in the son, and of course he was capable of making a good tenant to the *precipe*, and the recovery in that case was well suffered: for the court of K. B. held that the fine by lessee for years (A.), or the reversioner (the son),

could only operate by way of estoppel, to bar the parties claiming under such lessee or reversioner; but did not create a freehold as a feoffment would have done.

It was insisted that the freehold was not in the trustees; because, 1. The remainder to the trustees was *void* in its creation, being to commence *after A's death*, and then to hold *during his life*, which was repugnant, and could never take effect at all. 2. If not void in its creation, it was a *contingent* remainder, because it was uncertain whether it would ever take effect, as the term of 99 years might not determine in A.'s life-time. 3. [352] That if it was neither void nor contingent, yet it did not amount to a legal estate, but was only a *right of entry*.

But the Court resolved that the remainder was *not void* in its creation, its commencement not being restrained to the death of A. but limited from the death of A. *or other sooner determination of the estate for 99 years*; and therefore might take effect by surrender, forfeiture, or effluxion of time in A.'s life-time. 2. That it was not a *contingent* remainder, being limited to persons *in esse*, without any condition precedent to be performed: it did not depend on the death of A. but on such other events (*viz.* forfeiture, surrender, etc.) as might determine the particular estate from the *nature of the estate itself*. 3. That it was not a *mere right of entry*, but a *legal estate*, for that a grantor cannot reserve a right of entry to a stranger, nor can a right of entry subsist without an estate, therefore the trustees had the freehold, for the life of A. See *Fearne*, Cont. Rem. edit. 1791. i. 336—338, and the opinion of the Chief Justice in the Court of K. B. in 18 Vin. 413. and in the House of Lords, in 3 Atk. 135.

Vide *ante*, vol. iv. p. 85. title, *Fine*, ca. 5. *Viner*, vol. 18. p. 413. ca. 8: 3 Atkyns, 135: *Fearne's Conting. Rem.* (4th. edit.) i. 335: *Strange*, 1105. S. C. but not S. P.

Mr. Dormer, having failed in recovering upon the former ejectment, brought in the name of Berrington, brought another in the name of the present defendant Smith, for the same estates; and upon the trial of this second ejectment, at the bar of the court of king's bench, by a special jury in Michaelmas term 1738, a special verdict was found, stating the several facts found by the former verdict, with this addition, *viz.* that Mr. Dormer made five several actual entries upon the premises in question; the first on the 6th of January 1731; the second on the 6th of October 1732; the third on the 1st of January 1732; the fourth on the 5th of October 1733; and the fifth on the 10th of November 1735. And that on the 20th of the same month, he made the demise in the declaration mentioned.

This special verdict was twice argued in the court of king's bench; and the question was, Whether the common recovery, suffered by Robert Dormer and Fleetwood his son, in order to defeat the limitations in the settlement of 1662, under which the lessor of the plaintiff claimed, was good, for want of a good tenant to the precept? For if the recovery was not good, then the limitations in the settlement would take place, and the lessor of the plaintiff would be entitled under it; as it appeared by the special verdict, that all the intermediate remainder-men, between John Dormer, who made the settlement, and the father of the lessor of the plaintiff, were dead without issue male: And the court, upon mature deliberation, were unanimous in opinion, that the lessor of the plaintiff was entitled, under the settlement of 1662; the remainder therein limited not being barred by the recovery, as there was no freehold in the tenant against whom the recovery was had; and gave judgement accordingly.

The defendants therefore brought a writ of error in parliament, to reverse this judgement; contending (*D. Ryder, J. Strange*), that the estate being limited to the trustees, *after the death of Mr. Justice Dormer, during his life*, was a void limitation, because it could never take effect in possession; and that it could not be made good by rejecting the words *after his death*, because the sense would not be complete without them. That there was no instance upon the construction of deeds, where such material words, which are used by the parties to denote [353] when the estate shall take effect in possession, have ever been rejected; nor could the words *after the death of Robert Dormer*, by any construction be taken to signify *after the end of the term*; because by

express words, the estate was limited *after the end of the term*, to the first son of Robert Dormer in tail; and which express limitation must prevent any such construction, even by implication. That if the limitation to the trustees should not be void, but the words *after the death* of Robert Dormer, might be rejected, and the limitation to the trustees take effect in the disjunctive, viz. *or other sooner determination of the term*; yet it was conceived, that the trustees, by force of those words, took no *vested* remainder, but their estate remained *in contingency*; for no remainder can be said to be vested, unless it be so limited as to come into the possession of the remainder-man, upon every determination which may happen of the particular estate; but the words, *other sooner determination of the term*, cannot extend to a determination of the term by effluxion of time, because the estate, *after the end of the term* (which in a legal sense always signifies after the end by effluxion of time) is by express words limited to the first son of Robert Dormer; so that the words *other sooner determination*, can extend only to a determination of the term by surrender or forfeiture, which might or might not happen.

It was admitted, that when a remainder is limited to take effect in possession upon an event *which of necessity must happen*, such remainder will vest; but if it be limited to take effect in possession, upon an event *which may never happen*, then it does not vest. Now, it was not an event which must necessarily happen, that Mr. Justice Dormer's term should end by surrender or forfeiture, because it might determine by effluxion of time or death: So that the present case was no more than this, viz. a limitation to Mr. Justice Dormer for 99 years, if he so long live; and if his estate shall determine by surrender or forfeiture, (it is the same thing, for the conditional word *if* makes no difference), then to the trustees during his life, and which was plainly no more than a contingent remainder; the consequence of which must be, that on the death of Sir William Dormer, the freehold vested in Fleetwood the son of Mr. Justice Dormer, and consequently was well conveyed, by the fine to the tenants to the precipe, and the recovery was well suffered. That this construction of the limitation to the trustees, was most agreeable to, and best answered the intention of the parties to the settlement; the end and design of appointing trustees to preserve contingent remainders in this and all other marriage settlements, being only to give them a right to enter, upon any conveyance made by the particular tenant for life or years, to destroy the contingent remainders *before they arise*; but not to prevent the particular tenant and his son, who *has* a vested remainder in tail, from suffering a common recovery. And if this limitation be construed not to vest any estate in the trustees, it gives the father and son no more power over the estate, than they have when the father is made tenant for life; for in that case, [354] although there be trustees to preserve contingent remainders, yet the father and son, in the life of the father, and without the trustees joining, can bar all the subsequent remainders. But by construing the freehold to be in the trustees, when the father is only tenant for years, though his first son is of age, no settlement can be made on the marriage of the son, or for payment of the debts of the family, though the father and son join, without the consent of the trustees, which would be very inconvenient; and it was apprehended, that it would have been no breach of trust, if the trustees had joined in suffering the recovery. Supposing however the freehold to be in the trustees, yet by the fine levied by Robert Dormer and Fleetwood his son, Dormer Parkhurst and John Parkhurst were made good tenants to the precipe: For it must be admitted, that if the estate had been conveyed by Robert Dormer and Fleetwood, to Dormer and John Parkhurst by a feoffment upon the land, they would have had the freehold without the trustees joining, and in that case the recovery would have been good; and it was apprehended, that the fine had the same effect, such a fine being in many books called a feoffment upon record, and no where judicially determined to be otherwise; and if the freehold passed by the fine, then also the recovery was well suffered. That in the present case, the daughters of the said Robert Dormer, who were in possession of the estate by virtue of this recovery, were the grand-daughters of John Dormer who made the settlement, and the heirs of Robert the father, and Fleetwood their brother, who was the remainder-man in tail, and joined in the recovery, and for whose benefit the trustees were created; whereas Mr. Dormer, the lessor of the plaintiff, was only a collateral relation, and the most remote remainder-man in the whole settlement. For these reasons therefore it was hoped, that the judgement given in his favour would be reversed.

On the other side it was argued (F. Chute, T. Bootle), that the title of the lessor of the plaintiff to the premises in question, was clearly found; it appearing by the special verdict, that the several intermediate remainder-men between him and John Dormer, who made the settlement, were all dead without issue. That the estate limited to the trustees to preserve the contingent remainders, was a vested remainder to take effect in possession during the life of Robert Dormer, upon the determination of the particular estate limited to him for 99 years, either by effluxion of time, forfeiture, or surrender: And though that part of the limitation, which depended upon the contingency of Robert Dormer's death, was of no operation or effect, to vest an estate in possession in the trustees, on that single event; yet as the particular estate for 99 years might determine in his life-time, by either of the other events happening, *i.e.* forfeiture or surrender, the remainder vested in the trustees took effect in possession; and a remainder so limited is well warranted by the rules of law, and is neither void or contingent. That to make this a contingent remainder from these words, *or other sooner determination*, would be contrary to the established [355] notion of what the law calls a contingent remainder; for such a remainder can only be one of these three ways; either where the person to whom it is limited is not *in esse*; or where the particular estate may determine, before the remainder can take place; or where some collateral accident must happen before it can take effect. But none of these fell out in the present case: For the person to whom the estate was limited, *viz.* the trustees, were existing. The remainder to them would take effect immediately upon the determination of the particular estate by surrender, or forfeiture. And here was no collateral accident to happen before it could take place; but only such as made a determination of the particular estate, and what was implied in its very creation. The words *or other sooner determination*, are what are implied in every term for years, and to which every term is subject by surrender or forfeiture; they are no other than what are made use of in all common limitations of estates to trustees to preserve contingent remainders, in every settlement. To put therefore such a construction upon these words, as to make the estate arising from them to the trustees a contingent remainder, would disappoint the very end proposed by them; it would frustrate the intention of the parties, and endanger most of the family settlements in the kingdom. For that the design of this limitation to the trustees, was to preserve the contingent remainders from being destroyed, was evident from the settlement itself; and that it was the intention of him who made the settlement, to preserve and continue this estate in the male line of the family, was most manifest from this: that he limited it to the male line in a remote degree, in preference to the daughters of his eldest son Sir John Dormer, who were his heirs at law.

Now taking it that the estate limited to the trustees, was a vested remainder in them, to take effect in possession upon the determination of the particular estate limited to Robert Dormer, as it plainly was, this puts an end to all other questions: for then the case, taken abstractedly from the fine, stands thus:—Robert Dormer, tenant for 99 years, if he so long live, and from and after the determination of that term, then to trustees and their heirs, during the life of Robert Dormer; remainder to Fleetwood his son in tail; he and his son suffer a common recovery. Considered as the recovery of Robert Dormer, it is void; because, he being only tenant for years, could not give a freehold to another; and without which, there could not be a good tenant to the precipe; for to make him so, he must have a freehold in him. And taking it as the recovery of Fleetwood the son, it fails; the freehold being in the trustees, and not in him, he having only a remainder expectant on the determination of their estate.—And as to the fine levied by Robert Dormer and Fleetwood his son, which has been insisted on to answer the supposition of a freehold gained that way, it stands thus: Considered as the fine of Robert, it is void for want of freehold; it being settled beyond all doubt, that a fine by tenant for years operates nothing, and is absolutely void: And considered as [356] the fine of Fleetwood, it is equally so for want of a freehold in him; it being equally clear, that none can levy a fine but he who has a freehold in possession.

After hearing counsel on this writ of error, it was proposed to ask the judges their opinions on the two following questions; *viz.* 1. "Whether the remainder limited to the first son of Euseby Dormer, was good in its original creation, or not? 2. If good whether it was well barred by the fine levied by Mr. Justice Dormer, and his son Fleetwood Dormer, and the recovery suffered by the said Fleetwood Dormer?"

The judges having taken time to consider, the lord chief justice of the court of common pleas acquainted the house, "That the judges had considered the said questions, and though they all agreed in opinion, yet as this cause was elaborately spoken to by the counsel at the bar, it was apprehended their lordships might expect the judges should give their reasons, as well as their opinions:" And accordingly, the lord chief justice delivered the reasons of the judges at large, with their unanimous opinions upon the points of law to them proposed.

Whereupon, it was ORDERED and ADJUDGED, that the judgement given in the court of king's bench should be AFFIRMED, and the record remitted: And it was further ORDERED, that the plaintiffs in error should pay to the defendant in error, £10 for his costs. (Jour. vol. 25. pp. 602. 605.)

CASE 2.—Earl of SHELBURNE, and another,—*Appellants*; NICHOLAS BIDDULPH,—*Respondent* [9th May 1748].

[Mews' Dig. vii. 33, viii. 821.]

The operation of a fine levied by a tenant in tail, who has the immediate reversion in fee in himself, is to merge the estate tail, and bring the reversion in fee into immediate possession, by which means it will become liable to the incumbrances of all those who were seised of it. Therefore where A. settled his estate to himself for life, remainder to B. his eldest son in tail-male; remainder to C. his youngest son, in like manner; remainder to his own right heirs; B. being in possession, granted leases, with covenants for a perpetual renewal, and afterwards died without issue. C. the remainder-man entered and levied a fine, the uses of which were declared to himself in fee. It was held that C. was bound to a performance of B.'s covenants in the leases.

JUDGEMENT of the Irish Court of Exchequer AFFIRMED.

Covenants for the perpetual renewal of leases are considered as real agreements, and go with the land; and will therefore affect even the legal interest of all those who take the estate, with notice of these leases and covenants.

See *Cruise on Fines*, and *Symonds v. Cudmore*, 1 Show. 370: 1 Salk. 338: 3 Salk. 335: 4 Mod. 1: 12 Mod. 32: Carth. 257: Skin. 284, 317, 328: Holt. 666: 1 Freem. 503.

This case ought to have been classed under the head of Fines.

[357] Charles Lord Shelburne, elder brother of the appellant the Earl, being entitled to the inheritance of the lands of Logamarley, otherwise Annasclan and Ballyngown, in the King's County, subject to the dower, or some interest for life of his mother Elizabeth Lady Dowager Shelburne; he, together with his said mother, by indenture dated the 7th of December 1692, granted and demised the said lands to Henry Salmon, his heirs and assigns, for the lives of the said Henry Salmon, Henry Salmon the younger, his son, and Robert Hutton; at the rent of £10 a year for the first three years, and £15 a year for the residue of the time: And Lady Dowager Shelburne and Lord Charles thereby covenanted with Henry Salmon, the lessee, his executors, administrators, and assigns, that if, upon the death of either of the lives named in the lease, the said Henry Salmon, his executors, administrators, or assigns, should be inclined to name a new life in the place of him so dying, they would, upon request, perfect a lease of the lands for a new life, under the same rents and covenants as in the then lease; provided that the said Henry Salmon, his executors, administrators, or assigns, should pay £15 in consideration of such renewal, within three months next after such death, to the said Lady Dowager Shelburne and Lord Charles, their executors, administrators, or assigns, or either of them.

This lease, by assignment, became afterwards vested in Nicholas Biddulph, the respondent's grandfather, to whom the said Charles Lord Shelburne by indenture, dated the 25th of October 1694, also granted the towns and lands of Rathrobbin,

Curragh, and Bredagh, with other lands lying in the barony of Ballyboy, in the King's County, to hold to him, his heirs and assigns, for the lives of Charity Biddulph, wife of Nicholas the lessee, Francis Biddulph his son and heir, (father of the respondent), and Alice Biddulph, eldest daughter of Nicholas the lessee, and the life of the survivor and survivor of them, and for and during the life and lives of such person or persons as by virtue of the said deed should, from time to time, successively and for ever be added thereto, at the yearly rent of £80 10s. 6d. for the first six years, and the yearly rent of £103 3s. 10d. for the remainder of the term. And there was a covenant of the part of Charles Lord Shelburne, his heirs and assigns, for a perpetual renewal of this lease, by inserting a new life, in the room and stead of every life which should fail, from time to time, upon the lessee, his heirs or assigns, paying half a year's rent (according to the respective reservations therein contained, for that half year wherein such life should so cease or fail) over and above the annual rent reserved, and nominating a new life within twelve months after the failure of each of the lives then in being, or to be afterwards nominated. And Nicholas Biddulph thereby covenanted for himself, his heirs and assigns, to pay to the said Lord Shelburne, his heirs and assigns, from time to time, upon failure of every person for whose life the lease should be held, half a year's rent above the reserved rent, within twelve months after [358] the failure of every such life: And if, upon failure of any life, he, his heirs or assigns, should not pay the fine within the twelve months, and nominate another life, it should be lawful for the Lord Shelburne, his heirs and assigns from thenceforth for ever, to refuse to add any other life in the lease; and after the failure of the lives then in being, the lease should determine. And the lessee also covenanted to lay out, within six years, £100 in building a good farm-house and out-houses on the premises; and within the same term to inclose one acre, and plant it with fruit trees; and to plant, at least, 1000 trees of oak, ash, or elm; and sufficiently to ditch and quickset all the meres and bounds of the premises, and to maintain and keep the houses and improvements in good repair. And a letter of attorney was inserted in this lease for livery of seisin, which appears to have been delivered accordingly.

Charles Lord Shelburne, by another indenture, dated the 10th of October 1693, also granted and demised to the same Nicholas Biddulph, but by the mistaken surname of Bidwell, the lands of Cullymore, in the said barony of Ballyboy, and King's County; to hold to him, his heirs and assigns, for the lives of Nicholas the lessee, and Charity his wife, who, by mistake, was called Dorothy Bidwell, and Francis Biddulph, the respondent's father, therein also, by mistake, called Francis Bidwell, eldest son of the said Nicholas, and of the longer liver of them, subject to a rent of £10 payable half yearly, free from taxes. And in this lease there were the like covenants, as in the last mentioned lease, for a perpetual renewal, on payment of a fine of half a year's rent, and on the nomination of a new life, within twelve months after failure of each life in the lease, or which should afterwards be nominated. And on this lease there likewise appears to have been livery of seisin; and the appellant, Henry Earl of Shelburne, was a subscribing witness thereto.

Nicholas Biddulph, in confidence of enjoying the benefit of these leases, and not in the least suspecting the title of Lord Charles, or his power to grant such leases, laid out very great sums of money in the improvement of the several estates thereby demised, and constantly paid the several rents reserved thereon to Charles Lord Shelburne during his life, and afterwards to the appellant the Earl.

Charles Lord Shelburne died in April 1696, without issue and intestate; and upon his death, Henry Earl of Shelburne, his brother and heir, possessed his personal estate, and became entitled to several estates, of the yearly value of £1000 and upwards, of which Lord Charles died seised in fee simple, and which descended to the Earl as his brother and heir at law. And he claiming title to the inheritance of the several estates comprised in the before mentioned leases, (subject to the jointure estate of the Dowager Lady Shelburne, in part of the lands), received the rents reserved upon those leases from time to time, as they became due; and in Easter term, 1697, the Earl levied a fine with proclamations, of the said demised estates.

[359] Afterwards, by indentures of lease and release, dated the 15th and 16th of April 1697, in consideration of a marriage then intended, and which afterwards took effect, between the Earl and Arabella Boyle, and of her portion; Lady Shelburne and the Earl limited and conveyed the estates comprised in the said leases, and the oth-



estates which had descended to the Earl, as heir of his brother, to the use of the Earl and his heirs, till the marriage; and after the marriage, (subject to the jointure estate of the Lady Dowager Shelburne, in part of the lands in the King's County, and to a term of years therein created, in trustees, for securing a rent-charge of £300 per ann. to Arabella Boyle, afterwards Countess of Shelburne, for her separate use), to the use of the appellant, the Earl of Shelburne for life, without impeachment of waste; with remainder, as to part of the lands, to Arabella Boyle for life, for her jointure; with remainder, as to the whole, to the first and other sons of the appellant the Earl, on the body of the said Arabella in tail male; with remainder to the appellant the Earl and his heirs. In which release there was a power reserved to the Earl, after the death of the Lady Dowager, (who died soon after), to make leases of the premises; and to his then intended wife, the Countess of Shelburne, after his decease, to make leases of such part as was contained in her jointure, for 21 years or three lives, at the best improved yearly value. And a covenant was therein contained, that the Earl was then seised of an absolute estate of inheritance in fee simple, and had power to grant and limit the estates according to that deed; and that the premises should be and remain to and for the several uses and estates therein limited and appointed, and should be held and enjoyed accordingly, freed from all former incumbrances; other than and except the several leases then in being thereof, under the several rents thereon respectively reserved.

Nicholas Biddulph, after the death of Charles Lord Shelburne, continued in quiet possession of the said leasehold estates, and duly paid his rents to the appellant the Earl, till March 1702, when he died intestate, leaving the before named Francis Biddulph, his son and heir, an infant of the age of twelve years; who thereupon became entitled to the said several leasehold estates, as special occupant; and Charity Biddulph, his widow, as guardian to her son Francis, before any rent became due, in pursuance of the covenant in the lease of the lands of Cullymore, within twelve months after the death of Nicholas Biddulph, tendered the fine due on his death, and nominated John Biddulph the younger, another son of the said Nicholas Biddulph, as the life to be inserted in the lease in his stead, and demanded a renewal of that lease, according to the covenant. And Alice Biddulph, one of the lives named in the lease of the lands of Rathrobbin, dying in December 1735, Francis Biddulph, within twelve months after her death, named the respondent as the life to be inserted in that lease in her stead, and tendered the fine due upon her death, together with all arrears of rent, to Andrew Kennedy, the Earl's agent in Ireland, (his Lordship being then in Eng-[360]-land), and demanded a renewal of that lease, according to the covenant.

Francis Biddulph, the respondent's father, upon the respondent's marriage with Patience Colley, by indentures of lease and release, dated the 25th and 26th of April 1736, in consideration of the marriage and portion, conveyed all the leasehold estates before mentioned to the use of the respondent for life, with several remainders over. And the respondent having become entitled to these estates under this settlement, and the appellant the Earl soon after coming into Ireland, the respondent waited upon his Lordship, and again applied for a renewal of the said several leases, and named the life of John Biddulph to be inserted in the place of the said Nicholas, the respondent's grandfather, in the lease of the lands of Cullymore, in pursuance of the nomination before made by Charity Biddulph, the respondent's grandmother, and named his, the respondent's own life, to be inserted in the lease of the lands of Rathrobbin, in the place of Alice Biddulph; and he likewise named his own life to be inserted in the lease of the lands of Logamarley, in the stead of Henry Salmon, who was then also dead; and the respondent, at the same time, tendered to the Earl the several fines which had become due upon the several deaths before mentioned, together with all arrears of rent; but the appellant the Earl, though he had constantly received the rents reserved upon these leases from the respondent, and his father and grandfather, and had never questioned their validity, yet absolutely refused to accept the fines, or execute any renewals of the leases; alledging, that Charles Lord Shelburne, the lessor, being only tenant in tail of the demised lands, under a settlement made in the year 1679, and having never levied any fine or suffered any recovery thereof, had no power to make any such leases; and that he, the appellant, having, by his fine and settlement in 1697, conveyed the estates which he became entitled to upon the death of

Lord Charles, to the use of himself for life, with remainder to his first son in tail, which the inheritance was then vested in the other appellant the Lord Dunkerron; he was not bound by the before mentioned covenants, nor was able to execute any renewals to the respondent.

The respondent thereupon, in July 1736, exhibited his bill in the court of chancery in Ireland, against the appellants; stating the said several leases, and his title thereto and the several tenders made on the dropping of the respective lives above mentioned, and praying, that the appellant Earl Henry might be compelled to execute renewals of the said leases, according to the covenants therein contained, on payment of the respective fines; or, that the respondent might have a compensation out of the real or personal assets of the said Charles Lord Shelburne, deceased.

The appellant the Earl, in July 1737, put in his answer to this bill, and there stated the settlement in 1679; and admitted, that his brother Lord Charles died seised of several estates in fee; one of which was of the yearly value of £866 13s. 4d. and another of £148 per ann. which estates had descended to him as [361] brother and heir of Lord Charles; and he further stated, that soon after the death of Lord Charles by indentures of lease and release, dated the 15th and 16th of April 1697, being a settlement made upon his intermarriage with the countess his wife, in consideration of the said marriage, and of her marriage portion, all the said lands, subject to the estate for life of the Lady Dowager Shelburne, were limited to the uses before stated, whereby he was made tenant for life, with a remainder in tail, which was then vested in the other appellant Lord Dunkerron. The Earl then admitted, that there were covenants and clauses in the settlement, in relation to the leases in being of the estates, as before mentioned; that he had refused, and still did refuse, to renew the said leases; and insisted, that he was not obliged to do so, in regard he did not claim under his brother Lord Charles, and therefore did not take the estate, subject to the leases or incumbrances made by him; who, he insisted, had no power to make leases with such covenants of renewal as aforesaid; and admitted, that he had levied a fine of the premises in Easter term 1697, but that he had suffered no recovery.

Exceptions having been taken to this answer, the Earl, on the 4th of February 1739, put in a further answer; and thereby admitted, that he had, ever since the death of Lord Charles, accepted the rents payable by the said leases; being advised that the leases were, during the continuance of any of the lives for which they were originally granted, good and valid against him.

The cause being at issue, witnesses examined, and publication duly passed, it came on to be heard on the 17th and 20th of November 1746; when the court declared their opinion, that the respondent was entitled to renewals of the three leases in the pleadings mentioned, according to the covenants in the said respective leases, upon payment of the rent and arrears and fines, with interest; and therefore decreed, that it should be referred to the chief remembrancer, to state an account of what was due to the appellant Earl Henry, for the rent and arrears on the said respective leases, and also for the respective fines, with interest from certain times in the decree mentioned, after the death of the several lives on which renewals were claimed; and that upon payment of such rents, arrears, and fines, with interest the leases should be respectively granted by the appellants, for the lives in the bill mentioned, according to the covenant of renewal for ever; on which account, all parties were to have all just allowances; and if any matter appeared difficult, the remembrancer was to report the same specially: And it was decreed, that the Lord Dunkerron should have his costs from the respondent, who was to recover the same, together with his own costs, from the appellant the Earl.

From this decree the present appeal was brought; and on behalf of the appellants it was argued (D. Ryder, R. Wilbraham), that tenant in tail at law, independent of the statute of 32 Hen. VIII. had no right to make a lease absolutely to bind the issue in tail, and much less the remainder-man; and that even by that statute tenant in tail has no [362] power to grant leases to bind those in remainder; and therefore the leases in question were absolutely void as against the appellant Earl Henry, who did not claim under Lord Charles, or as issue in tail, but as remainder-man.

It might be objected, that Lord Charles, who granted the leases, was tenant in tail with remainder to the Earl in tail, and a reversion to Lord Charles in fee; that there

not only the estate tail was bound, but the reversion also; and as the Earl had by the destroyed the estate tail, in order to acquire an absolute power over the estate, prior grants of Lord Charles should take place of any subsequent uses by Earl Henry, and would therefore bind the estate in his hands. But to this it was answered, that the estate tail out of which the leases first arose being spent, and the Earl not limiting under it, but by a distinct limitation to himself in tail male, his fine could not let in Lord Charles's leases upon that estate, which came in lieu of the Earl's estate tail; nor could it, by consolidating the two estates, let them in upon the reversion; both because the Earl acquired a new estate, and because the uses of the fine were never declared to him in fee, but directly to the uses of the settlement; by which, in consideration of his own marriage, the Earl had an estate for life only, with remainder to his first son, the other appellant; and these estates arose and were granted out of the estate tail which the Earl had before the fine, and not out of the reversion. But even if the fine did let in the leases, the most that could be insisted on was, that it let them in during the continuance of those leases only, and could not extend to leases not then in being: For there could be no ground of equity to carry it farther, and make the fine give them a greater benefit than the law gives them; which is the mere legal effect of an act done for another purpose, and by accident only turns to their benefit, without any precedent right to it, or any consideration for it; and therefore, with respect to the respondent, totally voluntary.

It might also be objected, that in the settlement made by Earl Henry there was an exception of the leases; and consequently this must establish them, and every covenant in them. To this it was answered, that Earl Henry at that time, which was very soon after the death of his brother, had no notice of these leases; but there being any upon the estate, it was a prudent caution in the covenant against incumbrances, except the leases; by which however nothing more was intended, than to secure the covenantor against any breach of covenant, or any loss or damage that might ensue therefrom. But there could be no ground for insisting, that the exception in the covenant should establish or confirm the leases, any otherwise than so far as they were good and available in law; and much less that the respondent, or those under whom he claimed, who were no parties to the settlement, nor gave any consideration for this benefit, had a right to come into a court of equity, to have the benefit of this exception, or any supposed agreement implied in it, in their favour.

[363] As to the alternative relief prayed by the bill, of either a specific performance, or a satisfaction out of the personal or real assets of Lord Charles; it was said, that if the respondent was entitled to any satisfaction, it must be by way of damages for non-performance of the covenants; which is a matter triable merely at law, because a court of equity cannot assess damages. And as Earl Henry had conveyed all the freehold premises by lease and release in 1697, which was before the act of 3 and 4 of William and Mary, for preventing fraudulent alienations; and before any suit was commenced for non-performance of the covenants for renewal; it was apprehended, that the appellants were not now liable to any suit or action, on account of the real assets which descended to them from Lord Charles. The whole estate which descended to Earl Henry was settled upon the appellant Lord Dunkerron, who was a purchaser for a valuable consideration, and consequently he could not be charged. Besides, it did not appear that any consideration was paid to Lord Charles upon granting these leases; the sums said to be laid out upon the premises were small, and not more than might have been laid out by a tenant for three lives; and therefore, the respondent had no merit or pretence to be relieved in equity on that account.

On the other side it was contended (W. Murray, T. Clarke), that by the fine which Earl Henry levied in 1697, the estate tail limited in remainder to him by the settlement of 1679, was barred and extinguished, in the same manner to all intents and purposes as if he was dead without issue; and the reversion in fee, which descended to him as heir of Lord Charles, immediately took effect in possession; and as the new uses in the marriage settlement of 1697, arose out of that reversion in fee, they were therefore subject to all antecedent incumbrances and engagements which could affect that reversion. That as this reversion in fee, after it had taken effect in possession by means of the fine, was specifically bound by the covenants for perpetual renewal; and as such covenants are considered as real agreements, and go with the land, so they are in their nature proper for a specific performance; and will in equity affect

the legal interest of all those who take the estate with notice of them. That all the claiming under the settlement of 1697, had notice of these leases and covenants, and were as much bound by an equitable lien upon the lands, as Earl Henry himself: especially in favour of lessees who had made very great improvements, and were therefore to be considered as purchasers of the right of renewal. That the appellant the Earl, was absolutely bound by the warranty and assets of his brother Lord Charles, even before the fine levied, and could not have entered and avoided the leases during the legal extent of them, by reason of such warranty and assets: But if the Earl, notwithstanding the warranty, and before levying the fine, could have entered on the lands and avoided the leases: the lessees would have been clearly entitled under the covenants to have received a satisfaction for their damages out of the real assets of Lord Charles descended to him, which were then in his possession, and [364] abundantly more than sufficient to have satisfied such damages. The right therefore, which the lessees had gained by the fine letting in the reversion, and giving them a specific remedy upon it, was such an advantage as a court of equity ought to enforce by its decree; as much as if Lord Charles had died seised of an immediate estate in fee simple of the leasehold premises in question. That the defence made by the Earl against the respondent's receiving a satisfaction out of the real assets of Lord Charles was most inequitable; as it tended to deprive the respondent, who was a fair purchaser, of the benefit of his lease and covenants, by an act of the Earl himself; who besides the profits received from his brother's estates, had also received, in the portion of his wife, a consideration for the alienation of his brother's assets by the settlement. And with respect to Lord Dunkerron, no incumbrance was brought by this decree upon the estate which he derived under his father's settlement, but what appeared from the express exception in that settlement, to be intended as a charge upon it. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

After hearing counsel on this appeal, the following question was put to the judges; viz. "Whether by the fine levied by the appellant the Earl of Shelburne, in Easter term 1697, the reversion in fee of the estate in question was let in, subject to the leases in question made by Charles Lord Shelburne, and the covenants therein contained for a perpetual renewal?" And the lord chief justice of the king's bench having delivered the unanimous opinion of the judges to this effect, viz. "That the leases for lives now in being were good and effectual, as being served out of the reversion in fee which Lord Charles had when he made them, and which was now in Lord Henry; and that the covenants for renewal were binding on Lord Henry, as a lien on the same reversion, which he had let in by barring, discharging, and extinguishing his estate tail:" It was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree therein complained of affirmed; and that the appellant, the Earl of Shelburne, should pay to the respondent £100 for his costs, in respect of the said appeal. (Jour. vol. 27, p. 226. 231.)

## RENTS.

[365] CASE 1.—THOMAS DYKE, and others,—*Appellants*; Bishop of BATH & WELLS,—*Respondent* [27th May 1715].

[Mews' Dig. v. 1269.]

A manor belonging to a bishop's see was usually leased out for lives, at a rent of £49 3s. 4d. One of the bishops, on renewing this lease, excepted the demesnes, which were of the value of £32 11s. 1d. but he reserved the full ancient rent of £49 3s. 4d. This bishop, however, accepted a rent of £16 12s. 3d. being the proportion, after deducting for the demesnes, in full of the whole reserved rent. This acceptance will not bind his successor, who is entitled to the full rent reserved by the lease.

DECREE of the Court of Exchequer AFFIRMED.

The respondent was seised, *jure episcopatus*, of the manor of Bockland, in the

county of Somerset, consisting partly of leasehold lands, called *demesnes*, or over-lands, and partly of copyhold lands; and anciently, the whole manor, both demesnes and copyholds, were granted by the bishops of the see to lords farmers, in trust for the tenants thereof, for 21 years, or three lives; and these tenants held their estates, under several and distinguished rents, amounting in the whole to £49 3s. 4d. per annum.

In 1619, Dr. Arthur Lake, the then Bishop of Bath and Wells, designing to advance the revenues of his bishoprick, refused, on renewing the lease of the manor, to demise the whole, as had been usually done; and excepted thereout all the demesnes or leaseholds, being of the ancient yearly rent of £32 11s. 1d. but of the improved value of £500 per annum, and upwards; and yet he reserved, in the new lease, the full ancient rent of £49 3s. 4d. He declared however, that this reservation was only made, to prevent any question which might arise touching the validity of the lease, in case less had been reserved than the full old rent; and therefore he agreed, notwithstanding the reservation, to accept, and did accordingly accept, the yearly sum of £16 12s. 3d. which was the proportional part of the rent, for and in respect of the copyholds, exclusive of the leaseholds, in full satisfaction and discharge of the whole reserved rent of £49 3s. 4d.

In order to settle the estate of these copyhold tenants, and that they might not in future stand chargeable to succeeding bishops, with more than this proportional rent of £16 12s. 3d. two bills were, by the advice and direction of Bishop Lake, brought into parliament in the 18th and 21st years of James I. to enable the bishop and his successors, to grant leases of the manors with the above exception, reserving thereon the yearly rent of £16 12s. 3d. only; but the ensuing death of the bishop, and the then situation of publick affairs, prevented these bills from being passed.

[366] Dr. Laud, who succeeded Dr. Lake in the bishoprick, by an instrument under his hand and episcopal seal, dated the 21st of September 1627, stating at large the above transaction in the time of his predecessor, and the benefit which had accrued to the bishoprick by this severance of the demesnes from the copyholds; and, in order to quiet his copyhold tenants and their families, did testify and declare, that he would yearly accept the said sum of £16 12s. 3d. being as much as ought to be paid; and, upon receipt thereof, would give full discharges for the whole £49 3s. 4d.; *not doubting, but his successors would be induced likewise, to have the same regard to the copyhold tenants, by not exacting the whole £49 3s. 4d. but would be content to accept the said £16 12s. 3d.*; and the rather, in respect no prejudice did arise, nor any diminution of rent by so doing; but the full rent of the said manor would be payable and issuing out of the said demesnes, or over-lands, and the copyhold tenements.

The several successors of Bishop Laud in this see executed similar declarations, respecting the rent payable by these copyhold tenants, because the full rent still continued to be reserved upon every new lease; namely, Bishop Pierce, on the 9th of December 1662; Bishop Creighton, on the 8th of September 1671; Bishop Mew, on the 3d of October 1682; and Bishop Kidder, on the 10th of December 1698.

Bishop Kidder, by lease dated the 9th of December 1698, demised the manor, with the exception of the demesnes or over-lands, to the appellants for three lives, reserving the whole rent of £49 3s. 4d.; but he nevertheless accepted the proportional rent of £16 12s. 3d. during all the time that he afterwards continued in the see.

In 1703, he was succeeded by the respondent; who was thereupon attended with the several declarations executed by his predecessors for near 100 years back, and had copies thereof left with him; but he refused acceding to that equitable mode, and insisted on being paid the whole rent reserved by Bishop Kidder's lease; which the appellants, not thinking themselves warranted, as trustees, in submitting to; the respondent, in Hilary term 1710, filed his bill in the exchequer against the appellants, to recover the arrears of the said reserved rent of £49 3s. 4d. and to compel them to execute a new counterpart of Bishop Kidder's lease; upon a suggestion, that the former counterpart was lost.

Hereupon the appellants, on behalf of themselves, and the rest of the copyholders of the said manor, exhibited their cross bill, to be relieved in the premises; and that the bishop might be compelled to execute such a declaration as his predecessors had done; and that they might be quieted in the enjoyment of their copyholds, on payment of the said proportional rent of £16 12s. 3d.

On the 11th of June 1713, both causes were heard; but the court being equally divided, the Lord Chief Baron, and Mr. Baron Bury, for the appellants, and Mr. Baron Price, and Mr. Baron Banastre, for the respondent, no decree could be made: And [367] therefore, according to the course of that court, the causes were, on the 11th of February following, heard before Sir William Wyndham, the then chancellor, who agreeing in opinion with the Barons Price and Banastre; it was decreed that the defendants Dyke, Kerstake, and Venner, should forthwith execute and deliver to the plaintiff, a counterpart of the lease then in being; and come to an account with him before the deputy remembrancer, for the arrears of the said rent of £49 3s. 4d. which should be due at the time of executing such counterpart; and that the cross bill should be dismissed; but that no costs should be paid by either party, in either of the said causes.

From this decree, the defendants appealed; insisting (J. Jekyll, N. Lechmere) that it plainly appeared, that the full ancient rent of the whole manor, both demesnes and copyholds, when leased together, was never more than £49 3s. 4d.; and that upon the severance of the demesnes from the copyholds in Bishop Lake's time, it was but reasonable and just, that the copyhold tenants should be chargeable only with so much, as, being added to £32 11s. 1d. the old rent of the excepted lands, would make up the £49 3s. 4d. and that was £16 12s. 3d. and no more. That the agreement between Bishop Lake and the tenants, being grounded on such just and reasonable motives, constantly approved by the several succeeding bishops, and confirmed by such long usage, ought, in equity, to be binding upon the respondent, who enjoyed the benefit of the severance then made, and also the full rent that was ever payable for the whole manor. That though it was then apprehended, that a rent *pro rata* could not be reserved on a bishop's lease, which was the true reason why £49 3s. 4d. and not £16 12s. 3d. only was reserved; yet the law had been otherwise settled since that time. That the appellants ought not to be decreed in equity, to execute another counterpart; unless the respondent would likewise do equity, by executing such a declaration as his predecessors had done. And therefore it was hoped, that the decree would be reversed; that the respondent would be obliged to accept the said £16 12s. 3d. in full of the reserved rent of £49 3s. 4d. that all future leases of the said manor and copyhold tenements should be under the said yearly rent of £16 12s. 3d. and that the appellants should have their costs in the court of exchequer.

On the other side it was argued (R. Raymond, S. Mead), that the decree was just and reasonable, notwithstanding the declaration of Bishop Kidder; for there was great reason to believe, that he was deceived into that declaration, by relying on the instrument alledged to have been signed by Bishop Laud; which bore evident marks of being spurious, or at least of being founded on facts which never existed, and suggestions which were not true. But supposing this instrument to be genuine, and that no reasonable or solid objection lay to Bishop Kidder's declaration; yet that declaration could not be binding upon his successors, even if it had been *penned with positive words*: For, if such inventions as these should be permitted to [368] prevail, it would establish a method to elude the restraining and disabling statutes (1 Eliz. c. 19: 13 Eliz. c. 10: 14 Eliz. cc. 11. 14: 18 Eliz. c. 11: 43 Eliz. c. 29: 1 Jac. 1. c. 3.); which were made to prevent the diminution of the ancient revenues of the church. Much less could this declaration be binding, when it was only *penned by way of recommendation*; for the bishop did not thereby pretend to bind his successor, saying no more than this, that *he did not doubt* but his successor would be prevailed with by the same reasons, to do the same thing; so that the successor was clearly left at liberty to be governed or not by those reasons, just as he saw cause to approve or disapprove of them.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 20. p. 58.)

CASE 2.—Duke of BRIDGEWATER,—*Appellant* ; Sir FRANCIS EDWARDS,—*Respondent* [27th February 1733].

Where by great length of time it is become impossible to know out of what particular lands ancient quit rents are issuable, courts of equity have exercised a jurisdiction ; and have constantly, on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents, and payment of the same for the future.

See the case of *Eton College v. Beauchamp*, 1 C. C. 121 : and 1 Eq. Ab. 32 (B.) with the other cases cited there, and in 1 Eq. Ab. 364.—So courts of equity will interfere, where the days on which the rent is payable are stated to be uncertain, *Holder v. Chambury*, 3 P. Wms. 256, (and see the notes there):—or where there are no demesne lands on which to distrain: *Leeds (Duke) v. Powell*, 1 Vez. 170 ;—or where the distress is obstructed by fraud ; *Davy v. Davy*, 1 C. C. 147 : or where no distress can be made, the subject being of an incorporeal nature, as where a rent is issuing out of tithes, *Berkeley v. Salisbury* (E.), cited 2 Bro. C. R. 519, as from 1 C. C. 121.—See Fonblanque's Treat. Eq. i. 144, 145, in n.

DECREE of the Court of Exchequer REVERSED.

The appellant and his ancestors were lords of the manor of Middle, in the county of Salop, and entitled to receive several small rents or services from the tenants of the said manor ; and particularly, a rent of 7s. a year from the respondent and his ancestors, or those whose estate he had, which rent was issuing out of lands in Houlston, a village or hamlet within the manor, belonging to the respondent.

This rent having been neglected to be paid for several years, and the respondent having been applied to, but refusing to pay the same ; the appellant, in Easter term 1731, exhibited his bill in the court of exchequer against the respondent, setting forth his title to the said rent, and that the same had been paid by the ancestors of the [369] respondent, or their tenants, and particularly by James Fewtrell and Margaret Fewtrell his widow, on behalf of the respondent or his ancestors, but that the respondent refused to pay the same. And in regard the appellant could not discover what part of the respondent's lands were chargeable with the said rent, so as to distrain, or otherwise recover the same at law ; the bill prayed a discovery out of what lands the said rent issued, and also an account of the rent and the arrears thereof, and that the appellant's right thereto might be established.

The respondent by his answer to this bill, admitted, that the appellant was lord of the manor of Middle, and that he was entitled to several rents from the tenants there ; but denied that the appellant or his ancestors, to his knowledge or belief, had ever had or received, or been entitled to the said rent of 7s. or that the same had been paid by the respondent, or his ancestors.—He admitted, that he was seised of divers lands in Houlston, but denied that the same were held of the manor of Middle, or that any of the tenants of the said lands of the name of Fewtrell, did ever pay the said rent to the appellant ; and insisted, that in case the appellant had any right or title to the said rent, he might have his remedy at law for the same.

Issue being joined in the cause, divers witnesses were examined, and the same was heard on the 5th of July 1732 ; when the court, without hearing any proofs read, were pleased to decree, that the appellant's bill should be dismissed with costs.

From this decree of dismissal the duke appealed ; and on his behalf it was argued (J. Willes, D. Ryder), that chief rents commencing time beyond memory, by great length of time it frequently becomes impossible to know out of what particular lands they issue, but which is necessary to be proved in a course of proceeding at law, to recover such rents ; and therefore such remedy is exceeding difficult and tedious, and in most cases absolutely impracticable : For which reason, and that there may not be a right without a remedy, courts of equity have for a long series of time exercised a jurisdiction in cases of this nature ; and have constantly, where there has been proof of payment made within a reasonable time, decreed a satisfaction of all arrears of such rents, and payment of the same for the future : And if in these cases, courts of equity were to deny relief, many rents of this kind, though indisputably due,

would be irrecoverable and entirely lost. That the appellant had suggested by his bill, that he could not discover what part of the lands was chargeable with the rent so as to distrain for, or recover the same at law; and had made proof in the cause, both by the depositions of witnesses, and by ancient rentals, that the said rent had been constantly paid for many years by the tenants of the respondent's ancestors, to the ancestors of the appellant, until about the year 1710. If it should be objected, that these proofs are not mentioned in the decree to have been read, nor ordered to be entered as read; it may be answered that the court did not dismiss the bill upon any defect in the proofs, but because they were of opinion [370] that they had no jurisdiction, and could not give the appellant any relief, even though his case had been made out as stated in the bill, and therefore there were no proofs read; and it is the usual method of that court, not to permit any proofs to be entered as read, but what are actually read at the hearing. The appellant therefore hoped, that he should either be permitted to read his proofs at the hearing of the appeal, although they were not read, or entered as read, in the court of exchequer; or, that the court should be directed to enter into the examination of the facts contained in the appellant's bill, and in that case, that the decree of dismissal would be reversed.

For the respondent it was only said (T. Lutwyche, N. Fazakerly), that the appellant had not evidence to support his pretended demand; and that if there was sufficient evidence of it, there was nothing appearing in the cause, which made it necessary to come into a court of equity; but that the matter might as well have been determined at law, and would have been attended with much less expence.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the court of exchequer should proceed to hear the cause upon the pleadings and proofs. (Jour. vol. 24. p. 360.)

## SATISFACTION.

CHARLES DAVYS,—*Appellant*; MICHAEL HOWARD, et ux.,—*Respondents*

[22d April 1762].

[Mews' Dig. xii. 880.]

J. E. covenants to lay out £7500 in the purchase of lands to the use of himself for life, with remainder to his first and other sons in tail male. He purchases lands in fee of that value, and permits them to descend to his eldest son. Held that the lands so descended, are a satisfaction of the covenant.

Vide *Wilcocks v. Wilcocks*. 2 Vern. 558. S. P.

So where A. covenanted to settle lands of a certain value, and purchased lands of less value, which he allowed to descend, such purchase was allowed to be in part satisfaction of his covenant; *Lechmere v. Carlisle (Lord)*. 3 P. Wms. 211.

As to performance or satisfaction of covenants by a devolution of interests more beneficial to the covenantee, see *Blandy v. Widmore*, 1 P. Wms. 324; *Lee v. D'Aranda*, 3 Atk. 419; *Kirkman v. Kirkman*, 2 Bro. C. R. 95.—As to satisfaction of covenants by devises, see *post*, title WILLS [7 Bro. P. C. 461].

By indenture dated the 5th of April 1699, previous to the marriage of the appellant's father, John Davys esquire, with the appellant's mother, the honourable Anne Caulfield, made between [371] Hercules Davys esquire, and the honourable Lettice Davys his wife, the appellant's grandfather and grandmother, of the first part: William Lord Viscount Charlemont, Henry Davys, and Stephen Ludlow, esquires, of the second part; Richard Lord Bishop of Meath, William Ponsonby, and Sir Ledger Gilbert, esquires, of the third part; and the said John Davys, eldest son and heir apparent of the said Hercules Davys, and the said Ann Caulfield, eldest daughter of the said Lord Viscount Charlemont, of the fourth part: reciting a marriage then intended, and soon after had between the said John Davys and Ann Caulfield, and that Sir Edmund Stafford, by indenture dated the 10th of December 1646.



demised unto John Davys, father of the said Hercules Davys, certain lands therein particularly mentioned, situate in the county of Antrim, for 99 years from Michaelmas then last; and that Sir Henry O'Neil, by deed, dated the 14th of September, in the 19th year of the reign of King Charles I. demised to the said John Davys, father of the said Hercules, other lands therein mentioned, in the said county of Antrim, for 99 years, from the feast of All Saints, then next ensuing; and that Randall late Marquis of Antrim, Ann Lady Marchioness of Antrim, and Dame Martha O'Neil, by indenture, dated the 11th of December 1673, demised other lands therein mentioned, in the county of Antrim, to the said Hercules Davys, for 99 years, from the 15th of June 1669; and that Arthur Earl of Donegall, by indenture, dated the 21st of June 1692, granted unto the said Hercules Davys, the appropriate tythes belonging to the late dissolved abbey of Dessart, alias Kells, for the term of 61 years, from the 1st of May then last; the said Hercules Davys, in consideration of the said intended marriage, and of £2500 to him paid or secured by Lord Charlemont, being the said Ann's portion, and for other considerations, granted and conveyed all the said leasehold lands, and several other lands of inheritance, which he was seised of in his demeane as a fee, viz. The lands and town of Lisafullan, Corbally, Corragh Donnagby, with the corn mills and tuck mills thereon, and Drean, situate in the said county of Antrim, unto the said Lord Charlemont, Henry Davys, and Stephen Ludlow, to hold the said lands of inheritance to them and their heirs; to the use of the said Hercules Davys, and his heirs, until the marriage should take effect, and afterwards to the use of the said John Davys for his life; remainder to trustees, to preserve contingent remainders; and after the death of the said John Davys, to the use of the said Ann, in part of her jointure; which, together with what further provision was then made for her use, was to be in lieu of dower, with remainder to the first and every other son of the said John and Ann lawfully begotten, successively in tail male, with several remainders over. And to hold the said leasehold lands to Lord Charlemont, Davys, and Ludlow, their executors, etc. during the residue of the respective terms then to come, upon trust, to permit the profits to be received by the said John, during his life, and after his death by the said Ann, during so many years of the said terms as she should live after the death of the said John, as to so much of the said rents as would, [372] together with the profits of the said lands of inheritance, make up her jointure £400 yearly, acquitted from the jointure of the said Lettice, and all other incumbrances; and the surplus profits, during the said Ann's life (if any) to go to the persons to whom the said lands of inheritance were limited; and after the death of the said John and Ann, to permit the eldest son of the marriage to receive the profits of the said lands; and after his decease, to permit the several other persons, to whom the said lands of inheritance were limited, to receive the rents of the said leasehold lands during the residue of the said terms. And after further reciting a mortgage from Lord Santry to Thomas Whitchet and Stephen Ludlow, for £8000 in trust, for the said Hercules Davys, as to £2666 13s. 4d. part thereof; as also a bond from the Lord Viscount Massareen, by the name of Clotworthy Skeffington esquire, with his father, late Lord Viscount Massareen, to the said Hercules Davys, in the penalty of £3000, conditioned for payment of £1680; and also a mortgage from Henry Earl of Drogheda to the said Hercules Davys, for £4000, the portion of the said Lettice; and likewise the right of the said Hercules Davys to a sum of £2000, secured by a mortgage from Edward Harrison to Henry Davys esquire, brother of the said Hercules, £1000 whereof was declared by the said Henry to be the proper money of the said Hercules, and to be in trust for him; the said Hercules did by the said indenture, assign to the said Bishop of Meath, William Ponsonby, and Saint Ledger Gilbert, their executors, etc. the said mortgages and securities, and hereby empowered them to recover and receive the same, upon trust, to pay or permit the said Hercules, his executors or administrators, to receive to his or their own use, £846 13s. 4d. with the interest thereof, part of the mortgage on Lord Santry's estate, or of the said Hercules's share thereof, being £2666 13s. 4d.; and also to receive on his own use, during his life, the yearly interest of the £1000 due from Edward Harrison; and as to the residue of the said mortgage on Lord Santry's estate, and as to the rest of the aforesaid debts and mortgages, due by the Earl of Drogheda and Lord Massareen, amounting in all to £7500 upon trust, that the trustees should, during the life of Hercules, out of the rents and interest of the said mortgages and debts,

pay to John Davys, his son, so much as, with the clear rents of the freehold and leasehold lands limited as aforesaid, for the present maintenance of the said John and Ann, should in all make up £500 a year, above all deductions; and after the death of the said John, in case the said Ann survived him, should thereout yearly, during the life of the said Hercules, pay to the said Ann so much as, with the clear rents of the said lands limited for her jointure, should in all make up £490 a year, above deductions, and the said Hercules to receive the residue of the interest of the said £7500 during his life; and after his death, and subject to the direction for completing the jointure of the said Ann Davys, and also of the said Lettice Davys, the said trustees were directed to pay the residue of the rents, profits, and interest of the said £7500 to such person or persons as the [373] said lands of inheritance should come to, by virtue of the said limitations: And it was declared, that the said £7500 was so vested in the trustees, upon this further trust, that they should at any time, by the direction of the said Hercules during his life, and after his death, by the direction of the said John, lay out the said £7500 in the purchase of lands of inheritance, to enure to the same uses as the interest of the money so laid out was thereby limited.

In this settlement there was a power reserved to John Davys, to charge the freehold estate conveyed to the trustees, and the lands which should be purchased with the £7500, or any part thereof, with any sum or sums of money, not exceeding £2500, for a provision for the younger children of the marriage. And after several particular covenants, not material to the present question, the settlement concluded with the following proviso: "Provided always, that if the said sum of £7500 shall remain undisposed of in a purchase of lands and hereditaments, at the death of the said Hercules, and John Davys his son, that then the said £7500, or such part thereof as shall remain so undisposed of, shall be paid unto such person or persons, for such uses, unto whom the said lands of inheritance herein abovementioned, are by the said settlement limited, so far forth as the same can be by the rules of law or equity, subject nevertheless to the jointures, payments, and portions herein above limited, as aforesaid."

Hercules Davys received £3500, part of the £7500, but neglected to pay it to the trustees, or to invest it in the purchase of lands, according to the intention of the settlement; and after his death John Davys, the appellant's father, filed a bill in the court of chancery in Ireland, against Hercules Davys the younger, second son and executor of Hercules the father, in order to have the trust money replaced, and laid out in land, according to the intention of the settlement of the 5th of April 1699.

This dispute was adjusted in an amicable manner, by indenture tripartite, dated the 16th of September 1721, made between Hercules Davys the younger, as executor of his father, of the first part; the said William Ponsonby and Saint Ledger Gilbert of the second part; and the said John Davys of the third part: Whereby, after reciting the settlement of 1699, and the suit commenced by John against Hercules: and that Hercules, in his answer to the bill, had confessed that his testator had received all the money due upon the securities so vested in the said trustees, save the mortgage from the Earl of Drogheda for £4000; Hercules, the executor, did assign and make over to the said William Ponsonby and Saint Ledger Gilbert, the surviving trustees, all his right and interest to the £4000 so secured by the said mortgage from Lord Drogheda; and also £3000 secured by a mortgage made by Sir Richard Buckley to Hercules Davys the elder, in August 1705; to the end, that the said principal sums of £3000 and £4000 and the interest then due thereon, and the sum of £411 7s. 4d then paid by Hercules the [374] executor, might be applied to the several trusts in the settlement of 1699; and John Davys thereby covenanted to indemnify and save harmless the said Hercules Davys, and his said testator's estate, from all claims or demands for, or on account of, the said £7500 and every part thereof.

The mortgages thus assigned being of an old date, and carrying an high interest John Davys did not press the calling in of the money, or the taking of any step towards laying out the same in the purchase of lands, according to the direction and intention of the settlement made on his marriage. But in 1729, the Earl of Drogheda obtained a decree in the court of chancery in Ireland, against Davys and the trustees for the redemption of the £4000 mortgage, and that upon payment of that sum to Saint Ledger Gilbert, the surviving trustee, subject to the uses of the said settlement Gilbert should assign the mortgaged premises to the Earl of Drogheda, or such person as he should direct.

Mr. Gilbert accordingly assigned Lord Drogheda's mortgage, pursuant to the decree, and permitted John Davys to receive the mortgage money, which he was to lay out in other securities; and accordingly, about the 18th of June 1730, John Davys lent £2000, part of the £4000, upon a mortgage of the estate of Thomas Fortescue esquire, taken in the name of Mr. Gilbert; and about the 9th of July following, he lent the remaining £2000 to Nathaniel Clements esquire, upon the securities of two mortgages, assigned by him to Mr. Gilbert, and of a bond for that sum, executed by Clements as a collateral security.

John Davys afterwards finding a favourable opportunity of laying out £2000 on a good security, at six per cent. called in the money due on Mr. Clements's mortgage; and Mr. Clements, with the approbation of the heir at law of Mr. Gilbert, the surviving trustee, paid the money to Davys, who laid it out immediately upon a mortgage made by James Shiell esquire, at £6 per cent. And those several sums of £3000, £2000, and £2000, part of the £7500 trust money, continued on the several mortgages of the estates of Sir Richard Buckley, Thomas Fortescue, and James Shiell, until John Davys's death, there being no step taken to lay out the same in the purchase of lands, according to the direction of the settlement.

John Davys in 1707 succeeded to a small estate in the town of Carrickfergus, of the yearly value of £158, by virtue of the will of his uncle Henry Davys. And about the year 1722, he became possessed of some lands in the counties of Dublin and Kildare, under the same will, by virtue of a remainder limited to him in fee, expectant upon an estate for life limited to another John Davys, brother of the said testator Henry. Those estates were charged with two legacies of £500, and £500 payable to two brothers of the said John Davys; and the testator had given other legacies to a large amount, particularly £5000 to his daughter Judith.

Though the said John Davys was several years in the actual possession of these estates, he never attempted to appropriate to [375] himself the trust money, either by laying it out in a purchase of those estates for the purposes of the trust, or in any other purchase, although the securities for that money were often changed during his life; and the trustees, relying entirely on the prudence of his conduct, and the sufficiency of his fortune, managed the trust money as he directed, or left the management of it to his discretion.

The appellant, by the death of an elder brother in 1741, became the eldest son of the family, and his father, John Davys, made him a lease of the Carrickfergus estate for 99 years at £5 per ann. rent, by way of a maintenance, and to enable him to keep up the family interest in that town, which they had often represented in parliament.

In 1743, John Davys died intestate, leaving Ann Davys his widow, the appellant his eldest son and heir, and James Davys his younger son, and four daughters; namely, Sarah his eldest daughter, married to Thomas Callaghan esq. Judith, married to John Tuckey, the respondent Alice, and Jane Davys spinster.

In 1743, 1745, and 1753, the terms of the leasehold interests vested in the trustees by the settlement of April 1699, drew towards an end; the lease from Sir Henry O'Neill determined the 1st of November 1743; the lease from Sir Edmund Stafford was to determine at Michaelmas 1745; and the lease of tythes from the Earl of Donegal, was to determine on the 1st of May 1753, and did actually determine in the lifetime of Ann Davys the widow. The freehold estate in the county of Antrim, conveyed by that deed, was but £100 a year; and the profit of the lease from the Marquis and Marchioness of Antrim was but inconsiderable. The principal security for the jointure of Ann Davys, was the money vested in the trustees by that settlement, of which £3000 and £2000 charged upon the estates of Sir Richard Buckley and Thomas Fortescue, still stood in the name of the surviving trustee; £2000, other part thereof, which had stood in the name of the trustees when charged on Mr. Clements's estate, was called in by John Davys, and laid out upon mortgage of Mr. Shiell's estate, at £6 per cent. as before stated, by John Davys in his own name, who was liable to be called upon by the trustees for that money, as also for the sum of £500 received by him from the executor of his father, to complete the £7500 trust money, it being evident that the estates which came to John Davys from his uncle, were not charged with, nor any way liable to the jointure of Ann Davys.

The appellant, upon the death of his father, succeeded, as his heir at law, to the

estates which his father held under Henry Davys's will, in the counties of Dublin and Kildare, and in the town of Belfast. He took also as special occupant, a villa, which his father had purchased for 300 guineas, at Hampstead near Dublin, for three lives, renewable for ever, at the rent of £40 per ann. on which his father had made some improvements, in order to make it a commodious habitation for his family. He [376] likewise succeeded, under his father's marriage settlement, to the freehold lands thereby limited to the issue of the marriage, which were about £100 a year. and to the remainder of the terms for years of the leasehold estates comprised in that settlement. He also became entitled to the money vested in the trustees by that settlement, subject to the jointures and payments therein mentioned, of which the jointure to Ann Davys was then the sole subsisting charge.

The appellant, with the approbation of his mother, took out administration to his father, and used his best endeavours to get in the personal estate, which was considerable, although several debts were desperate. He lived in great harmony with his mother during her life, and as it was agreeable to her, he kept house for her, and an equipage suitable to her rank in life, at the mansion house at Hampstead, where she from time to time resided with her unmarried daughters; and when she chose at any time to reside in Dublin, he provided a house for her there, and supplied her with money from time to time, as she called for it, without observing minutely whether the money she called for, together with what she agreed to allow towards housekeeping and equipage, exceeded or fell short of her jointure. When his affairs at any time called him to England, he left orders with his agents to supply her in the same manner; and if, through the negligence of his agents during his absence, she raised money for her use in any other manner, he regularly paid it, with interest, when he returned to Ireland.

In 1749, a suitable match being proposed for the appellant's brother, James Davys, the said Ann his mother, in order to make a better provision for him, conveyed to him by deed of the 3d of May 1749, her part of the distributive share of her husband's personal estate, with power to him to give the appellant a release for her share, on the appellant's paying or securing £2000 for the uses of the settlement intended on his marriage; and the appellant being one of the parties to the marriage settlement, which was dated the 6th of July 1749, engaged for the payment of that sum to the uses of the settlement, and which engagement he punctually fulfilled.

In 1755 the appellant's mother died intestate, while he happened to be in England; and the respondent Alice took administration of her goods and credits, and in a little time afterwards intermarried with the respondent Michael Howard, without the knowledge or privity of the appellant, or his brother.

In January 1757, the respondents filed their bill in the court of chancery in Ireland, against the appellant and the said James Davys his brother, and John Tuckey and Judith his wife, Jane Davys and Thomas Callaghan, and Cornelius and Mary Callaghan, the children of Thomas Callaghan by Sarah his wife, then deceased, and against Bryan Mac Manus, Hugh Kirk, and Thomas Croker; praying an account of the personal estate of the said John Davys, and to have the same distributed according to the statute; and that such children as claimed any benefit of that distribution, [377] should bring into the mass of the estate, all such sums as they had respectively received from the said John Davys in his life-time, for their advancement in the world, the said Alice offering to bring in £800 which she had received for her particular advancement: She likewise, as administratrix of her mother, prayed an account of the arrears of her mother's jointure, and of the distributive share which her mother was entitled to of her father's personal estate.

The appellant put in his answer to this bill, and annexed several schedules thereto, containing accounts of what he had received, and what still remained of his father's personal estate outstanding upon securities, and of his own payments and disbursements in respect thereof: And by his answer he set forth the settlement of April 1699, and insisted on his right to the several sums thereby, or in consequence thereof, vested in the trustees of that settlement; and he relied on the agreements made with his mother as to the jointure, and on the grants and agreements in the indentures of the 3d of May, and the 6th of July 1749, before mentioned, as to his mother's distributive share of his father's personal estate. And the better to bring those matters in issue, he filed a cross bill against the plaintiffs in the original cause, setting forth

those several matters, and praying a discovery of such part of the personal estate, and of all deeds and papers relating thereto, as were in the hands or power of the respondents.

The respondents put in their answer to the appellant's cross bill, and afterwards amended their original bill, and stated the settlement of the 5th of April 1699; but insisted, that the several estates which had been devised to John Davys the father, by his uncle Henry Davys, and were suffered to descend to the appellant in fee, were to be deemed a satisfaction for the £7500 mentioned in the settlement: They likewise stated, that at the time of the death of Henry Davys, those estates were charged with large sums, the debts and legacies of the said Henry Davys amounting to £11,000, which had been since discharged, and should be taken to be a satisfaction for the appellant's interest in the trust money: They also stated the purchase made by John Davys of the lease for lives renewable for ever, of his house and gardens at Hampstead, which he had suffered to come to the appellant, although it was in his power to prevent his taking both the estate and the lease.

The appellant put in his answer to the respondents amended bill, and thereby admitted that the estate devised to the said John Davys by his uncle's will, descended to him clear of all the incumbrances, but insisted that the testator's debts and legacies had been charged upon and paid out of his personal estate; and that the said John Davys had not by any act or writing signified his intention, that the appellant should not have the full benefit of the settlement, notwithstanding the descent of the real estate according to the common course of law; and that there was no reason to infer [378] any such intention by implication, as his personal estate, when got in, would afford a reasonable and ample provision for the younger children, without breaking through the rules of law, or making any forced construction in equity, to charge or prejudice the heir.

Every thing material in the cross cause being put in issue by the respondents amended bill, the appellant did not proceed further therein: And the respondents having replied to the answers of the appellant, and all the defendants, except Kirk and Mac Manus (the bill as to them being dismissed) the appellant rejoined: And witnesses were examined, and publication passed.

The respondents, although they could not suggest, or point out any declaration or deed, to shew that the intestate intended that the descent of the estates he held under his uncle Henry's will on the appellant, was to be a satisfaction for the trust money settled by the marriage settlement in 1699, yet they endeavoured to prove some matters from whence they would infer such an intention. Accordingly, they produced evidence to shew, that the Carrickfergus estate was, in 1743, worth £203 per ann. and the estates in the counties of Dublin and Kildare, £450 per ann. They also produced evidence to shew, that the debts and legacies of Henry Davys amounted to £10,170, and would infer, that the paying those debts and legacies were equivalent to laying out money in the purchase of estates; that it might be considered as an application of the trust money; and the suffering those lands thus discharged, to descend on the appellant, was the same thing as settling them according to the directions of that settlement. And that the descent of the Carrickfergus, Dublin and Kildare estates, were a satisfaction of the said £7500 as a debt from the said John Davys to the appellant. They also produced evidence to shew, that the appellant's father had laid out 300 guineas in the purchase of the lease for lives renewable for ever, of a house and gardens at Hampstead near Dublin, on which he had laid out a great deal of money in improvements, by which the value of it was increased.

By the evidence produced for the appellant it appeared, that the Carrickfergus estate was worth but £140 per ann. and the Dublin and Kildare estates but £269 13s. That the personal estate of Henry, the testator, was considerably more than sufficient to pay his debts and legacies; and that he had directed them all to be paid out of his personal estate, except two legacies of £500 and £500 which he had given to his nephews, Hercules and Henry, the brothers of the appellant's father, and which he directed should be paid out of the Dublin and Kildare estates, within six months after the appellant's father got into possession of those estates. That the lease at Hampstead had been purchased for £270, and the improvements were rather ornamental than beneficial, though on account of them a man of taste might be willing to pay an advanced rent for it. That the executors of Hercules Davys, the appellant's

grandfather, had, in 1720, assigned to Ponsonby [379] and Gilbert, the surviving trustees of the settlement of 1699, the mortgage for £4000 on Lord Drogheda's estate, mentioned in that settlement, and a mortgage for £3000 on Sir Richard Buckley's estate; which, with the money then paid to the appellant's father, completed the whole sum of £7500 which was subject to the trusts of that settlement. That the said £3000 mortgage continued in the trustees, until the death of the appellant's father; and that the trustees were by a decree in chancery, in the year 1729, obliged to convey that mortgage to Lord Drogheda's trustees, upon his paying £4000 and the interest then due. That the £4000 so received, was laid out on other securities, namely, £2000 on a mortgage of an estate of Thomas Fortescue esquire, and £2000 on securities given by Nathaniel Clements esquire, both taken in the name of Saint Ledger Gilbert, the then surviving trustee; and that Mr. Fortescue's mortgage was still subsisting at the death of the appellant's father. That Clements's mortgage continued till the year 1740, and was then called in, because there was an opportunity of laying the money out at a higher interest; and that Gilbert, the last surviving trustee, being then dead, his heir at law was obliged to join in re-assigning Mr. Clements's securities, although, from the opinion entertained of John Davys's care and fortune, it was not thought necessary to make use of the trustee's name, when that money was laid out on another security, namely, the mortgage on James Shield's estate. It also appeared, that the freehold and leasehold lands, comprised in the settlement of 1699, were at best but a scanty fund for the jointure of Ann Davys, which rendered it extremely proper that the £7500 trust money should be, as it really was, an auxiliary fund for her security. It appeared, that the pecuniary fund was in the lifetime of John Davys lessened, by the determination of the lease from Sir Henry O'Neill, on the 1st of November 1743. That soon after his death it was more reduced, by the determination of the lease from Sir Edmund Stafford in 1745, and still more by the determination of the lease of tythes from Lord Donnegall, on which his agents entered in 1751; and by those several reductions the trust money became a necessary part of the fund for securing Mrs. Davys's jointure. It was never pretended that the lands of Carrickfergus, and in the counties of Kildare and Dublin, were charged with, or any way liable to the payment of that jointure. And it appeared, that by the descent of the freehold and inheritance of the Carrickfergus estate on the appellant, the accession to his income was but £5 per ann. It was also fully proved, that his father had granted him a lease of that estate for 99 years, at the rent of £5 per annum. And that Judith, the heir at law of Henry Davys, had got possession of that estate on an ejectment in the year 1744, and continued in possession till the year 1750. And a paper of the hand-writing of the said John Davys, and indorsed on the back thereof, "*a computation of deficiencies in Captain Davys's marriage settlement,*" was also proved in the words and figures following. viz. "Hercules, senior, proposed, and parties were of opinion, that freehold lands and leases [380] would yield during the life of John and Ann £500 per annum, and £400 per annum, during the life of Ann after John's death, if not, to be made up out of the interest of £7500 which was paid to Hercules during his life. Now Hercules is long since dead, and the £7500 was to purchase lands for John for life; remainder to his son in tail, the maintenance falls short of £500 per annum. And they pretend he has released, and that proved by a person. Suppose John Davys dies, Ann is to be paid £400 per annum out of said maintenance lands, which falls short thereof by determination of leases or otherwise, where must that be made up? Why out of the lands purchased with £7500. Is not that a wrong to John's heir? the intent being, that maintenance lands, and the interest of £7500, should make good Ann's jointure, which, if Hercules should survive, would be no wrong to said heir; but he dying the interest ceased, for then principal was to purchase lands entirely for the benefit of said heir; for otherwise the £400 per annum, chargeable thereon for Lettice her jointure, and £400 for Ann, would be more than said £7500 purchase would yield. *Note,* That if the £7500 was laid out as by the deed directed, the same would then have purchased about £500 per annum; whereas it will not now purchase above £350 per annum. And also it was the intent of all the parties, that the said John, after the death of his father, and his heir in tail male, was to have by the said maintenance lands, and the estate to be purchased by the £7500, £1000 per annum. And as the case now is, John's heir is not likely to have above £600 per annum. It is not the

executors of Hercules, but the executors of Henry, who administered to John my grandfather, which was omitted in this case. And I desire to know what demand I can have of them on account of my father's marriage articles, which I expect will be laid before Mr. Bernard. Samuel and I administered to Henry; Ezekiel Davys, Wilson and Charles Howard administered to Samuel; the other two Howards to Charles (Francis and Griffin) brothers to said Charles deceased. How Miss Sharrard is concerned as to my demand (Samuel's sister) I am to be informed."

The cause was heard on the 6th, 9th, 10th, 16th and 17th of February 1761, before the lord chancellor of Ireland; and his lordship having taken time to consider, he on the 9th of March following, was pleased to order, adjudge, and decree, that it should be referred to one of the masters to take an account of the personal estate of John Davys deceased, the appellant's father, into whose hands the same came, and how it had been applied or disposed of; and to report whether any, and what part thereof, stood out at interest, on any and what securities, at the death of the said John Davys; and whether any, and what interest, and by whom, had been received on account of such securities; and whether any, and what part of the personal estate of the said John Davys had been laid out at interest since his death, and when and by whom; and whether any interest, and to what amount, had been received on [381] account thereof, and by whom; and whether any, and what part of the personal estate of the said John Davys, since his death, had yielded any other, and what profit and how much in the whole, and who had received such profit; and also to take an account of what debts were due and owing by the said John at the time of his death. And his lordship declared, that the trusts in the deeds of 1699 and 1721, as to the appellant, were satisfied by the real estate that descended to the appellant from John Davys his father; and that the appellant was not entitled to any allowance out of the personal estate of the said John, on account of the securities in the said deeds mentioned. And the master was directed also to take an account of the personal estate of Ann Davys deceased, into whose hands the same came, and how disposed of; and to take an account of what provision the said John Davys made for his children in his life-time, and what they received since his death.

From this decree, so far as it related to the point of satisfaction, the appellant appealed; insisting (T. Sewell, G. Perrot), that John Davys his father, by the receipt of the money due on Mr. Clements's mortgage, became a debtor to the representative of the surviving trustee in the settlement of 1699, and such representative might and ought to recover the same out of his personal assets; and as the descent of lands upon the appellant could be no satisfaction of a debt due to the appellant himself, there could be no pretence to say it could be a satisfaction for a debt due to the trustee. That even the devise of lands has never been held to be a satisfaction for money, or a personal debt or demand, because they are of different natures; but in the present case, the lands descended did not come to the appellant by the gift of his father, but by act of law; and it was a new and unheard-of doctrine, that a debt due to the heir should be satisfied by the descent of lands; for it would be to put the heir in a worse condition than any common devisee of lands, who, notwithstanding the devise, would be entitled to be paid his debt, unless it was otherwise provided by the will. That in cases of debts by specialty, or even by mortgage, the heir at law or devisee has a right to have the descended or devised estate exonerated out of the personal estate; and the appellant in the present case, supposing him to be a creditor immediately on his father's estate for the trust money or any part of it, as for a debt by specialty, would have the same right against his father's assets; but such part of this trust money as was received by the appellant's father, was by him placed out again on Shiell's mortgage, as a specifick part of the trust fund, and so remained; and if it had not been so placed out by him, he would only have been a debtor by simple contract for the same, upon the ground of his having received it. That the words of the decree seemed to amount to a declaration, that the trusts of the deeds of 1699 and 1721, were satisfied as to the £2000 mortgage on Sir Richard Buckley's estate, and the £2000 mortgage on Mr. Fortescue's estate, as well as with respect to Mr. Clements's mortgage, and that those securities should be considered as part of John Davys's personal estate; but there could not surely [382] be any ground to say, that those securities ever were part of his personal estate, they being specifically bound by the trusts of the deeds of 1699 and 1721, which John Davys neither had

it in his power, nor attempted, or shewed the least intention to alter; and at his death, these mortgages, and the money received by him on Mr. Clements's mortgage, were all liable to make good his wife's jointure, and therefore must remain subject to the said trusts; and yet it might as well be contended, that the trust as to her was satisfied by her husband's dying intestate, whereby she became entitled to a third part of his personal estate; as that the trusts were satisfied *quoad* the appellant, by the descent of lands upon him.

On the other side it was contended (C. Yorke, A. Forrester), that as to £411 17s. 4d. part of the principal sum of £7500 assigned to trustees by the deed of 1699, there was no ground for the appellant's retaining it out of John Davys's assets, because it appeared by the deed of 1721, to have been received not by John Davys, but by the surviving trustees. That if John Davys had covenanted to lay out £7500 in the purchase of lands, to the use of himself for life, with remainder to his first and every other son in tail male; and had purchased lands in fee to that value, and permitted them to descend to his eldest son; the lands so descended would have been deemed a performance of the covenant, and the appellant could not have compelled John's representative to have laid out £7500 of his assets: So if a man covenants to leave his wife a certain sum, and dies intestate, and the widow's distributive share of the assets amount to the sum covenanted, it is a performance of the covenant (See *Blandy v. Widmore*, 2 Vern. 709. 2 P. Wms, 323. *Davila v. Davila*, id. 724.); and she cannot have both her distributive share, and the sum which her husband covenanted to leave her. These points are settled by judicial determinations. That the several securities amounting to £7500 were, by the settlement of 1699, vested in trustees, for the purpose of being laid out in land; and John Davys, by the deed of 1721, undertook the performance of that trust, making himself answerable for the breach of it. From the making of the settlement of 1699, this sum must be considered as land; and by the deed of 1721, John Davys was himself become covenantor, that it should be such. When therefore he left fee simple lands of £1000 annual value to descend on the appellant, this was a full satisfaction for the breach of trust in not laying out the £7500, or rather a performance of the covenant, and cut off all further resort against his assets.

But it is said, that John Davys did not himself purchase the fee simple lands which he left to descend on the appellant; and therefore this differs the case from former authorities.—He however cleared those lands of incumbrances, to the amount of £11,670, probably applying (but if so or not was immaterial) the £7500, or so much of it as came to his hands in that way. This in effect made him a purchaser, and the appellant virtually received the £7500, for it made no difference whether the money was paid to him, or for his use and benefit. But in truth it did not signify whether the lands descended to the appellant were or were not purchased by his father. no court of law or equity ever enquiring whether the real estates in the hands of the heir were originally purchased by the ancestor debtor; for whether he has them by descent or purchase, they are assets for satisfying his obligations, and equally beneficial to his heir, who is compensated for his demand by lands, which the ancestor might have given away from him.

It is however further objected, that it did not appear that John Davys intended the lands descended to the appellant, to be a satisfaction for the £7500 or any part thereof. But the intent in these cases is to be collected, from the substantial performance of the agreement or covenant: As, where a debtor leaves a legacy equal to the debt, the legacy, if nothing appears to the contrary, is a presumed satisfaction of the debt, and yet every legacy imports a gift or bounty: But John Davys had sufficiently manifested his intent, by a deed of the 24th of March 1740, whereto the appellant was witness, that the appellant should have no part of the £7500. For he therein recited a mortgage debt of £6000 due to him from Mr. Tynte, and assigned that mortgage to trustees, for applying £1000 part thereof in payment of his daughter Sarah's portion, and the residue to himself, his executors and administrators. This mortgage was substituted in lieu of some of the original securities: and the disposition of it shewed, that John Davys did not intend the appellant to have any part, and must therefore mean him a compensation by the descent of the fee simple lands. Besides, the appellant possessed himself of all his father's deeds and papers, which would probably have removed every doubt concerning the intent.



That the original securities assigned by the settlement of 1699, were all extinguished in the life-time of John Davys; and Sir Richard Buckley's mortgage, which was assigned as a secondary one, by the deed of September 1721, was also extinguished, and at an end. So that the appellant had no specific lien on any particular part of John Davys's personal estate, but a general demand upon the whole, for a breach of trust in not investing £7500 in the purchase of lands; and if, under the circumstances of this case, he had the least right to retain any part of his father's personal assets for answering that demand, he should have brought his bill for establishing it: whereby the respondents would have had a fair and proper opportunity of controverting the justice of such demand.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decree therein complained of as declared, "that the trusts in the deeds of 1699 and 1721, as to the appellant, were satisfied by the real estate that descended to him from John Davys his father; and that the appellant was not entitled to any allowance out of the personal estate of the said John, on account of the securities in the said deeds mentioned;" should be reversed. And it was DECLARED, that the said deeds were satisfied by the real estate that descended to the [384] appellant from John Davys his father, except as to the mortgage made for £2000 and interest, by Thomas Fortescue to St. Ledger Gilbert the surviving trustee, and which mortgage belonged to the appellant, as first son of the marriage: And it was further ORDERED and ADJUDGED, that the said decree in all other respects should be affirmed; and that the court of chancery in Ireland should give all proper directions, for carrying the said decree, with this variation, into execution. (Jour. vol. 30. p. 238.)

## SETTLEMENTS.

CASE 1.—Earl of KERRY,—*Appellant*; Lord Viscount FITZ-MAURICE,—*Respondent* [11th March 1752].

[Mews' Dig. xii. 1069.]

A. on his marriage, settled lands to the use of himself for life, remainder to his wife for her jointure, remainder to the first and other sons of the marriage in tail male; reserving to himself a power of charging the estate with £3000 for younger children, or the payment of debts; and covenanted to lay out £6000, part of the wife's portion, in the purchase of lands, to be settled to the same uses. The £6000 was not laid out. After the eldest son of A. came of age, it was agreed, in consideration of his advancing £3000 for the purchase of a commission in the army for the son, to make a new settlement more beneficial for the younger children. Accordingly a settlement was made, whereby the lands were limited to the former uses, but A. was empowered to charge £3000 for each of his younger children; and his covenant to lay out the £6000 was released. On a bill being filed to set aside this subsequent settlement, and to have the £6000 laid out pursuant to the covenant, the court dismissed the bill, but without costs.

William Lord Kerry (the appellant's great grand-father) by articles, dated 17th of December 1692, between himself and Thomas Fitz-Maurice, his eldest son, of the one part, and Elizabeth Lady Shelburne, Charles Lord Shelburne, and Ann Petty, of the other part, in consideration of a marriage then intended between the said Thomas Fitz-Maurice and Ann Petty, and of a portion of £10,000 agreed to be paid with her; covenanted, before the 1st of June then next, to convey all his manors, lands, and premises, to the use of himself and his heirs, till the marriage; and afterwards, as to the town and lands of Listowhill, Dromlegagh, Bally Mac Jordan, Cregane, and several other denominations therein particularly mentioned, situate in the baronies of Clanmorris and Iraghty Connor in the county of Kerry, to the use of the said Thomas for life, remainder to the use of the said Ann for life, as her jointure, and in lieu of dower; and as to all other the premises, to himself for life, remainder to the use of the said Thomas for [385] life; remainder to trustees

to support contingent remainders; and after the deaths of the said Lord William, Thomas, and Ann, the whole to the use of the first and other sons of the said marriage, in tail male with divers remainders over; with a power to Lord William to charge any sum not exceeding £3000 for his younger children, or payment of his debts.—Also a power to Thomas, to charge £4000 for his younger children, with such yearly maintenance for them as he should think fit, not exceeding £100 a year to each, and £500 per ann. as a jointure to any other wife: And it was agreed, that Lord and Lady Shelburne should, before the 25th of March then next, pay £6000, part of the said portion, to trustees, to be laid out in the purchase of lands of inheritance, or on mortgage till such purchase; and that the lands so purchased, should be conveyed, and the interest of the said £6000 paid to the said Thomas for life; remainder to the said Ann for life; remainder to the first and other sons of the said marriage in tail male; remainder to the daughters in tail; remainder to the right heirs of the said Thomas.

The marriage soon afterwards took effect, and by indentures of lease and release, dated the 28th and 29th of March 1693, Lord William, and Thomas his son, in consideration of the marriage, and in pursuance of the articles, conveyed all the lands therein, and in the articles mentioned, to the several uses therein expressed: and by this settlement, a term of 60 years was limited to trustees from the death of the said Thomas, upon trust to raise £4000 for the daughters and younger sons of the marriage, with £200 a year for their maintenance in the mean time. And power was reserved to Lord William, by deed or will, to charge any sum not exceeding £3000 for his younger children, or for payment of debts.

By indenture, dated the 18th of January 1696, Lord William, in execution of this power, demised several of the lands in settlement, to trustees for 999 years, to commence upon his death, upon trust to raise and pay to his second son William £3000, and in the meantime, £300 per ann. for his maintenance.

Soon afterwards Lord William died, leaving the said Thomas his eldest son, who thereupon became baron, and afterwards Earl of Kerry, and entitled to the whole estate as tenant for life, with remainder to his first and other sons in tail male. And in October 1703, he paid his brother William the said £3000, with interest, to the amount of near £1000 more.

Earl Thomas had issue by the Lady Ann his wife, William his eldest son, Thomas his second son, and the respondent his third son, and three daughters, Ann, Arabella, and Charlotte; and in 1712 he married his daughter Ann to Sir Maurice Crosbie, and gave her a portion of £2000 out of his own pocket; and in 1707, sent his eldest son William, then about 13, to Eton college, and there expended on him £400 a year for five years; and from thence, in 1712, removed him to Oxford, where he remained at an expence of £600 a year, till the end of 1714, when he grew profuse, neglected his studies, and at last quitted the university without his father's consent. Being afterwards of age, and desirous of going into the army, he prevailed upon Lord Cadogan, a near relation of his, to press his father to purchase for him a company in the guards; but as Earl Thomas had just given his daughter Ann a portion, which took away all his ready money, and had four younger children unprovided for, and as the income of his estate did not then exceed £2250 per ann. his lordship for some time refused to comply; but it being proposed, that upon such purchase the family estate should be new settled, and particularly, that (in regard the estate had since 1692 advanced from about £1200 to £2250 a year, and was likely to rise much higher) the provision for the Earl's unmarried younger children should be enlarged, and that William the eldest son should be made tenant for life; and, in consideration of a mansion-house, offices, gardens, deer-park, and other improvements made on the estate by the Earl, he should be discharged from his agreement for laying out the £6000; he was on these terms, prevailed upon to pay £3000 for the purchase of the said company.

And accordingly, by indentures of lease and release, dated the 10th and 11th of May 1716, between Earl Thomas and his said son William of the first part, Sir Thomas Vesey, Bishop of Ossory, and Thomas Burgh, Esq. of the second part, Robert Doyne and John Pratt, Esqrs. of the third part, and Sampson Cox, and Marcus Dowley, Esqrs. of the fourth part; in consideration of the said £3000, and for settling the premises in the name and blood of the family, and for making

a further provision for Earl Thomas's younger children, etc. the earl and his son William conveyed the premises mentioned in the articles of 1692, and the settlement of 1693, to the Bishop and Mr. Burgh and their heirs, to the use of Earl Thomas for life, without impeachment of waste; remainder, as to part, to the said Ann his lady for life; remainder, as to part, to the use of the said Robert Doyne and John Pratt for 500 years, for raising any sum not exceeding £3000 a-piece, as Earl Thomas should appoint, for the portions of his younger sons and daughters, to be paid them by such proportions and at such times, as he should by deed or will direct; and for want thereof, then the said sons and daughters to have £3000 a-piece at their ages of 21. And as to other parts of the premises, viz. Listowhill, and the commons thereof, Dromlegagh, Bally Mac Jordan, Banemore, Ballygarott, Beale and Pullogh, to the use of the said Robert Doyne and John Pratt, their executors and assigns, for two several terms of 21 years, to commence, as to part, from the death of Earl Thomas, and as to the rest, from the death of him and his lady; upon trust to permit all persons to whom Earl Thomas should sell any of the woods, timber, or underwood thereon, to sell and carry the same away. And subject to these several terms, and to the jointure of Lady Kerry, the whole estate was limited to the use of the said William for life, remainder to his first and other sons in tail male, with remainders over to Thomas and John Fitz-Mau-[387]-rice, the second and third sons of Earl Thomas successively, and to their first and other sons in tail male; remainder to the right heirs of Earl Thomas; with power to the said William and his brothers respectively, when in actual seisin, by deed or will to settle jointures not exceeding £600 a year, and to make leases; and a proviso for extinguishing such power of settling jointures, if either of them should, in the life-time of Earl Thomas, marry without his consent under his hand and seal. And after reciting, that Earl Thomas had expended great sums in building and furnishing a very large mansion-house, etc. and making other improvements at Lixnaw, and had walled in a park and gardens adjoining, and that £6000 was, by the articles of 1692, agreed to be laid out in a purchase, or at interest; the said William, in consideration of those improvements, and of the £3000 paid him as aforesaid, did for himself, his heirs, executors, etc. release to Earl Thomas, his heirs, executors, etc. and to the heirs, executors, etc. of Lord and Lady Shelburne, all claim and demand to the said £6000, and to all lands or hereditaments, which by the said articles were intended to have been purchased therewith; and covenanted, that neither he or his heirs should commence any action or suit upon the said articles, concerning the said £6000.

In Trinity term 1716, Earl Thomas and his son William, in pursuance of a covenant in this last settlement, joined in a common recovery; and soon after, Thomas Fitz-Maurice, the second son, died an infant and without issue.

In August 1725, Earl Thomas married his daughter Arabella with Arthur Denny, Esq. whose circumstances requiring ready money, for the payment of his and his father's creditors, the Earl advanced for that purpose £4000 as his said daughter's marriage-portion, instead of securing the £3000, which he had power to charge for her on his estate, by virtue of the settlement of 1716.

But, intending to keep that charge on foot, for the benefit of the respondent his youngest son, by indenture, dated by mistake the 8th of April 1725, instead of the 8th of April 1726, between the Earl of the one part, and the respondent of the other; reciting, that the Earl had some time before paid his said son £3000 in part of the portion he designed for him, and that his said son had lent him the said £3000, to be paid as a portion with his said daughter Arabella, and that the Earl was, by the settlement of 1716, empowered to charge £3000 a-piece for the portions of his younger children; the Earl covenanted, that he would, by deed or will, secure the said £3000 to his said son, either by leaving the same as a charge affecting the premises, which by the said settlement he was empowered to incur for the portion of his said daughter Arabella, or any other of his children, or in any other manner as counsel should advise: And the respondent covenanted, not to demand any interest which should grow due for the money during the Earl's life.

The Earl also intending the woods growing on his estate, as a further provision for the respondent, by deed dated the 22d of [388] June 1726, reciting the settlement of 1716, and his power thereby over the woodlands, in consideration of £100

paid him by the respondent, and in execution of his said power, and in order to make a further provision for him, the Earl conveyed to him all the woods on the lands of Dromlegagh, Bally Mac Jordan, Beale, Listowhill, Cleverough, and Banemore; with liberty, during the terms of 21 years thereof limited to Doyme and Pratt, to fell and carry away the same.

Earl Thomas, by his will dated the 22d of April 1738, reciting, that he had by deed granted to the respondent some of his woods, but not then having an opportunity of seeing what particular woods he had granted him, did, for greater certainty, bequeath to him all his woods and underwoods on Dromlegagh, Bally Mac Jordan, Broomederaugh, Tullamore and Pullogh, Agathroghis, Cleaveragh, Listowhill, Banemore and Ballygarrott, Beale and Drummerrin, which denominations comprehended all the woodlands on the estate; and he thereby appointed £3000 a-piece for the respondent and his sister, Lady Charlotte, who had intermarried with Sir John Colthurst, and charged the said portions on the lands chargeable therewith by the settlement of 1716, and made the respondent sole executor and residuary legatee.

On the death of Earl Thomas, which happened in March 1741, the respondent by force of the said deed of the 8th of April 1725, and of the Earl's will, became entitled to Lady Arabella's £3000, with interest from the testator's death; and by force of the deed of the 22d of June 1726, and of the said will, he also became entitled to all the woods on the estate, comprised in the said trust terms of 21 years; and thereupon the said William, then Earl of Kerry, by virtue of the settlement of 1716, entered upon, and held the family estate to the time of his death in April 1747, without having once, either in his father's life-time or afterwards, complained of that settlement; but, on the contrary, complied therewith in all respects, and particularly in the following remarkable instances:—First. Being about to marry in his father's life-time without his consent, he, by articles previous thereto, dated the 28th of June 1738, reciting the settlement of 1716, and the power to him thereby reserved to settle a jointure when in possession, covenanted to settle £600 a year on his intended wife for her jointure.—Secondly, After his father's death, he by a settlement, dated the 19th and 20th of August 1742, in execution of the said articles and power, secured to his lady, a part of the estate of £600 a year for her life.—Thirdly, It being apprehended, that as Earl William had married without consent, the said jointure was not warranted by the settlement of 1716, he obtained a private act of parliament in Ireland, whereby, reciting the articles of 1692, and the covenant for laying out the £6000, and that the same had not been laid out, and that Earl William had, by his father's agreeing to advance £3000 to purchase for him a commission in the army, been induced to come into the said settlement of 1716, and for the reasons therein mentioned to release Earl Thomas, and Lord [389] and Lady Shelburne from the said £6000: and also reciting the said settlement of 1716, and particularly the clauses for enabling Earl Thomas to charge the estate with portions of £3000 a-piece for his daughters and younger sons, and for enabling the sons to settle jointures: and that Earl William had married without consent, and that therefore the said settlement upon his lady could not be rendered effectual without the aid of parliament: It was enacted, that all deeds then executed, or after to be executed, and the will made, or to be made by Earl William, pursuant to the said power in the settlement of 1716, should be valid, as if he had married with consent, and had then been in possession, and his father dead: any thing in that settlement to the contrary notwithstanding. To which act of parliament the appellant, by his uncle and next friend on his mother's side, and the respondent and his two sons were consenting.—Fourthly, Earl William, after the death of his father, paid the interest of the said portions of £3000 a-piece appointed for the Lady Charlotte Colthurst, and the respondent as aforesaid.—And lastly, Earl William, by his will, reciting the settlement of 1716, and his powers of charging a jointure of £600 a year for his wife, and £4000 for his younger children, in execution of those powers, confirmed the said jointure of £600 a year, by him before settled on his lady, and charged the said estate with £4000 for his daughter the lady Ann.

In April 1747, Earl William died, leaving issue the appellant, his only son, and the said Lady Ann, his only daughter, both infants: and thereupon the Countess

of Kerry, his widow, whom he had by his will appointed guardian of his son during her viduity, and sole executrix, by virtue thereof, possessed herself of the Earl's real and personal estates.

The Countess refusing to pay the respondent the £3000 provided by the settlement of 1716, for the Lady Arabella, and agreed to be secured to him as aforesaid, or the interest thereof, or to suffer him to cut down the woods growing on two parcels of land called Cregane and Ballygonloge, claimed by him as sub-denominations or parts of the lands called Bromlegagh, Bally Mac Jordan, and Listowhill, comprised in the said terms of 21 years; the respondent, in Hilary Term 1747, filed his bill in the court of exchequer in Ireland, against the appellant, the said Countess, as his guardian, and as executrix of Earl William's will, the Lady Arabella Denny, the Reverend Barry Denny, administrator of Arthur Denny her deceased husband, and Henry Hargrave, as administrator of John Pratt, the surviving trustee of the several terms for payment of the said £3000 and interest from the death of Earl Thomas; praying, that the same might be a charge in the respondent's favour, on the lands by the settlement of 1716 made chargeable therewith; and also to be decreed the woods, which by the true intent of that settlement, were comprised in the said terms of 21 years, with power to cut down and dispose hereof during those terms; and for an injunction, in the nature of a writ of ~~strep~~-[390]-ment, to stop the cutting of the said woods, and for general relief.

The appellant, and also the Countess, by their answer, insisted, that by the settlement of 1716, Earl Thomas had but a bare power to charge the lands with £3000 for the Lady Arabella, and never did any act that could amount to an execution of that power in her favour; and that the deed of the 8th of April 1725, neither did or ought to induce any charge upon the lands comprised in the 500 years term. And after setting forth the articles of 1692, and settlement of 1693, and the covenant for laying out the £6000, the appellant alledged, that Earl Thomas had denied his son, the appellant's father, a reasonable maintenance, and that taking advantage of his distress, he had forced him into the settlement of 1716, and therefore insisted, that the said settlement ought to receive the strictest construction. He also insisted, that the respondent was not entitled to the woods on Cregane and Ballygonloge, as being grand denominations, and not sub-denominations, or comprised in the said terms of 21 years.

The other defendants having answered, and the cause being at issue, witnesses were examined on both sides. Those for the respondent fully proved the settlement of 1716; the payment of £4000 by Earl Thomas to Arthur Denny, as the portion of Lady Arabella; the deed of the 8th of April 1725; the declared intention of Earl Thomas, to give the respondent the £3000, provided by the settlement of 1716, for Lady Arabella, in lieu of the money by him advanced for her portion; and that the parcels of woodland called Cregane and Ballygonloge, were sub-denominations, and parts of some of the capital or grand denominations comprised in the settlement of 1716.

The appellant examined ten witnesses to prove, that Cregane and Ballygonloge were capital and not sub-denominations: But of these witnesses the first three, upon being cross examined, appeared to have made, at the instance of the appellant's agent and one of his witnesses, extrajudicial affidavits, which the agent afterwards hewed them before their examination in the cause, for their instruction; and four other of the witnesses appeared, by their own confession, to be of the lowest and most indigent class.

Pending this cause, the appellant, by his next friend, filed a cross bill against the respondent, to which he made his mother, as executrix of Earl William, a party; and therein charged the articles of 1692, the settlements of 1693, and 1716, and all the other matters contained in his answer: And after setting forth the covenant for laying out the £6000 in the purchase of lands, charged that Earl Thomas had prevailed on Lord and Lady Shelburne to pay the same to him, upon assurances that he would lay the same out in a purchase; and that he had accordingly, soon after, made several purchases in the county of Kerry, and elsewhere.—That no house was built by Earl Thomas, but only a small addition to an old one. [391] That Earl Thomas having paid with his daughter Arabella a portion of £4000, the said Arthur Denny, and Edward Denny his father, or one of them, released the

£3000 which the Earl had power to raise by the settlement of 1716, for Lady Arabella's portion; and that the said Edward and Arthur Denny, and Lady Arabella, or some of them, exonerated the estate therefrom.—That after the marriage, Earl Thomas, in order to revive the said charge on the estate, had, in 1726 or 1727, perfected an appointment of the said £3000 to the respondent, which, though executed several months after the said release, was antedated.—That if the said £6000 had been laid out in lands, Earl William would have been tenant in tail thereof, with remainder in tail to his brother Thomas and the respondent successively, with a remainder in tail to the Ladies Ann, Arabella, and Charlotte; and that the said £6000 was at the time of perfecting the settlement of 1716, and still ought to be considered as land intailed accordingly; and therefore that Earl William's release could not take away the appellant's right, to have a sum of money invested in lands, equal to the value of £6000 laid out, at or in a reasonable time after Earl Thomas received the same.—That Earl Thomas died possessed of a great personal fortune, of which the respondent possessed himself as his executor; and therefore this cross bill prayed, that the original and cross causes might come on to be heard together, and that the respondent might be compelled to purchase lands of inheritance, equal in value to £6000 laid out when the said sum was paid to Earl Thomas and for general relief.

The respondent, by his answer, denied his belief of the £6000 having been paid to Earl Thomas, upon any assurances of his laying the same out in a purchase; and said, that as no notice was taken in the settlement of 1693, of the agreement in the articles, for laying out the said £6000 in lands, he, the respondent, thought it probable, and therefore believed, that the said agreement was waived, or varied, by all parties interested therein, before Earl Thomas's marriage.—That Earl William had, for a valuable consideration, and without fraud or compulsion, executed the settlement of 1716, and thereby released his right to the £6000, and all benefit of the agreement for laying the same out in lands; and that Earl Thomas had then built a house and offices at Lixnaw, and afterwards made additions thereto, and had made a deer-park, and walled in large gardens, and made great plantations of fruit and forest trees, and several other improvements on the estate; by which, and by obliging his tenants to build, plant, and make improvements, the lands comprised in the settlement were greatly advanced in value, of which the appellant from the death of his father had the benefit.—That the rents, in 1700, amounted to no more than £1453 13s. 9d. but the estate was now lett for near £5000 a year.—He insisted, that Earl William had power, by fine, to bar his issue of the benefit of the intended purchase, in case the same had been made, and of all right to the said £6000 and the lands to be therewith purchased; and that as the money [£3000] was not laid out, but released by Earl William by the settlement of 1716, for £3000 actually advanced for him by his father, and as the common recovery was suffered pursuant to that settlement, the articles of 1692, and settlement of 1693, were thereby totally barred and extinguished; and as Earl Thomas and Earl William would have had an absolute power over the lands, in case the same had been purchased, the appellant ought not to be allowed to impeach the said release, which the respondent insisted upon, in bar of the relief sought by the appellant.

Several witnesses were examined on both sides in the cross cause, who all agreed, that Earl Thomas had been at great expence in building and improving his estate, and that he never cut any of his woods, even for his own use, but bought all he had occasion for.

Both causes came on to be heard on the 7th of November 1750, when the court was pleased to decree, that the respondent was entitled to, and should recover the £3000 and interest from the death of Earl Thomas, and that the same should stand a charge upon the towns and lands comprised in the term of 500 years, pursuant to the settlement of 1716, on account of the portion provided for the Lady Arabella, and directed an account thereof accordingly; and that if within twelve calendar months from the time of the report being confirmed, the said principal and interest, and the growing interest, should not be paid to the respondent, then the same should be raised by sale, or mortgage of the residue of the said term, and that all necessary parties should join in the conveyance. And it was further decreed, that the respondent and appellant should, at the next assizes for the county of Kerry, try the

following issue, viz. whether the lands of Cregane and Ballygonloge, or either and which of them, were grand denominations or sub-denominations, or part of the towns and lands of Bally Mac Jordan, Drumlegagh, and Listowhill, or of any and which of them; and that the appellant's cross bill should be dismissed without costs.

From this decree the appellant thought proper to appeal, insisting (T. Clarke, A. Forrester), that the settlement of May 1716 was obtained from Earl William his father, within two months after he came of age; when he was destitute of subsistence, and under the influence of parental authority, and was in the nature of it extremely hard and unreasonable: For by the settlement of 1693, made in pursuance of the prior articles, Earl William was tenant in tail of the whole estate, subject only to a charge of £4000 for his father and mother's younger children; whereas, by the settlement of 1716, he was made to release the £6000, which was to be laid out in land of which he was to be tenant in tail, as well as of the rest of the estate; his interest in tail was reduced to a mere tenancy for life; the estate was subjected to provisions of £3000 a-piece for every younger child of Earl Thomas and his wife, of whom there were no less than four then living; and Earl Thomas was invested with a power of selling all the wood and timber growing on the estate. [393] That this settlement was submitted to, in consideration only of £3000 laid out in a commission for the son's immediate support; and that a settlement obtained by a father from his son upon such hard and unequal conditions, deserved no favour, but every act done under it should be construed rigorously and strictly, and receive no aid or assistance in a court of equity. That Earl Thomas's paying Lady Arabella's portion, either out of his own money, or with what he might borrow from the respondent, would not of itself, and without any further act, have substituted him in her place, so as to make him be considered as an incumbrancer upon the estate: And the deed of the 8th of April 1725, was not such a further act, as made or continued her portion an actual charge on the land, but was only a covenant to do a future act for securing the £3000 said to have been lent by the respondent; and had Earl Thomas's intent been to charge the estate at all events with the £3000 portion to Lady Arabella, it was impossible to assign a reason why it was not done by him at the time of making this deed, it being as easy to do it then as to enter into such a covenant: But this proved, that he only meant to reserve to himself the power of charging or not charging the estate with Lady Arabella's fortune, according as the circumstances of his affairs and family might require; and as he did no subsequent act to shew his intent of charging the estate therewith, it ought not to be raised upon the appellant, who was sufficiently prejudiced by the execution of the large powers conferred on Earl Thomas by the settlement of 1716; and especially in favour of the respondent, who either did or did not advance the £3000 for Lady Arabella; if the latter, the covenant was merely voluntary; and if the former, he was more than amply satisfied by the large bequests to him in Earl Thomas's will. That a release of the 22d of October 1737, to Earl Thomas from Mr. Denny, of all demands upon the Earl and his heirs, and their lands and tenements, and the Earl's will of the 22d of April 1738, afforded further proof that he did not intend Lady Arabella's portion should remain a charge upon the estate; for had he so meant, he would, instead of a release of the portion, have taken an assignment of it from Mr. Denny; and his will, reciting the powers given to him by the settlement of 1716, the death of Thomas, one of his younger children, and Lady Arabella's marriage, and then only charging the estate with £3000 portion for the respondent, without taking any notice of Lady Arabella's portion, plainly proved, that he had then in view and contemplation, as well the settlement, as the estate of his family with relation hereto, and yet he only charged the estate with £3000 for the respondent's fortune; and as to the fortunes of the younger children, the will put his daughter Arabella's marriage upon the same footing with his son Thomas's death, and therefore charged no portion for either of them. These two acts, subsequent to the deed of the 8th of April 1725, evidently shewed, that Earl Thomas did not intend Lady Arabella's fortune should be raised out of the estate.

[394] It was also contended, that the court should not have directed an issue as to Cregane and Ballogonloge, but as to them should have dismissed the respondent's bill; for they were by express names, and as distinct from the other denominations of Bally Mac Jordan, Drumlegagh, and Listowill, granted by the settlement

of 1716 to trustees for the uses therein declared, and yet were neither by express names, or by general words comprised in either of the 21 years terms; and it was very hard to say, that though they were kept separate and distinct, in the granting part of the deed, they should, in the other part for raising the terms, be included within, and considered as part of other denominations, from which they were clearly separated in the granting part. Thus the words, Drumlegah, Bally Mac Jordan and Listowill, must be taken more largely in one part of the deed than the other, which was contrary to all rules of construction, and might probably work a wrong by bringing within these terms what Earl William never thought or intended to be comprised therein; since, upon reading the deed of 1716, no body would imagine Cregane and Ballogonloge to be comprised in the terms, they being expressly mentioned in the granting part, and no sort of notice taken of them in the terms. That the written agreement of the parties was the best interpreter of their intent, without recurring to extrinsic facts for extending beyond their natural import the words of a grant which had already had its proper and full effect; the respondent admitting by his answer to the appellant's cross bill, that he had received £8800 for the sale of part of the wood growing on the appellant's estate. Lastly, that the release of the £6000, comprised in the settlement of 1716, had no reasonable consideration for its support, and was liable to the same objections as the rest of that settlement; and this sum being paid to Earl Thomas, and stipulated to be laid out in land, could not be affected by the fines and recovery suffered by him and Earl William, so as to bar the appellant, who claimed as issue in tail the lands to be purchased with that £6000, and therefore it was hoped, that the decree complained of would be reversed, the original bill dismissed, and such order and decree made on the cross bill, as should be agreeable to the rules of equity and justice.

On the other side it was said (D. Ryder, W. Murray), that there was no proof, nor even the slightest presumption of Earl William's having been brought into the settlement of 1716 by fraud, surprise, distress, or any other undue means: and that from the time of executing that settlement, to his father's death in 1741, he never sought to be relieved against it, or ever complained of its being any hardship upon him. That his marriage articles, the settling a jointure upon his lady in pursuance of those articles, and in execution of his powers under the settlement of 1716, the act of parliament, and his last will, (all which, except the articles, were subsequent to the death of his father), were so many acts expressly admitting the validity of that settlement, and so many testimonies of his free and unconstrained submission thereto. That after an acquiescence of 31 [395] years, and so many repeated acts confirming the settlement of 1716, Earl William could not, were he now living, be relieved by a court of equity against that settlement, upon the mere point of inequality in the bargain, or any other circumstance appearing in this cause: And if he who was tenant in tail, and whose estate tail was by the settlement of 1716, and the recovery then suffered, turned into a bare estate for life, whereby he was manifestly a loser, could not be relieved; much less was the appellant entitled to relief against this settlement and recovery, who was clearly a gainer by it; as it effectually secured to him the reversion of a large estate, which under the old settlement Earl Thomas would have had it in his power to deprive him of. That the small provision made by the articles of 1692, and settlement of 1693, for the younger children of an ancient and noble family, the advanced value of the estate from 1692 to 1716, and the prospect of its further advancing, which had actually happened, it being now near £5000 a year, required some further provision for the younger children; a provision in some degree proportioned to their rank and quality, and the value of the family estate: And that part of the settlement whereby the estate was secured to the issue of Earl William, even against their own possible acts, was a wise and prudent disposition, being calculated to secure the estate to support and go along with the honours of the family, and therefore ought to receive all possible countenance and protection from a court of equity. That the bargain between Earl Thomas and his son, could not in any view of it be called a hard one: The additional charge induced on the estate for younger children by the settlement of 1716, was only £5000, payable on the death of Earl Thomas, who lived to the year 1741; in consideration whereof, Earl Thomas, after having given his son a most liberal and expensive education, made a most honourable



provision for him by the purchase of a company in the guards at the expence of £3000, laid out upwards of 25 years before his death; and the great sums expended by him in the improvement of the estate, by which great part of it was doubled in its value, seemed to be a sufficient consideration for releasing the £6000 agreed to be laid out in a purchase, if any consideration had been necessary to render such a release effectual. Besides, the £3000 paid by Earl Thomas in discharge of the £3000 incumbrance due to his brother William, though not mentioned as a consideration in the settlement of 1716, must be considered as an additional consideration to Earl William for coming into that settlement, Earl Thomas being under no kind of obligation to discharge that sum. And as the term of years granted by Lord William in 1696, for securing this £3000 was still subsisting; the respondent as executor of his father would be entitled to that sum, if his father's title to it was not extinguished by the settlement of 1716. That the value of the woods was inconsiderable in the year 1716, and the present value was owing to the great care and expence which Earl Thomas was at in preserving them. Under the settlement of 1693, he might at any time during [396] his life have disposed of all these woods as he thought proper, and was under no necessity of preserving the young growth; so that the difference to him under the two settlements respecting the woods, was only this, that the settlement of 1716 continued to his executors that property in and power over them, which he himself had in his lifetime.

As to the £6000 mentioned in the articles of 1692, it having neither been laid out in a purchase, nor paid to or vested in trustees, or otherwise laid out pursuant to those articles; and the subsequent settlement being quite silent about the laying out that money, and even as to the agreement for laying it out; it afforded a strong presumptive proof, that the agreement was rescinded or waived by the parties before Earl Thomas's marriage. That there was no other proof of the payment of this £6000 to Earl Thomas, than the respondent's admission in his answer, *that he believed the same was paid, having seen an account of his mother's writing, wherein £4000 thereof is mentioned to have been applied in October 1703, in discharge of his uncle William's portion of £3000 and interest, charged on the estate by the settlement of 1693*; which application, so far as the principal at least, was virtually a performance of the agreement touching the £6000; since the extinguishment of an incumbrance was equally beneficial to Earl Thomas's successors, as the purchase of a new estate would have been. For if this £6000 had been laid out in a purchase, a fine levied thereof by Earl William, would have been sufficient to bar his issue; in consequence of which it was apprehended, that Earl William's release of the covenant to make such purchase, and the benefit thereof, was a sufficient bar in a court of equity to the issue in tail, though not to the remainders, as much as if the immediate remainders in fee had been in Earl William. That as the old entail was destroyed by the settlement and recovery in 1716, and the appellant must now therefore claim under that settlement a large estate, which his grandfather and father might have deprived him of, and given away from him as they thought fit; a court of equity ought never to suffer him to dispute the validity of the release of the £6000 contained in a settlement of which he enjoyed the benefit. For whoever will claim under one part of a deed, shall not disturb or disappoint any other part of the same instrument; and therefore, the appellant ought either to give up his claim to the covenant, or quit his pretensions to the estate.—With respect to the £3000 originally designed for the portion of Lady Arabella Denny, Earl Thomas had, by the settlement of 1716, a power, by deed or will, to distribute the money charged on his estate for the portions of his younger children, in what proportions he thought proper; so that although he could not distribute amongst his three younger children, the respondent and his two sisters, more than £9000, yet he was at liberty to give the whole, or what share of it he thought proper, to any one of them. But supposing Earl Thomas had no such power of distribution, yet as he paid Lady Arabella's portion out of his own pocket, and constantly declared his intention [397] of giving the £3000 charged on the estate in her favour to the respondent, in recompence of the ready money which he intended for him, and which he was obliged to pay away in part of the portion of Lady Arabella; and as he manifested such intention soon after her marriage, by the deed of April 1725; and as Earl Thomas was by the payment of this portion a purchaser thereof in

equity, and might have disposed of the same in what manner he thought proper: the respondent was well entitled to it in equity, under the deed and will of his father. And though he neglected to make any charge of the portions of his younger children, in pursuance of his power, yet by the express words of the settlement of 1716, the estate would have remained charged with £3000 for each of them.

And as to that part of the decree directing the issue, it was conceived, that as the lands of Cregane appeared to have been enjoyed as part and parcel of Drumlegagh and Bally Mac Jordan for upwards of threescore years past, ever since the year 1693, or 1694; and as Ballygonloge appeared by the articles of 1692, by old rent-rolls, and by the abundant testimony of credible witnesses, to be part and parcel of the lands of Listowill; the respondent was the only person aggrieved by this order, and the appellant had not the least cause to appeal therefrom.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that as much of the decree therein complained of as directed, "that an issue at law should be tried, whether the lands of Cregane and Ballygonloge, or either and which of them, be grand denominations, or sub-denominations, or part and parcel of the towns and lands of Bally Mac Jordan, Drumlegagh, and Listowill, or of any and which of them," should be reversed; and that, instead thereof, these words should be inserted, viz. "Whether the lands of Cregane and Ballygonloge, or either and which of them are comprised in the description of the towns and lands of Listowill, Drumlegagh, and Bally Mac Jordan, or any and which of them, in the limitation of the term of 21 years created in the towns and lands last mentioned, by the indenture of the 11th of May 1716, according to the true intent and meaning of the said indenture:" And it was further ORDERED and ADJUDGED that, with this variation, the said decree should be affirmed: And it was further ORDERED, that the said court of Exchequer should give directions for carrying this order and judgment into execution. (Jour. vol. 27. p. 679.)

[398] CASE 2.—JOHN JEFFREYS, et Ux.,—*Appellants*; ISAAC REYNOUS, et Ux.,—*Respondents* [1st April 1767].

[See *Fry v. Sherburne* (Lord) 1829, 3 Sim. 258: *Wakefield v. Maffet*, 1885, 10 A. C. 422.]

By a settlement made previous to the marriage of A. and B. certain exchequer annuities were vested in trustees, in trust for the husband for life, then to the wife for life, and after both their deaths, for the children of the marriage equally, if more than one; and if but one, for such only child; to be assigned over to such child or children respectively, at their ages of 21, happening after the death of the survivor of the father and mother; but if either of the children should attain 21 during the joint lives of the father and mother, or the life of the survivor, then his or her share was to be paid within three months after the death of such survivor. But if there should be no children of the marriage, or being such, all of them should die before their shares should become transferable as aforesaid, then the annuities were to go to the survivor of the husband and wife. There was issue only one son, who attained 21, but died in the lifetime of his mother, who survived her husband. And upon a question between her and the son's executor, who was entitled to these exchequer annuities? it was held, that they became vested in the son on his attaining 21, and were transmissible and deviseable by him, notwithstanding he died in his mother's lifetime.

DECREE of Lord Northington, C. AFFIRMED.

I. S. gives all his personal estate to trustees, in trust, to pay the interest thereof to his wife, so long as she should continue his widow, but if she married again, then he directed his trustees to pay her an annuity of £110 and no more during her life; and in that case, he gave the residue of his estate to his son P. but made no disposition thereof in the event of his wife's not marrying again. The wife did not marry; and upon a question to whom this residue belonged, the court held that it belonged to the representatives of the son, who had attained 21, and died in his mother's lifetime.

By indenture made previous to the marriage of Peter Naizon with Margaret Prevèreau, dated the 14th of December 1739, between the said Peter Naizon and Martha Naizon his mother, of the first part, Daniel Prevèreau esquire, and the said Margaret Prevèreau his daughter, of the second part, and Peter Simond, of the third part; reciting, that the said Daniel Prevèreau being possessed of six several exchequer annuities of £15 each, the same had been assigned to the said Daniel Prevèreau and Peter Simond, and that a marriage was then intended between the said Peter Naizon and Margaret Prevèreau; it was witnessed, agreed, and declared, that the said Daniel Prevèreau and Peter Simond, and the survivor of them, and the executors and administrators of such survivor, should stand and be possessed of and interested in the said several annuities, in trust, after the marriage, to permit the same to be received by the said Peter Naizon and his assigns, during his life, and after his decease, by the said Margaret Prevèreau and her assigns, during her life; and after the decease of the said Peter Naizon and Margaret Prevèreau, that then the said Daniel Prevèreau and Peter Simond, their executors and administrators, should stand and be possessed of the said annuities, in trust for all and every the child and children of the said Peter Naizon, on the body of the said Margaret Prevèreau to be begotten, in equal shares and proportions if more than one, and if but one such child, in trust for such only child, to be paid, assigned, and made over to such child and children respectively, at their respective ages of 21 years, happening after the death of the survivor of them the said Peter [399] Naizon and Margaret Prevèreau; but if either of them should attain the age of 21 years, during the joint lives of the said Peter Naizon and Margaret Prevèreau, or in the lifetime of the survivor of them, then his, her, and their share and proportion of and in the said annuities should be paid, assigned, and made over to him, her, or them respectively, within three months after the death of such survivor, unless the said Peter Naizon and Margaret Prevèreau, or the survivor of them, should during their joint lives, or in the lifetime of the survivor of them, direct and appoint the share and proportion of any of the said children to be assigned to him, her, or them respectively sooner, which it should be lawful for him and them to direct and appoint accordingly; and upon further trust, that they the said Daniel Prevèreau and Peter Simond, their executors and administrators, should, after the decease of the said Peter Naizon and Margaret Prevèreau, pay the yearly produce and income of the said annuities, for and towards the maintenance and education of the said child and children, until his, her, and their shares and proportions thereof should become assignable.

In this deed there was a proviso, that if any of the children of the said marriage should die, before his, her, or their share or proportion of the said annuities should become assignable as aforesaid, then the share and proportion of him, her, and them so dying, should go, accrue, belong, and be paid to the survivors and survivor of them, when his, her, or their original share and proportion thereof, should become assignable and transferrable as aforesaid. And another proviso, that if there should be no child or children of the marriage, or there being such, all of them should die before any of their shares and proportions of the said annuities should become transferrable as aforesaid; then the said Daniel Prevèreau and Peter Simond, their executors and administrators, should stand and be possessed of the said annuities, orders, and tallies, and all benefit and advantage thereof, in trust for the said Peter Naizon and Margaret Prevèreau, and the survivor of them, and the executors, administrators, and assigns of such survivor: And it was thereby further agreed and declared, that the said Daniel Prevèreau and Peter Simond, their executors and administrators, should stand possessed of three several long annuities of £50, £25, and £25 (which had been assigned and transferred to them for that purpose) in trust, to permit and suffer the yearly income and produce thereof to be received by the said Martha Naizon and her assigns, during her life; and after her decease, upon such and the same trusts, and to and for such and the same ends, intents, and purposes as were before declared of and concerning the said six several annuities of £15 each.

The marriage soon afterwards took effect, and on the 24th of January 1750, Peter Naizon died possessed of a considerable personal estate, leaving Margaret his wife surviving, and Prevèreau Naizon the only child of the marriage, an infant.

Peter Naizon before his death duly made his will, dated the 19th of May 1749,

and thereby devised a leasehold estate to his wife [400] Margaret Naizon, her executors, administrators, and assigns; and after reciting that he had, by articles executed upon and previous to his marriage, made some provision for his said wife, he ratified and confirmed the same in all things, and gave her all such household goods, plate, linen, furniture, and implements of household as he should die possessed of, and all the ornaments of her person; he then devised as follows: "*Item*, I give, devise, and bequeath unto my good friends and relations, Peter Simond and James Cleopas Simond, of London, merchants, and their heirs, executors, administrators, and assigns respectively, all such stocks, funds, mortgages, and securities for money, and all other my personal estate whatsoever and wheresoever, and of what nature or quality soever the same be, not by me otherwise already disposed of, or hereafter to be disposed of, after and subject to the payment of my just debts and funeral charges, and all my estate and interest therein, upon trust, that they my said trustees, or the survivor of them, his heirs, executors, administrators, or assigns, shall and do pay and apply the interest, dividends, and annual produce thereof, unto and to the use of my said dear wife, for and during such and so long time only, as she shall continue my widow, and be and remain sole and unmarried; but in case my said dear wife shall, after my decease, intermarry with any after-taken husband, then my express will and meaning is, and then and in such case, I do direct my said trustees, and the survivor of them, his heirs, executors, administrators, or assigns, to pay to my said wife the yearly sum of £110, and no more, by and out of the interest, dividends, and produce of my personal estate, for and during the term of her natural life, over and above the provision made for her by her marriage articles, such payment to be made by two equal half-yearly payments, the first payment thereof to begin at the end of six calendar months next after my decease; and my will is, that such yearly sum of £110 shall not be subject or liable to the debts, controul, or engagements of any after-taken husband, but shall be paid to her own proper hands only, and that her receipt, notwithstanding her coverture, shall be a good and effectual discharge from time to time, and at all times, to my said trustees, or to either of them, or to the person or persons who shall pay the same; and then and in such case, I will and direct my said trustees to pay, apply, and dispose of the residue and overplus of the interest, dividends, and annual produce of all my stocks, funds, and securities for money, and of all other my personal estate, for and towards the maintenance and education of my son Prevèreau Naizon, and of all other the child and children by me begotten, or to be begotten on the body of my said dear wife, and for the better advancement and preferment in the world of all such child and children, in such proportion, manner, and form, as my said trustees, or the survivor of them, his heirs, executors, administrators, or assigns, shall in his or their discretion think fit, and most conducive to the benefit and advantage of my said son, and of all such other child or [401] children begotten or to be begotten by me on the body of my said dear wife, until my said son, and such other child or children on her body by me begotten or to be begotten, shall attain his, her, or their age or ages of 21 years respectively; and my will is, that then and in such case, all my stocks, funds, mortgages, and securities for money, and all other my personal estate whatsoever and wheresoever, over and above what shall be sufficient to answer and pay to my said wife the said clear yearly sum of £110, for and during the term of her natural life, shall be received by my said trustees and the survivor of them, his executors, administrators, and assigns, in trust, to and for the use and benefit of my said son Prevèreau Naizon, and of all such child and children, as is, are, or shall be by me begotten on the body of my said dear wife, equally between them, share and share alike, if more than one, to be paid, assigned, and transferred to him, her, and them severally, if more than one, at his, her, and their respective age and ages of 21 years; and if there shall be but one such child, who shall live to attain the age of 21 years, then my will is, that the whole residue and remainder of my personal estate shall go and be paid, transferred, and conveyed to such only child, at the like age of 21 years, and that, from and after the death of my said wife, such sums of money and securities as shall be reserved to answer and pay the said yearly sum of £110, to and to the use of my said dear wife, for and during the term of her natural life, shall also go to, and be equally divided amongst, all the children on her body by me begotten or to be begotten, who shall be then living, if there shall be more than one, and if there shall be but one, that then such sums of

money and securities, whatsoever the same shall be, shall also go and be paid or conveyed to such only child; and in case it shall so happen that my said son Prevereau Naizon shall depart this life before he shall attain his age of 21 years, and without leaving any issue by him lawfully begotten, and that I shall have no other child by my said wife born in my lifetime, or in due time after my decease, or there being such, all of them shall die in the lifetime of their said mother, and before any one of them shall attain the age of 21 years, then and in such case my will is, and I do hereby authorize and empower my said dear wife to give, dispose, limit, and appoint, the sum of £10,000, part of my personal estate, by deed or will, to be executed by her in the presence of two or more credible witnesses, to such person and persons, and to or for such use or uses, intents and purposes, and in such proportions, manner, and form, as my said dear wife, in case of such contingency happening as aforesaid, shall in her discretion think proper; and then also (that is to say) in case my said son Prevereau Naizon shall die before 21, and in the lifetime of his said mother, and that I shall have no child or children on her body by me begotten, who shall live to attain the age of 21 years, my will is, and I give, devise, and bequeath all the rest and residue of my stocks, [402] funds, securities for money, and personal estate, whatsoever and wheresoever, over and above the said sum of £10,000 which I have hereby given my wife a power to dispose of upon such contingency happening as aforesaid, unto and amongst the above named Peter Simond and James Cleopas Simond, and to and among their three sisters Catherine Simond spinster, Elizabeth the wife of Patrick Mackay, and Lydia the widow of Mr. Fregier, deceased, Francis Naizon, of Lisbon, merchant, and Combercrose, apothecary, equally between them, share and share alike, and in case of the death or deaths of any one or more of them, then to the survivors or survivor of such of them as shall be living, when (if ever) such legacy or bequest shall become payable to them, or the survivors or survivor of them." And the testator appointed his said wife, so long as she continued his widow, sole and unmarried, and the said Peter Simond, guardians over the person and estate of his said son Prevereau Naizon, and appointed the said Peter Simond and James Cleopas Simond executors of his will.

The executors proved the will, and James Cleopas Simond soon after dying, Peter Simond became surviving executor, and possessed such part of the testator's personal estate as was not specifically disposed of.

Prevereau Naizon attained his age of 21, on the 28th of August 1762, and being ignorant of the settlement made previous to the marriage of his father and mother, and advised that under his father's will, he was entitled to the residue of his personal estate, subject to such interest therein as Margaret his mother was thereby entitled to; he, on the 2d of May 1763, filed his original bill in the court of chancery, against the said Margaret Naizon his mother, and Peter Simond, for an account of the personal estate of the testator Peter Naizon, and to have the residue thereof paid unto court upon the trusts of the will; and that the interest of so much thereof, as Margaret Naizon his mother should by such will be entitled to for her life, might be paid to her, and that the said residue, or the stocks, funds, or securities, in which the same should be then standing out, might on her death be paid or transferred to him.

Soon afterwards, Prevereau Naizon intermarried with the respondent Elizabeth, and on the 28th of June 1763, he died without issue, having made his will, dated the 7th of June 1763, and thereby, after giving some pecuniary legacies, gave one full moiety of the residue of his estate and effects to the respondent Elizabeth his then wife, or her own benefit; and the other moiety thereof, to the child and children of his body, lawfully begotten or to be begotten (if more than one) equally between them, but in case he should not have any such child or children, he gave the said last-mentioned moiety of his estate to his said wife, her heirs, executors, administrators, and assigns for ever, to and for her and their own proper use and benefit, and appointed her sole executrix of his will, which she afterwards proved.

[403] The respondent Elizabeth on the 8th of November 1763, exhibited her bill for revivor and supplement, to revive and have the benefit of the former suit and proceedings, against the said Margaret Naizon and Peter Simond, and made Charles de Saily, a defendant thereto; and by way of supplement stated the will, and death of Prevereau Naizon without issue, and that by virtue thereof she was become entitled to the residue of the personal estate of the said Prevereau Naizon, and to the residue

of the personal estate of the testator Peter Naizon his father, subject to such right or interest therein, as was given to the said Margaret Naizon, by the said Peter Naizon's will, and to such provision as the said Prevereau Naizon was at his death entitled to, by virtue of any settlement made previous or subsequent to the marriage of his said father and mother, as being the only issue of such marriage; and therefore prayed such relief in the premises, as was sought and prayed by the original bill of the said Prevereau Naizon, except such as should be necessary to be varied by reason of his death.

The suit being afterwards revived, the said Peter Simond and Charles de Saily put in their answer, and therein disclosed the purport of the settlement, which had been made previous to the marriage of Peter Naizon with the said Margaret Prevereau. But Margaret died before she had put in her answer to this supplemental bill, having first made her will, and appointed the appellant Elizabeth her executrix and residuary legatee.

This occasioned another supplemental bill to be filed by the respondent Elizabeth against the appellants, and the said Peter Simond and Charles de Saily, in which she stated the settlement of December 1749, and insisted that she, as executrix and residuary legatee of Prevereau Naizon, did, upon the death of Margaret, by virtue of the said settlement, become entitled to the several Exchequer annuities of £50, £25, and £25, and the other six annuities of £15 a year each, and to the residue of the personal estate of the said Peter Naizon; and prayed an account of such personal estate, not specifically bequeathed, and that the residue thereof might be paid, assigned, and delivered over to her accordingly.

The appellants, by their answer to this bill, insisted, that the respondent Elizabeth did not, upon the death of Margaret Naizon, become entitled by the will of Prevereau Naizon or otherwise, to the said several Exchequer annuities; but that upon the death of Prevereau Naizon, in the lifetime of Margaret his mother, the same vested in the said Margaret, by virtue of the said settlement. And they also insisted, that Peter Naizon had not by his will disposed of the residue of his personal estate, save only in the event of his wife's marrying a second husband, and that she having continued a widow to the time of her death, the appellants, in right of the appellant Elizabeth, the residuary legatee and sole executrix of Margaret Naizon, did on her death become entitled to one third part of such residue, and the respondent Elizabeth to the other two third parts thereof, as the executrix and residuary legatee of Prevereau Naizon.

[404] On the 8th of August 1764, the respondents intermarried, and the suit thereby abating, they in November following, filed their bill of revivor and supplement; and the six annuities of £15 each, having been paid off and converted into £3000 three per cent. consolidated Bank annuities, the respondents thereby prayed an account of the personal estate of Peter Naizon, and that the said three long Exchequer annuities of £50, £25, and £25, and the said £3000 three per cent. consolidated Bank annuities, might be transferred and assigned; and that the said Peter Simond, as surviving trustee and executor of Peter Naizon, might transfer the several funds wherein the residue of the personal estate of the said testator Peter Naizon stood invested, to the respondents.

The suit being afterwards revived and at issue, the same was heard on the 8th of July 1765, before the master of the rolls, when his honour was pleased to declare, that according to the true construction of the settlement made on the marriage of Peter Naizon and Margaret his wife, the said Prevereau Naizon their only child, who lived to attain the age of 21, did, on his attaining such age, become entitled to the said three long Exchequer annuities of £50, £25, and £25, and the £3000 three per cent. Bank consolidated annuities, standing in the names of Peter Simond and Charles de Saily, subject to the interest for life of Margaret Naizon his mother therein: and that the same, upon his death, became transmissible to his representatives, and that the respondents in right of the respondent Elizabeth, as she was his executrix and residuary legatee, were entitled to the same under the will of the said Prevereau Naizon, as part of his general personal estate, and also to the yearly payments and interest of the said Exchequer annuities and Bank annuities, from the death of the said Margaret Naizon the mother; and it was accordingly ordered, that the defendant Simond and de Saily should transfer the said £3000 three per cent. Bank con-

solidated annuities, and that the defendant Peter Simond should assign the said three long Exchequer annuities, to the accountant general, in trust in the cause, and deposit the orders and tallies in the Bank, with the privity of the accountant general; and it was referred to the master, to take an account of the annual payments of the said Exchequer annuities, and the interest of the said Bank annuities, accrued since the death of the said Margaret Naizon the mother, received by the defendant Simond, or any other person by his order, or for his use; and it was ordered, that the said defendant should pay what should be found due from him on that account into the Bank, with the privity of the accountant general, to be placed to the credit of the cause on the respondent's account; and in case any of the said annual payments and interest, accrued since the death of the said Margaret Naizon, did remain un-received, it was ordered, that the defendant Simond should receive and pay the same into the Bank, with the privity of the accountant general, to be placed to the credit of the cause, subject to the further order of the court; and the master was to take an account of the personal estate of the testator Peter Naizon, [405] not specifically bequeathed by his will, come to the hands of the said defendant Peter Simond, or any other person by his order, or for his use; and in taking that account, the master was to distinguish how much consisted of interest, accrued in the lifetime of Margaret Naizon, and what the master should find to have accrued for interest, in her lifetime, was to be paid to the appellants; and the testator's personal estate was to be applied in payment of his debts and funeral expences, in a course of administration; and his honour did also declare, that according to the true construction of the will of the testator Peter Naizon, the clear surplus of his personal estate, not specifically bequeathed, by the event which had happened, was undisposed of, subject to the life estate therein of Margaret the testator's widow, and that the same became distributable between the said Prevereau Naizon deceased, as the only child and next of kin of the testator, and the said Margaret Naizon deceased, according to the statute made for distribution of intestates estates; and the principal of such *residuum* was to be divided into three equal parts, and one third part thereof was to be considered as the personal estate of the said Margaret Naizon deceased, and belonging to the appellant Elizabeth, as her executrix and residuary legatee, and that the two remaining third parts thereof belonged to the respondents, in right of the respondent Elizabeth; and it was further ordered, that such residue of the personal estate of the said Peter Naizon, should be divided accordingly.

From this decree both parties appealed to the lord chancellor: The respondents, as to what related to the clear surplus of the personal estate of Peter Naizon, and the directions given touching the same: And the appellants, as to what related to the funds mentioned in the settlement made on the marriage of Peter Naizon with Margaret Prevereau, and the directions given relative thereto.

On the 1st of February and 26th of April 1766, these appeals came on to be heard before the Lord Chancellor Northington, when he was pleased to order that part of his Honour's decree to be reversed, whereby it was declared, "That the clear surplus of the testator's personal estate, not specifically bequeathed, by the event which had happened was undisposed of, and that the same became distributable according to the statute of distribution, and which directed a division of such estate accordingly:" And his lordship declared, that the clear surplus of such personal estate of the testator Peter Naizon, was bequeathed and given after the death of Margaret his wife, to his children by her, or either of them that should attain the age of 21; and that therefore such clear residue did belong to the respondents as the representatives of the said Prevereau Naizon. And with respect to the appeal brought by the appellants, the decree was affirmed; his lordship concurring in opinion with the master of the rolls, as to the true construction of the settlement.

[406] From so much of this latter decree, as affirmed that part of the former which related to the marriage settlement, and reversed what related to the construction of the will, the present appeal was brought; and on behalf of the appellants it was contended (C. Yorke, C. Ambler), that as to the settlement, the trust of the exchequer annuities being declared in this manner, viz. that if any child of the marriage should attain the age of 21, during the life of his father and mother, or the survivor of them, the annuities should be paid, assigned and made over to him, within three calendar months after the decease of such survivor, unless the father and mother, or the sur-

vivor, should, in their lifetime, appoint the share of any child to be assigned to him: And the second proviso declaring, that if all the children should die before the said annuities *should become transferrable as aforesaid*, then the benefit of the trust should go to the surviving parent; and Prevereau Naizon having died in the lifetime of his mother, the mother, upon that event, became entitled to the benefit of this trust, by the express words of the proviso. It was however objected, that the word *transferable* in the proviso, meant the same as *vested*; and that the annuities became vested in Prevereau the son, on his attaining 21, in the lifetime of his mother. But it was said, that this construction was merely arbitrary, it being contrary to the intention of the parties to the settlement, and the express import of the words, which referred to the time when the fund should be actually assigned and made over to a child or children, *i.e.* at the death of the surviving parent: In short, two contingencies were required to concur, in order to vest the provision absolutely in a child: one, that such child should attain the age of 21, the other, that it should outlive the father and mother.

As to the will, it was to be observed, 1st, That the testator had not given the trust of his personal estate to his wife during her life, but during her widowhood only: if she married again, he directed his trustees to pay her out of the produce of his personal estate, the annual sum of £110 only; and it was upon this contingency of his wife's second marriage, that he had grounded every subsequent disposition which he made. For upon the most accurate examination of every following clause, it would be found, that the words *then and in such case*, or some restrictive and connecting words equivalent to them, confined the disposition therein made, to the event of such second marriage, which in fact never happened: And though such a disposition might seem extraordinary, it was not without precedent; and it was submitted, that the construction of the will must be made from the words of it, and the manner in which the testator had expressed his intention, without regard to the consequence of such construction. In the event which had happened, the residue was undisposed of; in which case, the respondents would still be entitled to two parts out of three of such residue; and there could be no just cause to complain of the distribution made by the wisdom and justice of law in case of an intestacy; which mode of disposition would [407] probably in this case have been agreeable to the testator himself, had he foreseen the event which had happened. But, 2d, there was even in this event no express disposition, and a disposition could not in this case be implied by any rule of construction, whatever might have been the case, if the residue was to go entirely the same way in both events. There was no instance of such implication, where the estate went different ways in the different events. If the widow had married again, Prevereau the son would not have been entitled, under the will, to the fund directed to be set apart to answer the annuity of £110 to his mother; because the money constituting that fund was given to the child or children who should be living at her death, and Prevereau died in her lifetime; and in the event which had happened, of the mother not marrying again, the respondents, as standing in the place of Prevereau the son, claimed and had obtained a decree for the whole residue.

On the other side it was insisted (W. de Grey, E. Willes), that the testator Peter Naizon had by his will made a compleat disposition of his fortune; as it appeared by the whole tenor of it, that he did not mean in any event to die intestate. If the supposed intestacy was to take place upon the widow's not marrying again, the provision under the will for his only child, would entirely depend on the conduct of the widow; and such child would be provided for, only in case the widow did that which the testator wished her not to do: And if she continued a widow, in pursuance of the intention and inclination of the testator, then, according to the construction contended for by the appellants, the only child of the testator was to lose all the provision intended for him by the will. But the true intent and meaning of the testator plainly appeared to be, that in all events, his child was to take the personal estate after the death of the mother; but in case she married again, the child was to be let into a considerable part of it, even in her lifetime. That the three long Exchequer annuities, and the £3000 three per cent. consolidated Bank annuities, must be considered as portions provided for the children, under Peter Naizon's marriage settlement; and that the same became absolutely vested in Prevereau Naizon his only child, on his attaining 21; and on his death, were transmissible and deviseable to the respondent



Elizabeth his wife, notwithstanding he died in the lifetime of his mother. But if the vesting of these annuities was to be postponed till after the death of the survivor of the father and mother, it might happen, that in case an only son should come of age and marry, and die leaving children, in the lifetime of either his father or mother, such grandchildren would be deprived of their parent's portion; which would be a very hard and unnatural construction of a settlement, made for the benefit of the issue of the marriage.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of affirmed. (Jour. vol. 31, p. 549.)

[408] CASE 3.—JOHN NEWTON, *Appellant*; WILLIAM NEWTON, and another,—*Respondents* [6th May. 1773].

[Mews' Dig. x. 1622.]

A settled estate is sold, but no part of the money is laid out in the purchase of other lands; yet the court will, under certain circumstances, presume an agreement between the parties interested, that it should be so laid out; and upon such presumption will decree the money to that person who would have been entitled to the land, if any purchase had been made.

DECREE of Lord Bathurst C. REVERSED.

By indenture of lease and release, dated the 1st and 2d of February 1714, between John Newton and Mary his wife, the widow of Ewens Messenger, of the first part; Mary Messenger, one of the daughters of the said Mary Newton by the said Ewens Messenger, of the second part; Brailsford Newton and Elizabeth Messenger, another daughter of the said Mary Newton by the said Ewens Messenger, of the third part; and Sir Gervase Clifton, bart. William Norton, William Newton, and Richard Walburge, of the fourth part; reciting indentures of lease and release, of the 1st and 2d of April 1710, between John Messenger, eldest son and heir of the said Ewens Messenger, of the first part; the said William Norton and William Newton of the second part; and the said John Newton and Mary his wife, of the third part; whereby all that messuage or tenement with the appurtenances called Dolbank, and other lands and tenements in the county of York, were settled and assured, in the first place, for securing the clear yearly sum of £20 to the said John Messenger for his life, and subject thereto, to the use of such person and persons, and his, her, and their heirs and assigns, and for such uses, intents, and purposes, and under such trusts, limitations, and appointments as the said Mary, the wife of the said John Newton, as well during her coverture with the said John Newton, as after his death, should by any deed or deeds, writing or writings, by her executed in the presence of three or more credible witnesses, by herself alone, or jointly with the said John Newton, or by her will in writing, limit, direct, and appoint; and for want thereof, to the use of the said Mary Messenger, and Elizabeth Messenger, the sisters of the said John Messenger, their heirs and assigns, as tenants in common, and not as joint tenants; and also reciting, that a marriage was then intended to be had between the said Brailsford Newton and Elizabeth Messenger; the said John Newton and Mary his wife, in consideration thereof, granted and conveyed to the said Sir Gervase Clifton, William Norton, William Newton, and Richard Walburge, and their heirs, the said messuages, lands, and premises called Dolbank, and other lands and tenements therein particularly mentioned, to the use of such person or persons, and for such uses, as the said premises then stood limited unto by vir-[409]tue of any settlement or settlements, deed or deeds then in force, until the said intended marriage between the said Brailsford Newton and Elizabeth Messenger should take effect; and from and after the solemnization thereof, as to the said messuages called Dolbank, and other premises in the county of York, to the use of the said Mary, the wife of the said John Newton, for her life; remainder as to one moiety thereof (subject to and chargeable with one moiety of the said £20 a year to the said John Messenger for his

life), to the use of the said Mary Messenger for her life, without impeachment of waste; remainder to trustees to preserve the contingent remainders; remainder to the heirs of the body of the said Mary Messenger lawfully to be begotten, and the heirs of the body and bodies of all and every such heirs or issue; remainder to the said Brailsford Newton for his life, without impeachment of waste; remainder to the said Elizabeth Messenger his intended wife for her life, without impeachment of waste; remainder to the heirs of the body of the said Elizabeth Messenger by the said Brailsford Newton, lawfully to be begotten, and the heirs of the body or bodies of all and every such heirs or issue lawfully issuing; remainder to the heirs of the body of the said Brailsford Newton, on the body of any other wife; remainder to the heirs of the body of the said Elizabeth Messenger, by any other husband; remainder to John Messenger, of Fountains, esquire, his heirs and assigns for ever. And as to the other moiety of the said premises, after the death of the said Mary Newton (subject in like manner to the other moiety of the said annuity) to the said Brailsford Newton for his life; remainder to the said Elizabeth Messenger his intended wife, for her life; remainder to trustees, to preserve the contingent remainders; remainder to the first and other sons of the said Brailsford Newton and Elizabeth Messenger, severally and successively in tail male; remainder to their daughters in tail, with cross remainders amongst such daughters; remainder to the heirs of the body of the said Brailsford Newton, by any other wife; remainder to the heirs of the body of the said Elizabeth Messenger, by any other husband; remainder to the said Mary Messenger for her life; remainder to trustees, to support the contingent remainders; remainder to the heirs of her body, and the heirs of such issue; remainder to the said John Messenger of Fountains, his heirs and assigns for ever. In which indenture of release was contained a proviso, enabling the said John Newton and Mary his wife, Brailsford Newton and Elizabeth his intended wife, and Mary Messenger, with the consent of the trustees, by any deed or deeds in writing, under his, her, and their hands and seals, to be by them executed in the presence of three or more credible witnesses, to alter, change, revoke, determine, and make void, all and every the use and uses, limitations, or estates therein limited, declared, directed, and appointed, concerning all and every or any part or parts of the said premises. And by the same, or any other deed or deeds, to limit, declare, raise, or appoint, any new or other [410] use or uses, estate or estates, trust or trusts, concerning the said premises, or any part thereof.

The marriage between the said Brailsford Newton and Elizabeth Messenger, soon afterwards took effect; and the said John Messenger, the son of the said Mary Newton, died without issue, leaving his said sisters Mary and Elizabeth his coheirs.

By indenture quadrupartite, dated the 3d of April 1719, between the said John Newton and Mary his wife, of the first part; the said Mary Messenger, of the second part; Brailsford Newton and Elizabeth his wife, of the third part; and Joshua Blackwell, William Percy, and Robert Newton, of the fourth part; reciting the aforesaid settlement, and the proviso therein contained, and that the said John Newton and Mary his wife, Mary Messenger, and Brailsford Newton and Elizabeth his wife, had sold and conveyed all the said premises in the county of York, to Edward Norton esquire, for £2400; and further reciting, that by the consent and agreement of all the parties, the said £2400 was paid to the said John Newton, in trust for the respective uses, benefit, and advantage of all the parties, proportionably and according to their respective rights and interest in and to the said premises so sold and conveyed, or to any part or parts thereof, according to the several and respective uses and limitations before-mentioned, and in the said recited indenture of release contained; and that the said John Newton, by the like consent and agreement of all the parties, had laid out and invested £1200, part thereof, in the name of the said William Percy, in South Sea stock, and had paid and lent in the name of the said Joshua Blackwell, the further sum of £1200, residue of the said £2400, unto the said Sir Gervas Clifton, and Robert Clifton esquire, his son and heir, upon their bond to the said Joshua Blackwell, in the penalty of £2400, dated the 15th of December then last; therefore in pursuance and performance of the trusts reposed as aforesaid, he the said John Newton did own, acknowledge, declare, and agree, that the said note or transfer of the said capital or principal stock, as also the said bond or obligation, were in the hands or custody of him the said John Newton, in trust and for the several uses,

benefit, and advantage of them the said John Newton and Mary his wife, Mary Messenger, and Brailsford Newton and Elizabeth his wife, and their heirs, severally, proportionably, and according to the several and respective rights, titles, and interests of them, each and every of them, and of their heirs, to the premises so sold and conveyed as aforesaid, or to any part thereof, according to the several and respective uses and limitations therein before mentioned, and in the said recited indenture of release contained, other than and except as to the said John Messenger of Fountains: And that the said capital or principal stock in the said South Sea company, as also the said bond and obligation, with all the interest, product, and advantage thereof, should remain and continue in the hands and custody of the said John Newton, as a security as well for the said principal sum of £2400, as for the lawful interest to him the said John Newton and Mary his wife, [411] Mary Messenger, and Brailsford Newton and Elizabeth his wife, and their heirs, severally and respectively, proportionably, and according to such the said several and respective rights, titles, and interests, of every and each of them and their heirs, to the premises so sold and conveyed as aforesaid, according to the several uses in the said indenture of release contained, other than and except as to the said John Messenger of Fountains. And the said John Newton did thereby covenant, that at any time afterwards, at the request of the parties interested, he would deliver up to the said Blackwell Percy and Robert Newton, the said South Sea stock and bond, in trust for the several uses, benefit, and advantage of them, the said Mary Messenger, and Brailsford Newton and Elizabeth his wife, and their heirs severally, respectively, proportionably, and according to their several and respective rights and interests aforesaid; and that so long as the said South Sea stock and bond, or any part thereof, should continue in his hands, he the said John Newton, his executors, administrators, and assigns, should pay to the said Mary his wife, Mary Messenger, and Brailsford Newton and Elizabeth his wife, the interest thereof for their several and respective benefit and advantage, and according to their said several and respective rights and interests.

The said sum of £2400 was not laid out in the purchase of other lands and tenements and settled to the same uses, as it ought to have been, but continued several years in the hands of John Newton, who, in the year 1729, delivered over to the said Mary Messenger, divers securities for money, to the amount, not only of her share of the purchase money received by him for the Yorkshire estate, but also of other her demands on him; in consideration of her depositing sufficient of such securities to answer the contingent demands of her sister Elizabeth, the wife of the said Brailsford Newton and her issue, of the said £1200, in case of the said Mary Messenger's dying without issue; upon which occasion he took her discharge for the same, in the words following: viz. "November the 10th 1729, I, Mary Messenger, do hereby acknowledge to have received of my father-in-law, Mr. John Newton, one mortgage for £1000, made by Mr. Meymotte, etc. to Mr. Joseph Farmery, and also one other mortgage for £300, made by Mrs. Riley to the said Joseph Farmery, and also one bond for £300, made by the said Joseph Farmery to the said John Newton, and also one other bond for £100 by Mr. Tomlinson, etc. to Peter Brown, and assigned to the said John Newton, all which sums make together the sum of £1700, and is in full discharge and satisfaction, as well of the portion given me by my late father Mr. Ewens Messenger, as also of £1200, being one moiety of the purchase money of Dolbank, to which I am entitled, as is set forth in a deed bearing the date the 3d day of April 1719, and which said £1200, in case I should happen to die without issue, is then to be and remain to my sister Elizabeth Newton, and her heirs; and for the better securing to them of their said contingency in the said £1200, I have agreed to [412] deposit security of equal value in the hands of Mr. George Bishop, to be kept by him for my use, as also for securing the contingent use of the said £1200, according to the intent and meaning of the before mentioned deed: I say, received of the aforesaid John Newton, the above-mentioned securities, as well in full of my aforesaid claims, as also of all other debts and demands. Witness my hand, Mary Messenger."

John Newton by his will, dated the 9th of October 1728, taking notice, that his wife Mary and his son Brailsford Newton were both dead, and after giving several pecuniary legacies to Elizabeth, then the widow of the said Brailsford Newton, declared his will to be, that she the said Elizabeth should accept the same, in lieu of all her demands under the said settlement of Dolbank, and that she should release to

her eldest son the appellant, all her contingent right, title, or claim, which she then had or might have to £1200, one moiety of the purchase money of Dolbank, and which might come to her in case she should happen to survive her sister Mary Messenger, and her said sister should die without issue; and he thereby appointed the said Robert Newton, who was a trustee in the deed of the 3d of April 1719, executor of his will; who proved the same, and possessed his personal estate more than sufficient to pay all his debts.

Pursuant to this will, the said Elizabeth Newton, by indenture dated the 4th of May 1733, fully and absolutely gave up, granted, and released, to the appellant her eldest son, his heirs, executors, administrators, and assigns, all her then as well as contingent right, title, interest, property, claim, and demand whatsoever, both at law and in equity, to the said sums of £1200 and £1200, making together £2400, the purchase money for the said estate at Dolbank. Some time afterwards Elizabeth Newton died, leaving the appellant her heir, and several other children.

In May 1768, the said Mary Messenger died without issue, and never was married, and left the appellant her nephew and heir; she continued in possession of the said £1200, as her moiety of the purchase money of the said estate called Dolbank, till her death; and she deemed and looked upon the same as real estate, and to be laid out in the purchase of freehold lands and tenements to be settled as aforesaid, and under that apprehension, she, in the year 1752, wrote and sent the following letter to the appellant, viz.

"My dear Jack,—As there is £1200, part of my fortune which comes to you at my death, which is upon securities, and the people that have it live at a great distance, makes it very difficult and troublesome for me to get the interest paid, and having had the truly great misfortune to lose my dear friend, who was so good to take that trouble off my hand; therefore I think proper to make this proposal to you, which is, that you will take upon yourself the management of those affairs, by taking in those securities, [413] which I shall be ready to deliver up to you, upon your giving me a security to pay me £60 a year for life, which will not only save me great deal of trouble, but be of advantage to you. For as it is uncertain when I shall end my days, it will prevent those things falling into any hands but your own.

"Sixhills, 2d September 1752."

The said Mary Messenger, shortly before her death made her will, and thereby gave several pecuniary and specific legacies to several persons, without taking the least notice therein of her right or interest in the said £1200, as her moiety of the purchase money of Dolbank; and she thereby gave to the said Robert Newton, the trustee named in the said deed of the 3d of April 1719, and to whom the respondents were executors, all the rest and residue of her personal estate, without taking any notice of the children of her late sister Elizabeth, and appointed the said Robert Newton executor thereof; who proved the same, and possessed all her personal estate to the value of £5000 and upwards, and applied the same to his own use, though he was not in any degree of kindred to the said Mary Messenger.

The appellant, as the heir of the said Mary Messenger, or under the said letter of the 2d of September 1752, or otherwise, being well entitled to the said sum of £1200, or to have the same laid out and invested in the purchase of freehold lands and tenements to be settled in the manner aforesaid, and to have the interest for the same from the death of the said Mary Messenger, he several times applied to the said Robert Newton for the payment thereof, but without effect; and therefore in September 1770, the appellant exhibited his bill in the court of chancery against the said Robert Newton, praying, that he might account with the appellant for the said sum of £2400, with interest for the same from the death of the said Mary, the wife of the said John Newton, and that the said sum of £2400 might be laid out and vested in the purchase of freehold lands and tenements, and that such lands and tenements, when purchased, might be settled, conveyed, and assured upon, and to and for such uses and estates, and with such limitations, as the lands and tenements so sold and conveyed to the said Edward Norton as aforesaid, at the time of such sale were, and stood settled and assured, or as near the same as by the deaths of parties and other accidents might be done; and that the trusts relating thereto might be performed and carried into execution, and that the appellant might be paid the interest of one moiety of the said £2400 to the time of the death of the said Mary Messenger, and

the interest of the whole thereof from her death to the time when the same should be so laid out and invested in the purchase of freehold lands and tenements; and that in the mean time the said sum of £2400 might be paid into court, and placed out at interest, for the benefit and security of the parties entitled thereto.

[414] But before the said Robert Newton had answered this bill, he died, whereby the suit abated; whereupon the appellant exhibited his bill of revivor against William Newton and Robert Lee, the now respondents, as executors of the said Robert Newton, to revive the suit; and they having appeared, put in their answers to the original bill, and also to the said bill of revivor, and thereby insisted, that they were entitled to the said £1200 as part of the personal estate of the said Mary Messenger at her death.

The cause being at issue, and several witnesses examined on the part of the appellant, came on to be heard before the Lord Chancellor Bathurst, on the 18th of July 1772, when his Lordship was pleased to order, that the appellant's said bill should stand dismissed, without costs.

From this decree of dismissal, the appellant appealed; insisting (E. Thurlow, A. Wedderburn), that it was never contended on his behalf, that money or personal estate could, generally speaking, acquire the descendible or intailable qualities of land, or real estate; for it had been all along admitted, that when land is converted into money, it becomes personal estate, and when money is converted into land, it becomes real estate: But then it is likewise a rule, that when money is previously agreed to be turned into land, it from thenceforth acquires the nature and quality of land, as when land is agreed to be sold and turned into money, such land, from the time of the agreement, is to be considered as money, or personal estate. It is true, that in this case there was landed estate, viz. the Dolbank estate, turned by a sale into money; but to rely on that single circumstance was fallacious, it being natural to suppose, and there were footsteps of it, that there was another circumstance, either previous to, or in a manner concomitant with the sale; i.e. that there was an express agreement among the parties, that the money which should arise by the sale, should again be vested in a new purchase of other lands, to be settled as the Dolbank estate had stood settled, under the settlement of 1714; and in the mean time, the money was to be deposited in the hands of a trustee, to place it out at interest on securities. The transaction relative to the depositing the money arising from this sale, must have been the consequence of some previous negotiation and agreement touching such purchase money; and if it was not a part of that agreement, that the money was not again to be invested in the purchase of new lands, there would not be any way left to make the declaration of trust of 1719, in any shape reconcilable to sense or reason, but its whole tendency must necessarily be, to lead all parties into error and misapprehension as to their rights and interests in that property, which came to them in exchange for the Dolbank estate. There certainly did exist, though their whole contents did not now appear, several deeds and instruments, at the time, or previous to the completing the sale of this estate; for the uses of the settlement of 1714 must, pursuant to the power of revocation in that deed, be revoked by some deed or instrument, working as an actual revocation, or by some deed or conveyance, work-[415]-ing as an implied, or constructive revocation. In the first case, the uses of the settlement of 1714, as to the Dolbank estate, must have been by such deed or instrument expressly repealed and made void; and the trustees of that settlement must have been directed to stand seised of that estate, to the use of some new trustee, upon trust to sell and convey the same to Mr. Norton; and it was very probable, that it might be there declared or agreed, that the purchase money should be again laid out in the purchase of new lands, to be settled to the uses of the deed of 1714; and that in the mean time, such purchase money should be deposited in the hands of Mr. John Newton, in trust, until a new purchase could be found, that he should lay out the same on securities at interest, or in the public funds, and pay the interest and annual profits arising thereby, to such persons as, under the settlement of 1714, would from time to time have been entitled to the rents of Dolbank, if no sale thereof had been made. But if there was no such express instrument of revocation, then there must have been some actual conveyance of Dolbank to Mr. Norton, which must necessarily have operated so as to amount to an implied revocation; and that conveyance might have in it some recital

or expression, demonstrating that it was only meant to vest the fee simple of the Dolbank estate in Mr. Norton as a purchaser, but not to make the purchase money become personal estate; it being to be again invested in a new purchase, and in the mean time deposited in the hands of a trustee, there to remain in the nature of real estate, for the benefit of the claimants, under the uses of the settlement of 1714. That every possible endeavour had been used to get a sight of the deeds executed upon the sale of this estate to Mr. Norton, but without success, as purchasers are constantly unwilling to produce their purchase deeds; and therefore, after this length of time, the case must be judged of from the nature and circumstances of the whole transaction; and it was apprehended, that there were grounds more than sufficient to form a presumption, that there was an actual agreement among the parties, that the sale to Mr. Norton was not made with an intention of turning landed property into money, but only to make him proprietor of the Dolbank estate; yet so as that his purchase money should ultimately be again turned into land or real estate, and to hinder it from lying dead in the hands of a trustee, it should be placed out at interest upon securities, until a new purchase could be had.

This presumption, it was said, was much enforced by carefully attending to the contents of the deed of 1719; which naturally presupposed, that upon the transaction with Mr. Norton, there was some such revocation, either express or implied, with some such agreement to invest, at some time or other, the money arising from the sale, in the purchase of other lands, in some such manner as before mentioned. For 1st, there was a recital, *that the Nortons and the Messengers had sold and conveyed Dolbank estate to Mr. Norton, for £2400.* Here was an express reference to some conveyance, for a price certain, which necessarily implied that some [416] revocation did precede or accompany that conveyance, or that it worked as a revocation of itself; but neither the conveyance or the revocation now appeared. 2dly, The recital proceeded by saying, *that by the consent and agreement of all the parties, the said £2400 was paid to the trustee Mr. John Newton, in trust for the respective use, benefit, and advantage of all parties, proportionably, and according to their respective rights and interests in and to the said premises so sold and conveyed, according to the respective uses and limitations contained in the said settlement of 1714.* Here again there was an express reference to an agreement among the parties, whereby they stipulated, that the transaction upon the sale to Mr. Norton should work no alteration in the rights or interests of the claimants under the settlement of 1714, but that the whole of such rights should remain in the same plight as they had subsisted under that settlement; and this again implied, that it must have been part of the agreement, (the contents of which must now be taken from presumption and conjecture) that ultimately new lands should be acquired, out of which the same rights and interests might be derived, as had subsisted upon the Dolbank estate under the settlement of 1714; the several words, *heirs, uses, and limitations*, pointing to rights and interests to be derived out of lands, or real estates, which only are capable of descending to an heir. Since the statute of Hen. VIII. to speak of uses with respect to money or personal estate, is to speak with great inaccuracy: Uses are not now applicable to personal estates, they can be nothing but trusts: Uses under that statute must necessarily be derived from the seisin of some cognizee, feoffee, releasee, etc. and this seisin can be of nothing but lands; neither did any use arise under the settlement of 1714, but out of lands, viz. the Dolbank estate; and therefore the uses stipulated for in the agreement here referred to, must be uses derived out of lands; from whence it follows; that it was a necessary part of the agreement, that new lands should be purchased out of which those uses might be derived. 3dly, The deed itself proceeded by witnessing, *that the said John Newton, the trustee, did thereby acknowledge and declare, that he had received the said consideration money of £2400, and that it was deposited in his hands in trust and for the several uses, benefit, and advantage of them the said John Newton and Mary his wife, Mary Messenger, and Braithford Newton and Elizabeth his wife, and their heirs, severally, proportionably, and according to the several and respective rights, titles, and interests of them, each and every of them, and of their heirs, to the same premises so sold and conveyed as aforesaid, or to any part thereof, according to the several and respective uses and limitations herein-before mentioned, and in the said recited indenture of settlement contained.* Here again there was a reference made to an actual deposit of the purchase

money, and it named the trustee into whose hands the deposit was made, which necessarily implied an antecedent agreement for such deposit in the hands of such trustee; and then it mentioned for whose use and benefit the deposit was made, i.e. the claimants under the settlement of [417] 1714, and their heirs, severally, proportionably, etc. Here the same arguments and inferences recurred with respect to the words *uses, limitations, rights, and interests*, as had before been made use of. But how could these claimants and their heirs be secured of having the like rights, benefits, and interests in this money, which was the price of the Dolbank estate, according to the several and respective rights, titles, and interests which they had in that state under the settlement of 1714, unless it was part of the agreement, that the trustee, in whose hands it was deposited, should ultimately lay it out in a new purchase? And to make them talk or intend otherwise, was to make them talk the most absurd language that ever was made use of. Here were the plain footsteps of a farther agreement, it was actually referred to in the recitals of the deed of trust, but its contents were there mentioned in an abridged form; and though it might now in that abridged form, appear somewhat obscure, yet to uphold the intention and meaning of the parties, a court of equity, in the matter of a trust, will supply what is wanted by intendment; and presume, that amongst the contents of this agreement, here were those stipulations which were absolutely necessary to give effect to the true meaning of the parties. *Quod necessario subintelligetur non de est.*

On the other side it was contended (R. Perryn, J. Madocks), that by the sale of the state in question, which was effected by means of the powers reserved to the parties, by the settlement of 1714, and in the execution of which they all concurred, the lands were by the consent of all the parties converted into money; which was paid into the hands of a trustee, and laid out by him, one moiety in South Sea stock, and the other moiety on a private security, by the consent of all parties. That the declaration of trust in 1719, considered the trust fund as consisting specifically of the South Sea stock, and the private security; and declared the trust of the specific sums so secured, with a covenant from the trustee to apply the stock and bond according to the trust before declared. That to re-convert the money into land, the consent of all the parties to the declaration of trust was necessary; but no such consent being had, nor any intimation given by any of the parties, that the fund or any part of it should be again converted into land, it was therefore to be considered at this time as personal property; and Mary Messenger being tenant in tail of one moiety, the remainders over were by the rules of law void; so that she became entitled to the absolute interest in that moiety, and consequently it became part of her personal estate, and passed as such to her executors.

As to the objection, that Mary Messenger intended, that John Newton should have her £1200 after her death, of which intent her letter was evidence; it was said, that his letter demonstrated that she looked upon the £1200 as money and not as land, and therefore was conclusive against the appellant's relief upon that ground; and his letter did not entitle him to relief upon any other, for it did not import a gift of the money to him. The utmost to be inferred from the letter was, that she understood the appellant would [418] be entitled after her death, and therefore she proposed to him to take the money, and pay her an annuity for her life. But this proposal was founded upon a mistake of her interest. It never was accepted, nor was she ever undeceived; and being founded in error, no right could accrue from it. If she had been undeceived, it was impossible to say what would then have been her intent, or to whom she would have given the benefit of this money. There was therefore no ground whatsoever, upon which the court could decree any right in the appellant; so that the bill was very properly dismissed.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed: And it was DECLARED, that the appellant was entitled to the £1200 in the pleadings mentioned. And it was further ORDERED and ADJUDGED, that the respondents should pay to the appellant £1200, with interest for the same, at the rate of £4 per cent. from the death of Mary Messenger; and that the court of chancery should give all necessary and proper directions, for carrying this judgement into execution. (MS. Jour. *sub anno* 1772-3. p. 662.)

CASE 4.—JOHN MORRIS, and others,—*Appellants*; JOHN CANTLE, and others,—*Respondents* [12th June 1782].

[Mews' Dig. ix. 1035.]

A. and B. are coheirresses of an estate: A. being married, her moiety is settled: to her husband C. for life; remainder to A. for life; remainder to B. for life; remainder to trustees for 1000 years; remainder to the right heir of the survivor of C. and B. The trusts of the term were to raise £1000 to be paid to such relations of A. as the survivor of B. and C. should appoint; and in default of the appointment, to the next heir or coheirs of B. A. and her husband died in the life-time of B. and B. by her will, devised the whole estate to trustees for certain purposes; but made no appointment of the £1000. It was decreed that the heirs at law of B. were entitled to have the £1000 raised and that the term of 1000 years created by the settlement, was not merged in the inheritance of the moiety to which B. became entitled. See Bro. C. R. 133 in n.

DECREE of Lord Thurlow C. AFFIRMED.

Ann the wife of Henry Merewether, and Rachael Coles spinster, her sister, being seised in fee as parceners of an estate in the county of Somerset, and Ann Merewether being desirous of making a settlement of her undivided moiety of the said estate, the said Henry Merewether and Ann his wife, by an indenture tripartite bearing date the 4th of October 1740, and made between the said Henry Merewether and Ann his wife of the first part, George Farewell and John Horton of the second part, and Robert Smith esq. and William Hawkins the younger, of the third part; and by a *fine per conusance de droit come ceo*, duly levied as of Michaelmas term [419] 1740, in pursuance of a covenant in the said indenture contained, settled and assured one undivided moiety of the capital messuage then in the tenure of the said Henry Merewether and Rachael Coles, and of a messuage then in the occupation of John Phelps as tenant to the said Henry Merewether and Rachael Coles, situate in the hamlet of Hassage, and of a farm called Hassage farm, and of a messuage, tenement or toft, called Porch's tenement, and of the moiety of all barns, stables, gardens, closes, emblements, advantages, and hereditaments to the said messuages, tenement, and farm belonging, and also the moiety of the tythes of corn, grain, and hay, issuing out of all the said premises, and also of the moiety of the tythes of corn, grain, and hay, issuing out of the said hamlet of Hassage, and also of the moiety of all other the messuages, lands, tenements, farms, tofts, tythes, and hereditaments of them the said Henry Merewether and Ann his wife, or either of them, or which were the freehold and inheritance of William Coles gentleman, deceased, late father of the said Ann Merewether, or of John Coles deceased, her late brother, situate in the said hamlet of Hassage, and in the several parishes of Wellow and Norton St. Philip, in the county of Somerset, to the use of the said Henry Merewether and his assigns for his life; and, after his decease, to the use of the said Ann his wife and her assigns for her life; and, after her decease, to the use of the said Rachael Coles and her assigns for her life; and, after the decease of the survivor of them the said Henry Merewether and Ann his wife, and Rachael Coles, to the use of the said Robert Smith and William Hawkins, their executors, administrators and assigns, for the term of 1000 years, upon the trusts therein after declared; with remainder, to the use of the heirs of the survivor of them the said Henry Merewether and Rachael Coles. And in the said indenture was contained a proviso in the following words, viz. "Provided also, and it is hereby declared, that the said term and estate so as aforesaid limited in use to the said Robert Smith and William Hawkins, or the survivor of them, their executors, administrators and assigns, for 1000 years, is upon the special trust and confidence, and to the intent and purpose, that the said Robert Smith and William Hawkins, or the survivor of them, or the executors or administrators of such survivor, shall and do by demise, mortgage or sale of the said moiety of the said messuages, lands, tenements, tythes, hereditaments and premises, for all or any part of the said term of 1000 years, or by, with and out of the rents, issues, and profits of the said premises, or otherwise as to them is



their discretion shall seem meet, levy and raise the sum of £1000, the same to be paid to such of the relations, kinsmen, or kinswomen of the said Ann Merewether, and at such times, and in such proportions, as the survivor of them the said Henry Merewether and Rachael Coles, by any deed or writing, or last will duly executed and attested, shall direct, give, limit, or appoint, and for want of such direction, gift, limitation, or appointment, to such person or persons as shall be next heir or coheirs at law of the said Rachael Coles."

[420] Henry Merewether and Ann his wife both died in the life-time of Rachael Coles, who thereby, and by virtue of the said indenture and fine, became entitled to an estate for life in possession, with a remainder in fee, in the lands and hereditaments comprized in the said indenture of settlement, expectant upon and subject to the term of 1000 years, and to the trusts thereof.

Rachael Coles made her will, bearing date the 26th of November 1756, and thereby, among other things, gave an annuity of £5 to John Mills, the father of the respondent George Mills, during his life; and, at his decease, bequeathed the sum of £100 to be paid and divided among such of his children as should be then living, in such proportions as he should by will appoint; and gave another annuity of £5 to Thomas Pearce, in trust for Ann Veale, the wife of Robert Veale, for her life, for her separate use; and the sum of £100 to such of her children as should be living at her decease, in such proportions as she should appoint; and directed that all the said annuities should be issuing out of her messuages, tenements, lands, and hereditaments, in Philip's Norton, and thereby charged the same with the payment thereof, and also with the payment of the said two sums of £100 at the respective deceases of the said John Mills and Ann Veale. And that the said two several sums of £100 might be paid, the testatrix devised all the said premises charged therewith to Thomas Pearce and Bennet Hall their executors, administrators, and assigns, for a term of 500 years, to commence from her decease, in trust, after the respective deceases of the said John Mills and Ann Veale, by mortgage of the said premises, to raise and pay the said two several sums of £100 to the persons entitled thereto under the said will. And the testatrix also gave an annuity of £10 to the said Bennet Hall, in trust for Elizabeth Litman, the wife of William Litman the elder, the father of the respondent William Litman, for her life, for her separate use; and, at the decease of the said Elizabeth Litman, the testatrix gave the sum of £100 to be divided equally among such of the children of William Litman the younger, the respondent, as should be living at the time of the decease of the said Elizabeth Litman; and directed that the said annuity of ten pounds should be issuing out of her messuages, lands, and hereditaments, situate at Hassage aforesaid; and thereby charged the said premises at Hassage with the payment of the said annuity of £10 and the said last mentioned sum of £100 at the decease of the said Elizabeth Litman. And, after giving certain pecuniary legacies to Mrs. Ann Fripp, Mr. James Fripp, and the reverend Mr. Henry Harris, the testatrix thereby charged all her said estates at Hassage with the payment thereof. And that the said £100 after the decease of the said Elizabeth Litman, and the said other legacies to the said Ann Fripp, James Fripp, and Henry Harris, might be raised and paid, the testatrix devised all the said Premises charged therewith to the said Thomas Pearce and Bennet Hall, for a term of 1000 years, to commence from her decease, in trust, by mortgage of the said premises, after her decease, to raise and pay the said legacies to the said Ann Fripp, James Fripp, and Henry Harris; and after the [421] decease of the said Elizabeth Litman, to raise, by mortgage, the said sum of £100, and to pay the same to such persons as should be entitled thereto under the said bequests. And subject to and charged with the payment of the said annuities and legacies, the testatrix thereby devised all her messuages, lands, and hereditaments, situate at Hassage and Philip's Norton aforesaid, unto the appellant John Morris, for his life, with remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the appellant John Morris, remainder to all and every the daughter and daughters of the appellant John Morris, as tenants in common in tail general; with remainder to the appellant William Veale the elder, during his life, without impeachment of waste, with remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the body of the appellant William Veale the elder, to be begotten; remainder to all and every the daughter and daughters of the body of the appellant William Veale the elder, lawfully

to be begotten, as tenants in common; with remainder to James Litman, son of the respondent William Litman, in fee.

In April 1769, the testatrix Rachael Coles died, without having made any appointment of the £1000 directed to be raised by the said indenture of settlement of 1740, leaving the respondents John Cantle, and George Mills, and Elizabeth Litman, since deceased, her co-heirs at law; and soon after the said Elizabeth Litman died, leaving the respondent William Litman, her only son and heir at law.

The appellant John Morris, after the death of the testatrix Rachael Coles, and by virtue of her said will, entered into possession of the real estate so devised to him, and hath ever since been in the possession and receipt of the rents and profits thereof.

On the 5th of April 1755, Robert Smith, one of the trustees of the term of 1000 years created by the indenture of settlement in the year 1740, died in the life-time of William Hawkins, who thereby became the surviving trustee of the term.

After the death of the testatrix Rachael Coles, the respondents John Cantle and George Mills, together with William Litman the elder, and Elizabeth Litman his wife, the father and mother of the respondent William Litman, both since deceased, conceiving themselves to be entitled to the said sum of £1000 under the trusts of the term created by the settlement of the 4th of October 1740, made frequent applications to the appellant John Morris to pay the same, and to the said William Hawkins the surviving trustee, to raise the said £1000, but without effect; and therefore in Trinity term 1772, the said respondents filed their bill in the court of chancery against the appellant John Morris, and against William Hawkins the surviving trustee of the term, stating to the effect before set forth; and that the appellant John Morris had in his possession the said indenture of the 4th of October 1740; and that the said William Hawkins refused to act in the execution of the trusts thereby reposed in him: and therefore praying that the ap-[422]-pellant John Morris and the said William Hawkins might be decreed to produce the said indenture of the 4th of October 1740: and also to join in raising the sum of £1000 out of the premises charged therewith: and that the said sum of £1000 when raised, might be equally divided between the respondent John Cantle and George Mills, and the said William Litman, in right of Elizabeth his wife, with all such sums of money as should be due in respect of interest from the decease of the said Rachael Coles, or from such other time as the same ought to have been raised in pursuance of the said indenture; and that the said William Hawkins might be decreed either to act in the execution of the trusts of the said term of 1000 years, for the benefit of the respondents John Cantle and George Mills, and the said William Litman, in right of the said Elizabeth his wife; or to assign the residue of the term, upon the trusts in the said indenture declared thereof, unto such person or persons as they should direct.

Elizabeth Litman having died intestate soon after the filing the bill, the said William Litman the elder, her husband, procured letters of administration of her personal estate to be granted to him out of the proper ecclesiastical court, and the cause was duly revived.

The appellant John Morris, and the said William Hawkins, put in separate answers to the bill, and the appellant Morris, by his answer, filed the 13th of February 1773, and the appellants William Veale and William Veale the younger, by their answer, filed in Trinity term 1773, admitted the indenture of the 4th of October 1740, the will of the said Rachael Coles, and the several other facts stated in the bill; but insisted, that the respondents and the said William Litman the elder, were not entitled to have the said £1000 raised and paid to them, but that in the event which had happened of the said Rachael Coles having survived the said Henry Merewether, whereby she became entitled to the inheritance in fee of the said settled premises, the trust of the said term sunk into the inheritance for her benefit, and was no longer a subsisting charge thereon; and that the intent of the parties to the said indenture in creating the said term, and giving the said power of appointing, was only to secure the sum of £1000 to the family and relations of the said Ann Merewether, it being contingent by the limitations of the said indenture, whether the inheritance out of which it was to come would go to her said husband or sister, but not to raise the said £1000 as against the sister or her devisees. And the appellants, by their said several answers, said that they were of kin and related by blood to the said Ann Merewether in the manner and degrees therein particularly stated, and, as such.

capable of taking as appointees of the beneficial interest of the said term of 1000 years; and that, in case the court should be of opinion that the trust of the said term did not, in the event which had happened, sink into the inheritance for the benefit of the said Rachael Coles, but that the said sum of £1000 was in all events to be raised, then the appellants insisted that the will of the said Rachael Coles [423] was a good execution of the power, and that it operated as an appointment of the said £1000, as well as a devise of the estate charged therewith, in favour of the appellants and the devisees over in remainder, subject to the said annuities and legacies; and that there were several annuities and legacies given by the will of the said Rachael Coles and charged on the said estate, and, among others, an annuity of £10 to the said Elizabeth Litman during her life, and after her death, a legacy of £100 to be paid and divided among such of the children of the respondent William Litman, son of the said Elizabeth, as should be living at the death of the said Elizabeth, equally between them; and also an annuity of £5 to John Mills, father of the respondent George Mills, during his life, and after his death, a legacy of £100 among such of his children as should be then living; and that the respondent George Mills, and the representative of the said Elizabeth Litman, ought not to be permitted to dispute the disposition made by the will of the said Rachael Coles, and at the same time to enjoy the annuities and legacies bequeathed to them and their families.

William Hawkins, by his answer, filed 15th of February 1773, said, that he was a stranger to all the matters contained in the bill; but that if it should appear, on the production of the settlement, that the legal estate in the said 1000 years term was vested in him, and the court should be of opinion that the respondents were entitled to the beneficial interests thereof, he was willing to assign the said term as the court should direct.

William Litman the elder afterwards died, and the suit was revived by the respondent William Litman his son, who was personal representative of the said William Litman his father, and also the personal representative of the said Elizabeth Litman.

The cause being at issue, the respondents examined witnesses, and proved themselves to be the coheirs at law of Rachael Coles; but before any further proceedings were had in the cause, the defendant William Hawkins died, and the respondents revived the suit against James Rudge his personal representative.

The cause was heard the 12th of March 1781, before the Lord Chancellor Thurlow, when, upon reading the indenture of the 4th of October 1740, the will of Rachael Coles, and the proofs taken in the cause, his Lordship ordered and decreed (DECREED, March 12, 1781), that it should be referred to Mr. Holford, one of the masters of the court, to compute interest after the rate of £4 per cent. per annum, on the sum of £1000 mentioned in the said marriage settlement, bearing date the 4th day of October 1740, from the time of the death of the said Rachael Coles, and ordered that what should be found due for such interest should be answered by the appellant John Morris, out of the rents and profits of the premises comprized in the term of 1000 years created by the said settlement, and be paid to the respondents; and for that purpose, the Master was to take an account of the rents and profits of the said premises received by the appellant John Morris, or by any other person or persons, by his order, or for his use; and that the principal of the said sum of [424] £1000 should be raised by mortgage or sale of the premises comprized in the said term, with the approbation of the said Master, and as he should direct, and all proper parties were to join in such mortgage or sale, and to produce before the Master upon oath all deeds and writings in their custody or power relating thereto, as the Master should direct; and in case the money should be raised by sale, such sale was to be to the best purchaser or purchasers that could be got for the same, to be allowed of by the said Master; and in case the money should be raised by mortgage, the tenant for life of the said estate was to keep down the interest of such mortgage out of the rents and profits of the said estate; and all parties were to be paid their costs of the suit, to be taxed by the Master out of the said estate, and such costs were to be raised in like manner as the said sum of £1000 was therein before directed to be raised.

From this decree the present appeal was brought, and on behalf of the appellants it was argued (LIT. Kenyon, J. Mansfield), that the evident object of the settlement made by Mr. and Mrs. Merewether of her share of the Hassage estate, was to give the estate to Mr. Merewether, upon the contingency of his surviving Mrs. Coles, the sister and

presumptive heir of Mrs. Merewether; for Mrs. Coles could take nothing by the settlement, which she could not have taken if the settlement had not been made. That the term of 1000 years seemed to have been created in contemplation of the event of Mr. Merewether surviving Mrs. Coles, for the purpose of giving to the family, or to the heirs of Mrs. Coles, by way of charge, a share of the estate, which in that event they would be deprived of. But as the event had happened otherwise, and Mrs. Coles, by survivorship, became seised of the estate in fee simple, it was conceived, that though at law her estate was subject to the term, yet as the trusts of that term were, in default of her appointment, for the benefit of her heirs, the term became a trust term attendant on her inheritance; otherwise her heirs, supposing she had died intestate, would have taken two distinct interests in the estate; one real, and the other personal; one subject to the payment of her debts, the other not subject. If a limitation of this nature was permitted to have effect, it would be a precedent for a new mode of defrauding creditors, by giving to the heir, as a purchaser, an interest which was entirely in the power of the ancestor. But if the term was to be considered, at the death of Mrs. Coles, as a subsisting charge on her inheritance, and not as a trust term attending that inheritance; yet it was conceived, that the will of Mrs. Coles would operate as an appointment, so as to bar the claims of the respondents. Mrs. Coles, by the settlement, had power by deed or will to appoint the £1000 to be raised, under the trusts of the term, to such of the relations, kinsmen, or kinswomen, of Ann Merewether, and at such times, and in such proportions, as she should think proper. By her will she had disinherited her heirs at law, and given the whole of her real estate, including the estate in question, to kinsmen and kinswomen of Ann Merewether, all the devisees being such. It is [425] true, she had not by her will in terms referred to her power of appointment, but such a power might be exercised without any reference to it. And it was apparent from her will, that she considered herself as disposing, by that act, of the whole estate, *subject to such charges only* as were created by it. It might again be objected, that the will disposed of the property as real estate, and that her power of disposition was over personal; but as that power was absolute, as to the proportions to be appointed to each relation, she might, by apportioning the charge, have effected her intention; and where a person, having a power of appointment, disposes of the property in a manner which might have been effected by a direct appointment, the disposition made shall be considered as an appointment, and operate as such. It might also be urged in answer to this objection, that though the £1000 was money, yet, as a charge upon the estate, it was properly to be considered as part of the estate, and disposable with it. Supposing not only that the £1000 was a subsisting charge upon the estate at the death of Mrs. Coles, but that the disposition made of the estate by her will could not be considered as an appointment of the money; yet it was conceived, that the charges made upon the estate, of annuities and legacies to kinsmen and kinswomen of Ann Merewether, ought to be deemed an appointment of so much of the £1000, and that the residue only ought to be raised under the trusts of the term. And if the £1000 was to be considered as a subsisting charge at the death of Mrs. Coles, and the disposition made by her of the estate was not to be considered as an entire appointment of it, nor the annuities and legacies to relations of Ann Merewether as a partial appointment; yet, as it was evident from her will, that she did not consider it as a charge which could defeat her disposition of the estate, and she clearly meant to disinherit her heirs at law, it was conceived that her heirs, claiming the benefit of the charge, claimed against the disposition made by her will; and that consequently, according to the ordinary rule of equity, such of them as were entitled to benefit under her will ought to have been put to their election, either to relinquish their claims, or to give up the benefits they took under the will. The respondent John Cantle, one of the heirs of Mrs. Coles, took no benefit under her will; but the respondent George Mills had a contingent interest in a legacy of £100, and Elizabeth Litman, under whom the respondent William Litman claimed, was entitled to, and received an annuity of £10 a year during her life. If, therefore, the £1000 was to be raised the respondent George Mills ought to relinquish his contingent legacy; and the respondent William Litman, as personal representative of his mother, ought to account for, and allow, the several payments made in respect of the annuity given to her.

On the other side it was contended (J. Madocks, W. Selwyn, J. Spranger), that there had not been any merger of the term of 1000 years either at law or in equity. To have

merged the term at law, the estate in the term and in [426] the inheritance must have met in the same person in one and the same right; but the term of 1000 years was not at any time vested in Rachael Coles, the owner of the inheritance. In order to have made an equitable merger of this term, it was necessary that the party should have had, exactly and precisely, the same interest in the sum of £1000 to be raised by virtue of the term, as in the lands comprized in the term. Upon the death of Henry Merewether, Rachael Coles, by virtue of the settlement of 1740, became seised of an absolute estate in fee simple, in the lands comprized in the term of 1000 years, expectant upon the determination of that term; but Rachael Coles had a mere naked power of appointing the £1000 in the manner directed by the settlement of 1740, and had not any interest whatsoever in the money itself by virtue of the term. Although it is clear that a man may execute a power without referring either to the power or to the deed out of which the power arises, yet it is necessary that he should mention the estate or the money which he disposes of by virtue of the power, so as to shew he had the very thing in contemplation at the time he executes the power, unless in cases where the instrument could not have any operation or effect without referring to the power. There were not any words or expressions to be found in the will of Rachael Coles, at all descriptive of the money which she had a power to dispose of by the settlement, but what were equally applicable to any other monies in which she had an absolute interest, and of which she had full power to dispose, independent of the settlement; and every part of her will might take effect out of the undivided moiety of the estate of which the testatrix was seised, without having recourse to the power contained in the settlement. The will therefore ought not to be considered either as an appointment by virtue of the trusts of the term to the appellants, or as a partial appointment to the respondents. That the legacies given by the will of Rachael Coles, to the respondents George Mills and William Litman, could not be considered as a satisfaction for their interests under the term of 1000 years. In all cases of satisfaction, that which is given by way of recompence or satisfaction, must be of equal benefit, and payable at the same time, as that in satisfaction of which it is presumed to have been given. But the legacies given to the children of John Mills, and the respondent William Litman, were not payable until after the respective deaths of John Mills and Elizabeth Litman; whereas the £1000 to be raised by virtue of the term, became payable immediately upon the death of Rachael Coles. There was not any express declaration in the will, nor could it be fairly inferred from the whole will taken together, or any part of it separately, that the annuities and legacies thereby given to the relations of Ann Merewether, were intended, by the testatrix, as a satisfaction for their interest in the £1000 directed to be raised by the settlement of 1740. It was probable that the testatrix meant some further or additional benefit to such of the legatees named in her will, as were related to Ann Merewether, inasmuch as there was not, in any part of her will, the [427] least reference to the settlement of 1740, or the term of 1000 years, created thereby, or the £1000 which she had the power of appointing. It deserved particular notice also, that fresh terms were created by the will, new trustees named, and other lands charged with the payment of the annuities and legacies, which were given, together with other legacies bequeathed to other persons not in any degree related to Ann Merewether, and charged on the same estates. It was submitted, therefore, that the annuities and legacies given by the will of Rachael Coles took effect by way of gift, and not as an appointment. That the appellants had not shewn, nor was it the truth of the case, that the estate of which Rachael Coles died seised, exclusive of that to which she became entitled under the settlement, was insufficient for the purpose of raising and paying all the annuities and legacies bequeathed by her will; the respondents William Litman and George Mills therefore insisted upon their claims under the will, as well as under the settlement, and that in so doing, they did not, in any manner, contravene or attempt to defeat any disposition made by the testatrix in her will; and that this was not a case in which a court of equity was warranted, by any former decision, to compel them to make an election, whether they would take under the will of Rachael Coles, or under the settlement of 1740.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed. (MS. Jour. *sub anno* 1782. p. 820.)

CASE 5.—A. R. BOWES, Esq.,—*Appellant*; MARY E. BOWES (Countess of STRATHMORE), by her next Friend,—*Respondent* [19th July 1797].

[*Mews' Dig.* vii. 177, 1393: xii. 1062 (*Strathmore v. Bowes*). See 1 Wh. and T.L.C. 7th ed. 613.]

A settlement made by a woman, while unmarried, is not in all cases void against any husband she may afterwards take. To avoid such a settlement, the husband must shew to the court that he has been deceived: mere concealment alone is not enough. And if he demands to have the deed set aside, without offering to make any provision for the wife, this is a ground for refusing relief. In all cases where a husband comes into chancery for his wife's fortune, he must make a settlement. A man who marries without a treaty, must be content to take a wife as he finds her.

See Mr. Justice Buller's opinion, sitting for the Lord Chancellor, on this case. 2 Bro. C. R. 349-351. See also *King v. Cotton*, 2 P. Wms. 674.

DECREE of the Chancery AFFIRMED.

2 Bro. C. R. 345. 1 Eq. Ab. (edit. 1793.) p. 58. (See 2 Bro. C. R. 88, as to a former point in the case.)

George Bowes, Esq. deceased, the late father of the respondent, by his last will dated the 7th of February 1749, gave and devised all his manors, messuages, lands, tenements, and hereditaments, not held in mortgage, nor in trust, nor by any leases, [428] to certain trustees therein named, in trust, in case of his leaving no issue male, for the respondent his daughter, for her life, without impeachment of waste, except wilful waste in houses, with remainder to her first and other sons, in tail male, with divers remainders over. And after reciting, that he was seised of, or entitled to, certain messuages, lands, tithes, and hereditaments, held by certain leases for lives and years, he thereby gave and devised the same to the said trustees, in trust, thereout to renew the several leases thereof as there should be occasion, and to pay the fines and fees of such renewals, and the rents reserved in the leases thereof; and subject thereto he directed that the same should be upon the same trusts as his said freehold estates, and he devised the same accordingly. And the said testator thereby declared his will to be that all the plate, linen, household goods, and furniture, belonging to his mansion house at Gibside, and all his plate, books, medals, jewels, and pictures, not therein otherwise disposed of, should go along with the said house, as heir looms, and be enjoyed therewith, from time to time, by the person and persons who for the time being should be entitled to such house by virtue of his will.

The said testator did not leave any issue male; and upon his death the respondent became entitled, for her life, to all his said real and leasehold estates, and at different times after his death she became entitled, for her life, to divers other real estates, which were purchased pursuant to the directions of his said will, and were conveyed and settled to and upon the same uses as mentioned in his said will of and concerning his said real estates.

Some time after her father's death, the respondent intermarried with the late John Earl of Strathmore, deceased, by whom she had issue three sons and two daughters, of whom John Earl of Strathmore was the eldest, and by virtue of the said will became tenant in tail of all the estates of the said testator, in remainder, after the death of the respondent his mother.

The Earl of Strathmore (husband of the respondent) died in March 1776, and the respondent on the 10th day of January 1777, executed certain indentures of lease and release, dated the 9th and 10th of January 1777, and made between the respondent of the one part, and Joshua Peele, then of Symond's Inn, in the county of Middlesex, esquire, and George Stephens, then of the parish of St. Mary-le-bone, in the same county, esquire, of the other part, whereby she granted and conveyed unto, and to the use of, the said Joshua Peele and George Stephens, and their heirs and assigns for ever, all the manors, messuages, lands, tenements, and hereditaments, whereof she was seised for her life, as aforesaid, with the appurtenances, upon trust from time to time, during her life, whether she should be sole or covert, and notwithstanding she should thereafter be covert, to pay, apply, and dispose of the rents, issues, and profits of the said estates and premises, to such person or persons, and for such purposes as she, whether covert or sole, and notwithstanding any future coverture, and as if

she was [429] sole and unmarried, should, by any deed or deeds, writing or writings, sealed and delivered, as therein mentioned, direct and appoint; and in default of such appointment, to pay the same into the hands of the respondent, for her separate and peculiar use and disposal, exclusive of any husband she should thereafter intermarry with; and wherewith he should not intermeddle, nor should the same be any ways subject or liable to his debts, controul, or management. And by the same indenture the respondent assigned unto the said Joshua Peele and George Stephens, their executors, administrators, and assigns, all her estate, right, title, and interest of, in, to, or out of the residue of the personal estate of her said late father, upon such trusts, and to and for such ends, intents, and purposes, as are therein and hereinbefore mentioned, of and concerning the rents and profits of the aforesaid hereditaments and premises. And in which indenture of release was contained a power or proviso, enabling the respondent, by any deed or deeds, writing or writings, with or without power of revocation, to revoke all or any of the uses and trusts thereof and by the same, or any other deed or deeds, writing or writings, to declare such new or other trusts as to her should seem meet.

This settlement was in fact made in contemplation of the countess's marriage with one — Grey, esquire, and was made with his knowledge and consent. But on the 17th day of the same month of January 1777, the Countess in fact married the appellant, whose name was then Andrew Robinson Stoney, and who afterwards took the surname of Bowes.

It was charged by the respondent, that at the time of such marriage, Bowes was a lieutenant on half-pay, in a regiment of foot, and greatly distressed in his circumstances, and possessed of little or no property; that he had recommended himself to the respondent's notice, and ingratiated himself into her favour, by various arts and contrivances, particularly by aspersing her character in the newspapers, and afterwards pretending to vindicate her from such aspersions, by engaging in a *pretended duel*; by these and other means imposing upon her credulity, and feigning to have a great regard and real affection for her. It was added, that the respondent having, on the 16th of January 1777, received information of the duel, (then supposed to be real), and that the appellant was mortally wounded, and his life in imminent danger, she was prevailed upon in the evening of that day to visit him at his lodgings, in St. James's Street, where he spoke in a very low tone of voice, and affected to be languid and in great torture, yet expressing pleasure at the respondent's condescension in visiting him, and great anxiety to be united to her in marriage before his death, which, he said, was fast approaching, and that he did not expect to live twenty-four hours; and adding, that if the respondent would only condescend to marry him, he should die happy; and the respondent, believing the truth of this representation, and from motives of gratitude and compassion, did thereupon, and not before, and without reflection, and without the advice or knowledge of any of her [430] friends, consent to marry the appellant; and such marriage was solemnized the next morning, the appellant pursuing his imposition so far, as to be carried to church on a litter.

No settlement or provision whatever was, in fact, made by the appellant, upon or for the respondent, either out of the said estates of which she became tenant for life, as aforesaid, or otherwise.

The respondent's case stated, That from the time of the marriage, the appellant formed a plan to obtain a revocation of the deeds of the 9th and 10th of January: That in a few days after his marriage with her, he began to lay restraints upon her, depriving her of all intercourse with many of her friends, and only permitting it with others, when he had any purpose to answer: That he cruelly restricted the correspondence between the respondent and her mother: That he prevented her in general from sending any letters to the few friends to whom he permitted her to write, but what were dictated by himself; and in about three months after his marriage with her, he proceeded to give her blows, and to frighten and intimidate her with threats and menaces, and continued to treat her with the greatest cruelty and utmost indignity, until her separation from him: That the appellant at divers times, during the time he and the respondent lived together, produced to the respondent a variety of parchment and paper writings to sign, which she was usually ordered by him to sign, and which she did accordingly generally sign, without knowing or being truly informed of the contents, purport, or meaning of such parchments or papers, and without being able to understand the same, from the terror and agitation she

was under : That she did not dare to have asked an explanation or alteration of any paper, had it even been read to her, the appellant peremptorily ordering her to sign whatever he put before her, and, by blows and menaces, compelling her upon all occasions to do and say whatever he desired her, and generally dictating to her what she was to say previous to her going into the room, to any person or persons whatsoever, upon business or otherwise ; so that she was afraid to refuse the signing of any deed or paper writing whatsoever, which he required her to sign.

In the month of May 1777, the respondent (by the terrors of personal violence, as she alledged), was compelled to sign a deed or instrument, dated 1st May 1777, by which she revoked the aforesaid indentures of the 9th and 10th of January 1777; immediately after which the appellant began to commit all sorts of waste on the estates, and raised large sums of money, by cutting down great quantities of timber; and also raised and received twenty-four thousand pounds, by granting annuities to the amount of three thousand pounds per annum, payable out of the rents and profits of part of the said estates, compelling the respondent to execute whatever deeds he thought proper for the security thereof.

After experiencing and suffering for several years the most cruel treatment from the appellant, and being compelled frequently to [431] execute deeds, and do acts against her will and intentions, the respondent declared, in her case, that she at length resolved to leave the appellant; and in or about the month of February 1785, effected her escape, and ever after lived separate and apart from him, except for a short time in the month of November 1786, when she was seized and forcibly carried away to Streatham Castle, in the county of Durham, by a number of armed men hired by the appellant for that purpose; at this time she continued in his possession, and was deprived of her liberty by him, for about the space of ten days, and during that time underwent many hardships and cruelties until she regained her liberty.

Being apprehensive of further violence and ill-treatment from the appellant and that her life was in danger, the respondent exhibited articles of the peace against him in his majesty's court of king's bench at Westminster, which court compelled the appellant to give security for keeping the peace towards her; and she afterwards instituted a suit in the consistory court of the bishop of London, in order to obtain a divorce from him for cruelty and adultery on his part.

The respondent being after her said separation from the appellant, destitute of all means of support, she, in Easter term 1785, exhibited her bill of complaint in the court of chancery, against the appellant and others, in order to have the indentures of 9th and 10th January 1777, established, and the trusts thereof performed, and to have the benefit thereof, and to set aside any deed of revocation she might have executed, and to have a receiver appointed of the rents and profits of the estates of which she was tenant for life as aforesaid.

The appellant having put in his answer to the bill, insisting on the deed of revocation, the court of chancery was, on the 16th of July 1785, moved on behalf of the respondent, that it might be referred to one of the masters of the said court, to appoint a proper person to be receiver of the rents and profits of the said estates; and that such receiver might be directed, in the first place, to pay and discharge thereout the interest of all mortgages, annuities, and other incumbrances upon or affecting the same; and in the next place, to pay and allow unto the respondent the sum of fifteen hundred pounds, for her support and maintenance, and towards her costs and expences since the separation from her said husband, and to make her a further sufficient allowance for her future support and maintenance.

Upon such motion being made, it was, by the consent of counsel for the appellant and respondent, ordered by the said court, that all matters in difference between them should be referred to arbitration; and the appellant at first signified his entire approbation of the said order of reference, but afterwards refused to come to any amicable accommodation; and on the 26th of November 1785, directed his attorney to inform those concerned for the respondent, that he would not consent to any reference whatsoever, so that the said order of reference was not proceeded on.

[432] The suit, instituted by the respondent in the said consistory court, to obtain a divorce from the appellant, was proceeded in with all possible expedition on her part; witnesses were examined therein, and the cause was declared to be concluded, and assigned for sentence; but the appellant afterwards appealed therefrom



to the arches court of Canterbury, and the judge of that court pronounced against the said appeal, with costs, whereupon the appellant again appealed to the court of *delegates*; but the respondent at length obtained final sentence of divorce, or separation, from bed, board, and mutual cohabitation, both for *cruelty* and *adultery* on his part.

In Trinity term 1786, the appellant exhibited his cross bill in the court of chancery, against the respondent and others, thereby praying, amongst other things, that the said indenture of settlement, executed by the respondent, before her marriage, as aforesaid, might be declared null and void, and be decreed to be delivered up to be cancelled, and for an account and payment of the rents and profits of the said estates, and that the appellant might be decreed to be well entitled thereto during the joint lives of the appellant and the respondent. The defendants having appeared, and put in their answers to this cross bill, witnesses were examined in both the causes.

On the 8th day of March 1788, the said two causes came on to be heard before the Lord Chancellor (Thurlow), when it was ordered that the plaintiff's, (viz.) the respondent's bill, in the first cause, should stand dismissed as against the defendant Birch, with costs; and that the plaintiff's (viz.) the appellant's bill, in the last cause, should also stand dismissed as against all the defendants, except the respondent, with costs. And it was further ordered, that the parties should proceed to a trial at law in the county of Middlesex, on the following issue, (viz.) "Whether the deed, bearing date the 1st of May 1777, was obtained by duress?" and the usual directions were given for the trial of such issue, and the consideration of costs, and of all further directions, was reserved until after the trial of the said issue.

The said issue afterwards came on to be tried before Lord Loughborough, then lord chief justice of the court of common-pleas, and a special jury, at Westminster Hall, when the jury found that the said deed, bearing date the 1st day of May 1777, was obtained from the respondent by duress.

On the 19th day of June 1788, the said causes came on to be heard before Mr. Justice Buller, Master Holford, and Master Ord, who sat for the then lord high chancellor, on the equity reserved by the said order of the 8th day of March then last, when it was ordered that the appellant's said cross bill should stand dismissed as against the respondent, with costs. And it was further ordered, that the appellant should pay unto the respondent her costs, as taxed at law, and in the original cause. And it was also ordered, that the appellant should deliver up to the respondent the said deed, bearing date the 1st day of May 1777, to be cancelled; and [433] that the deeds bearing date the 9th and 10th days of January 1777, should be established; and that the appellant should deliver up possession to the respondent of all the castles, manors, royalties, mansion houses, messuages, lands, tithes, collieries, and estates; and should also deliver to her, upon oath, all the family pictures, plate, jewels, watches, and wearing apparel, and all other articles and things settled upon, or separately belonging to her; and the said George Stephens being alleged to be abroad, it was referred to the master to appoint one or more proper person or persons to be receiver or receivers of the rents and profits of all the said castles, manors, royalties, mansion houses, messuages, lands, collieries, and estates; and directions were given respecting such receiver or receivers, and his or their accounts; and the said master was to make a separate report or reports as to such receiver or receivers. And it was further ordered, that the appellant and Henry Bourn (his agent) should be restrained from receiving any further rents, profits, or produce, or distraining on the tenants of the said estates, and from receiving any further sums of money arising from the sale of timber on the estates in question; and that the appellant should be restrained from cutting down any more timber growing on the estates in question. And it was further ordered, that the master should take an account of the rent and profits of the said castles, manors, royalties, mansion houses, messuages, farms, lands, collieries, and estates; and also of all sums of money arising by sale of timber and coals which had been received by the appellant, and the said Henry Bourn, or either of them, or by any other person or persons, by their or either of their order, or for their or either of their use as to the appellant, since the filing of the bill in the original cause, and as to the defendant Bourn since the 26th of February 1785. And it was further ordered, that the appellant and the said Henry Bourn should pay what should be found due from them respectively, on the said account, to the respondent, for her

sole and separate use; and that the jewels and other things belonging to the respondent, which were deposited by the appellant in a box, in the shop of Messrs. Child and Co., bankers, at Temple Bar, should be delivered to the respondent; and the usual directions were given for taking the said accounts; and in the original cause it was ordered, that the respondent should pay unto the defendant George Stephens, his costs of that suit; and as between the respondent and the appellant, and the said Henry Bourn, the said court did not think fit to give any costs on either side.

The appellant afterwards petitioned to rehear the said causes, and the same were reheard accordingly before the then lord high chancellor, on the 3d of March 1789, when no other variation was made in the said decree, than by ordering that the master, in taking the accounts thereby directed against the defendant Henry Bourn, should make unto the defendant Henry Bourn, an allowance of all such sums as he had paid to the annuitants therein mentioned, in discharge of any payments of their respective annuities, out of the rents and profits of the Highland, Gibside, and Hilton estates, re-[434]-ceived by the said defendant Bourn, or by any person or persons by his order or for his use.

In pursuance of the said decree, the master made his report, bearing date the 9th day of June 1791, whereby he certified (amongst other things) that he had been attended by the solicitors for the respondent and the appellant and the other parties, and had proceeded to take an account of the rents and profits of the castles, manors, royalties, mansion houses, messuages, farms, lands, collieries, and estates, and of all sums of money arising by sale of timber and coals, which had been received by the appellant and the said Henry Bourn, or either of them, or by any other person or persons, by their or either of their order, or for their or either of their use, as to the appellant since the filing of the said original bill, and as to the defendant Bourn since the 26th day of February 1785, and that he found that the appellant, or some other person or persons, by his order, or for his use, received within the time aforesaid, on account of such rents and profits, the several sums set forth in the first schedule to his said report, amounting together to the sum of £733 14s. 7½d., which he had charged the said appellant with. And the said master also certified, that he had charged the appellant with two sums of £2825 3s. 1d. and £800, therein mentioned, making together £3625 3s. 1d. in respect of timber and bark; and that he found that the appellant, or some other persons or person by his order, or for his use, had received within the time aforesaid, by sale of coals wrought and gotten upon or from some part of the said estates, the several sums set forth in the second schedule to the said report, amounting together to £5936 13s. 4½d., with which he had charged the appellant, (which said several sums amounted together to £10,295 11s. 1d.) And the said master also certified, that the appellant having brought in before him a discharge of the said charge, but that the same not having been duly vouched, the said master had disallowed the whole of such discharge. And the said master further certified, that he found that the said defendant Henry Bourn, or some other person or persons, by his order, or for his use, received since the said 26th day of February 1785, on account of such rents and profits, the several sums set forth in the third schedule to the said report, amounting together to £3056 18s. 11½d., with which he had charged the said defendant Bourn; and that he found that the said defendant Bourn had paid and disbursed for taxes, repairs, labourers, and otherwise, on account of the said estates, the several sums set forth in the fourth schedule to the said report, amounting together to £1417 10s. 8d., of which he had made the said defendant Bourn an allowance; and that there remained due from him on balance, £1639 8s. 3½d.

The said decrees, made and pronounced in the said causes, were duly signed and enrolled on the 6th of April 1789, and the appellant submitted thereto, particularly, by attending through his solicitor before the master, in taking the accounts thereby directed, and claiming, by discharge, three thousand pounds, which was dis-[435]-allowed, as stated in the said master's report, and this appeal was not brought until the 19th of October 1796, being seven years six months and thirteen days subsequent to the time of enrolling the said decrees.

From the year 1788, and at the time of bringing the appeal, the appellant remained in contempt of the said court of chancery, for not paying to the respondent the sum of £230 15s., (being her taxed costs for trying the said issue at law), and for

not delivering up to her the said deed of the 1st of May 1777, and also for not delivering up to the respondent all the family pictures, plate, and jewels, watches and wearing apparel, and all other articles and things settled upon or separately belonging to her.

The appellant was ordered by the arches court of Canterbury, to pay to the respondent £300 for alimony; but although he was then in possession and receipt of the rents and profits of all the estates herein-before mentioned, he never paid the said £300, or any part thereof, to the respondent.

The appellant, having refused to pay the costs taxed and allowed to the respondent for prosecuting her suit in the spiritual courts, amounting in all to £1742 14s. 2d., was, in the year 1790, excommunicated by the judges delegates in that suit; and the appellant being therefore charged by his majesty's court of king's bench with writs of *excommunicato capiendo*, the appellant remained to the time of the appeal excommunicated, for refusing to submit to the justice of the ecclesiastical censure.

From the year 1791, the appellant remained in further contempt of the said court of chancery, for not paying to the respondent the sum of £116 5s. 6d. for costs, and the said sum of £10,295 11s. 6d. for rents and profits, in pursuance of the said decree of the 19th of June 1788.

After the making of the said decrees, and several years before the appeal was brought, (that is to say), in the month of November 1790, the respondent revoked the uses and trusts of the said indenture of the 10th of January 1777, and declared new and other uses of the estates therein mentioned, for the benefit of the Earl of Strathmore, and her two children by the appellant, which said two children were, until then, wholly unprovided for.

The appellant alleged (J. Mitford, R. Richards) the following reasons for repealing the two decrees of the 8th of March and 19th June 1788, by which he contended he was aggrieved; 1st. That the deeds of the 9th and 10th of January 1777, were a fraud upon the contract of marriage between the appellant and the respondent Lady Strathmore, being made without the knowledge of the appellant, and concealed from him at the time of such marriage.

2d. That, although such deeds were suggested to have been made in contemplation of a marriage intended between the said Countess of Strathmore and another person, yet such marriage did not take effect; and although the disposition made by those deeds might not be fraudulent, as against a person knowing of and consenting to such disposition, yet, as it would be clearly fraudulent [436] against creditors, or purchasers for valuable consideration, there was no sound reason why the same should not be deemed fraudulent as against the appellant, who, by the marriage, gave to Lady Strathmore a legal title to dower in his own estate, (worth at that time, as he asserted, about £1000 per annum), and became responsible for all the obligations of a husband, and particularly for debts contracted, or to be contracted by her.

3d. That all the cases which have been determined by courts of equity upon the subject, agree in regarding such a disposition as fraudulent and void, especially where made merely and only for the immediate and separate benefit of the person making it.

4th. That if the decrees complained of should be established, a precedent would exist, destructive of confidence in every matrimonial engagement, and leading to consequences subversive of all the grounds on which the law of this country, with respect to the obligations on husbands, by force of the contract of marriage, is founded.

The respondent submitted (J. Mansfield, G. Hardinge) the following reasons for the affirmation of the decrees:

1st. That by the law of this country, a woman, while unmarried, may dispose of and convey her property in any manner she pleases; and a husband whom she afterwards marries, without any settlement made by him, or any inquiry concerning her fortune, has no right to impeach any conveyance which she has made of her property for her own separate use.

2d. That there is no instance, in which conveyances made by a woman of her property before marriage have been deemed void, because they have not been disclosed to the husband, unless attended with such circumstances as proved such conveyances to be fraudulent; and that such conveyances are, in the case of a second marriage, where there are children by a former one, reasonable and laudable, and often favoured in a court of equity.

3d. That it was impossible to look at the circumstances of this case without perceiving that such a conveyance as the appellant attempted to impeach, might be extremely reasonable. That if it be possible to conceive the husband of all others, who ought the least to be permitted to question any such dispositions made by a wife, the appellant was that husband. That every step by which he acquired his supposed marital rights, was grossly fraudulent; and therefore it would be an extraordinary administration of equity to give him the property of his wife, which the law had secured to her, as a reward of his fraud. That his attempt to invalidate the deed in question must appear still more extraordinary, it having been determined that he, by the terrors of personal violence, had extorted from the respondent another deed, for the purpose of defeating this, which, by the appeal, he contended, was in itself void.

It was accordingly ORDERED and ADJUDGED, That the appeal be dismissed; and that the decree therein complained of be AFFIRMED, with £150 costs. (MS. Jour. sub anno 1797.)

[437] CASE 6.—JAMES JONES and ELIZABETH his Wife,—*Appellants*;  
THOMAS MARTIN, Clerk,—*Respondent* [26th January 1798].

[Mews' Dig. xii. 816, 830. Followed in *Fortescue v. Herrah*, 1812, 19 Ves. 67.]

A father covenanted at his daughter's marriage to leave her at his death a full and equal share of his personal estate with his son. Soon after the marriage, he began and continued for some years to sell real estates, and vested the produce in Bank stock, together with the produce of his personal estate, the whole of which he transferred into the son's name; who verbally promised to pay the father the dividends for his life. The son sold out the Bank stock, and invested the produce in India stock, which produced a greater interest, but paid his father only the amount of the former interest of the Bank stock. When the father died he left other personalty to a very small amount. The India stock is to be considered as part of the father's personal estate, and subject to the covenant in favour of his daughter.

DECREE of the Court of Exchequer REVERSED.

Anstruther's Rep. iii. 882.

The appellants in Easter term 1793, filed their bill in the court of exchequer, against the respondent and William Foster, stating,

"That by articles of agreement, dated the 15th day of September 1767, executed previous to and in consideration of the marriage of the appellants, and made between James Jones, the father of the appellant James Jones, and since deceased, of the first part; the appellant James Jones, (who was then the youngest son of the said James Jones, deceased, by Ann his wife), of the second part; the appellant Elizabeth Jones, (then Elizabeth Martin, spinster), who was then the eldest daughter of the respondent's father, Thomas Martin, esquire, and Elizabeth his wife, of the third part; the respondent's father Thomas Martin, of the fourth part; and John Franklin, gentleman, and the Reverend Morgan Powell, clerk, of the fifth part. After reciting the then intended marriage, James Jones, the father, covenanted with Franklin and Powell, the trustees, that he would, yearly, from the time of said marriage, during the joint lives of himself and the appellant James Jones, pay the sum of £100 to the appellant James Jones, by half-yearly payments. And also, that if there should be any issue of the appellant's living at the decease of the appellant James Jones's said father and mother, or the survivor of them, or at any time afterwards, he, James Jones the father, would, by his will in writing or otherwise, give and devise, convey and assure, certain messuages, lands, and hereditaments in the said articles mentioned, after the death of him the said James Jones, and Ann his wife, to the use of the appellants, their heirs and assigns, for ever. And also that he, the said James Jones the father, would, by his said will, give and leave unto the appellant James Jones, his shop, furniture, and implements, and also his library of books, to be

enjoyed by the appellant James Jones, immediately after the decease of his said father. And also, all his household furniture, to be enjoyed by the appellant James [438] Jones, immediately after the decease of his said father and mother. And also, that James Jones the father would, immediately after the said marriage, give up and resign unto the appellant James Jones, certain particulars of his business therein mentioned. And also that he would, by his said will, give and leave unto the appellant James Jones a full and equal share with his brother and sisters; (namely), John Jones, Ann Jones, and Catharine Jones, of all the personal estate of him the said James Jones, the father, to be had and enjoyed by appellant James Jones, immediately after the death of James Jones and Ann his wife. And it was by the said articles further witnessed, and said Thomas Martin the father, in consideration of the intended marriage, covenanted with Franklin and Powell, that if the marriage should take effect, and the appellants should have any child or children living at the decease of Thomas Martin and Elizabeth his wife, or the survivor of them, or at any time afterwards, he would, by his will, give and devise certain messuages or tenements and hereditaments in the articles mentioned immediately after the deaths of himself and Elizabeth his wife, and the survivor of them, to the use of the appellants, their heirs and assigns, for ever. And further, *that he would, at his decease, by his will, leave unto the appellant Elizabeth Jones, an equal share with her brother and sister, of all his the said Thomas Martin's personal estate, to be held and enjoyed immediately after the death of him the said Thomas Martin and Elizabeth his wife, and not before.* And likewise, that he would yearly, after the said marriage, during the lives of himself and Elizabeth his wife, pay unto the appellant James Jones (if the appellants, or any child or children between them should be then living) the clear annual sum of £100 by half-yearly payments.

"That at the date and execution of the articles, Thomas Martin had three children, viz. the respondent, his only son, Frances Martin, spinster, and the appellant Elizabeth Jones.

"That the appellants intermarried on the 5th of October 1767, and they had several children, who were then living, the eldest of whom was upwards of 21 years of age.

"That Thomas Martin, the father, pursuant to his covenant in the articles, paid the annuity of £100 to the appellant James Jones, from the time of the marriage of the appellants to his the said Thomas Martin's death.

"That the appellant, Elizabeth Jones's sister, Frances Martin, intermarried with William Guymer, and died without issue on the 18th of January 1779; and that the appellant, Elizabeth Jones's mother, died the 16th of May 1785.

"That John Franklin survived Morgan Powell, his co-trustee in the articles, and died in the year 1787, having made his will, and thereof appointed the defendant, William Foster, and the respondent, executors.

"That Thomas Martin, the father, made his will, dated 24th January 1786, which was duly executed and attested, and thereby, after reciting the articles of agreement relating to his real estates [439] therein mentioned, he, in performance of his covenant therein mentioned, gave and devised his said real estates to the uses specified concerning the same in the said articles; and after reciting the articles relating to his personal estate, and the death of Frances his youngest daughter, he, in performance of his said covenant, gave and bequeathed to the appellant Elizabeth Jones, one moiety of all the personal estate (which, after payment of his debts, funeral and testamentary expences) he should be possessed of at the time of his decease, and he gave all the residue of his personal estate to the respondent, and appointed him sole executor.

"That Thomas Martin, the father, died in the 90th year of his age, on the 26th of March 1792, without having revoked his said will; and that the respondent proved his will, and possessed his personal estate and effects to a considerable amount, and more than sufficient for the payment of his debts, funeral and testamentary expences.

"That on the death of Thomas Martin, the appellants became absolutely entitled, by virtue of said articles, to the real estates therein mentioned, and also to one moiety of all the personal estate and effects in anywise belonging to the testator Thomas Martin, at the time of his death, and remaining after payment of his debts, funeral and testamentary expences.

"That soon after the death of the testator, the appellants entered upon the real estates comprized in the articles, and were then in the possession; but that the respondent had never paid any money to or for the use of the appellants on account of their half part of the clear residue of the testator's personal estate.

"That the appellants had frequently applied to the respondent for an account and payment of one moiety of such clear surplus.

"But that the respondent, amongst other things, alleged, that the covenants in the articles on the part of James Jones, the father of the appellant James Jones, had never been, nor could be, in any manner (or, however, not substantially) performed, by reason that the real estate of James Jones, deceased, mentioned in said articles, was, at the date thereof, subject to some incumbrances for money exceeding the value thereof to be sold; and that James Jones died within a few years after the marriage. (viz.) on the 4th of February 1770, in such circumstances, that his whole real and personal estates were not near sufficient for payment of all the debts then owing by him; and therefore the respondent's father was discharged from the covenants and agreements on his part contained in the articles; but that the appellants insisted on the contrary, and the rather, as the covenants in the articles on the part of Thomas Martin were with trustees, and merely for the benefit of the appellants, and wholly independent of James Jones's covenants in the articles; and the appellants charged, that it was evident from the will of Thomas Martin, which was made many years after the death of James Jones, who died in insolvent circumstances, that Thomas Martin, deceased, considered his covenants as obligatory on him."

[440] The bill further charged, "That Thomas Martin's personal estate was very considerable, and that part thereof consisted of sums of money placed out on private securities, which were at the time of his death vested in the respondent, or for his benefit; and moreover, that Thomas Martin, after the marriage of the appellants, transferred unto the respondent several sums of money, to a large amount, in the publick funds, or on government securities, and particularly the sums of money in bank stock after mentioned, at the times following, (viz.) on the 29th of July 1783, £2000: on the 14th of August in the same year, £1000; and on the 22d of April 1785, £348; on the 9th of June 1785, £800; and on the 22d of April 1788, the further sum of £300; making together £4448: And the bill further charged, that all such several sums of money, in publick and private securities so transferred, were the absolute property of Thomas Martin, at and immediately before the times of the transfers thereof, and that the same were transferred by Thomas Martin unto the respondent, without any consideration paid for the same, and were in trust for Thomas Martin; and that the respondent, by some deed or instrument, in writing or otherwise, declared or acknowledged that the interest or dividends thereof, or of the said publick or private securities, should be paid or remitted to, or to the use of Thomas Martin, or to some such or the like effect."

And the bill further charged, "That the following sums were purchased in the name of the respondent, in the stocks or funds, and at the times after mentioned, viz. on the 20th of May 1785, the sum of £1000 in four per cent. bank annuities; on 21st of June in same year, the like sum in the same fund; on the 9th of June 1786, the sum of £200 in five per cent. bank annuities; and on the 29th of October 1787, the sum of £350 in the same fund; and the whole or great part of the money paid for the purchase of each of such sums, was paid with or out of money belonging to Thomas Martin, deceased, or in some manner received by the respondent, for his use or on his account, and the whole, or great part of these sums was really bought and transferred into the name of the respondent, in trust for Thomas Martin; and that the respondent, in or by some deed or instrument, in writing or otherwise, acknowledged or declared such trust, and promised or consented that the dividends or interest thereon should be paid or remitted to Thomas Martin, or to that effect."

And the bill charged, "That the whole, or great part of the interest or dividends of such sums in the publick funds, or on private securities, was, between the times of the respective transfers thereof to the respondent, and the time of the death of Thomas Martin, deceased, remitted or paid to him, or to his order, or for his use, by the direction or consent of the respondent, save as to all or part of the sums in bank stock which, in the year 1789, the respondent sold, and immediately afterwards invested the purchase money in East India stock in his own name, and the sums so pur-[441]

chased then remained in his name; and that the respondent executed a like declaration of trust, or a similar promise or agreement concerning the East India stock, or the interest or dividends thereof; and he, from time to time, paid the whole or part of the dividends or interest thereon unto or for the use of said Thomas Martin deceased, until the time of his death. And the appellants insisted, that such circumstances afforded clear evidence, that these principal or capital sums and securities were vested in the respondent in trust for his said father, either absolutely or wholly, or at least for life; and, if those sums or securities were transferred into the name of the respondent for his own benefit, even after the death of his said father, the bill charged, that the same was done *with an unjust view and design in both Thomas Martin and the respondent, to defraud the appellants, by lessening the amount and value of the personal estate belonging to Thomas Martin, at the time of his death, a moiety whereof, as it was well known to them both, would, on his death, belong to the appellants, under Thomas Martin's covenant in the articles*, and therefore the appellants insisted, that such gifts (if any such there was) ought not to prevail or have effect to their prejudice, and that they were entitled to one moiety of the several sums in East India stock and bank annuities, if the same were then unsold, or in case the same had been sold by the respondent, that then he ought to account for and pay unto the appellants, one moiety of the money produced thereby, together with interest. And the appellants insisted, that they were also entitled to a moiety of the monies received by the respondent, or then due on the private securities, with interest."

The bill moreover charged, "That Thomas Martin, having some years before his death taken a causeless dislike against the appellant James Jones, resolved, as far as he could, to defeat the appellants of the benefit of his covenant in the articles with regard to his personal estate, by vesting the greatest part thereof in the respondent, or some other person or persons, in trust for himself, or by giving the same to the respondent, or some other person or persons, either absolutely or with a reservation of a right thereto, or to the interest thereof, for his life; and that Thomas Martin and the respondent had several meetings, and much consultation between themselves, and also with some other person or persons, on such subject, and also in relation to the said articles, and several letters passed between them, and also between them and some other person or persons, on such subject, or in relation to the articles; and that Thomas Martin and the respondent consulted counsel as to the validity and effect of the articles, and of Thomas Martin's covenant, or otherwise, in relation thereto; and some case or cases relating to the articles, by which the fraudulent views and designs of the respondent and his father would manifestly appear, together with the opinion of counsel thereon, were then in the custody or power of the respondent."

And the bill charged, "That the said testator, Thomas Martin, in pursuance of his resolution, and in execution of a fraudulent [442] and unjust design, formed by him and the respondent to deprive the appellants of the benefit of the articles, did, at sundry times after the marriage of the appellants, give to the respondent, his wife, and children, divers sums of money, and other articles of personal property of considerable value."

The bill also stated an allegation on the part of the respondent, "That the said Thomas Martin, besides the provision which he, by the articles, agreed to make for the appellants, made a provision, or procured some benefit for them to a large amount and value, and to a greater amount and value than he ever advanced to or procured for the respondent."

The bill also stated, "That the appellants were advised that no action at law could be maintained against the respondent on his covenant, as he was one of the executors of said John Franklin, surviving trustee in the articles as well as the executor of said Thomas Martin, deceased."

The appellants, by their said bill, "Prayed that the will of said Thomas Martin might be established with regard to his real estates thereby devised, and that an account might be taken of the personal estate and effects of Thomas Martin possessed by the respondent, and that all articles of personal property which were at the time of the death of said Thomas Martin vested in the respondent, or any other person in trust for him, might be included in such account; and that all articles of personal property which might appear to have been given by said Thomas Martin, deceased, to the respondent, his wife, or children, or any of them, after the marriage of the

appellants, might be declared to have been given in fraud of the appellants, and of the covenant and agreement of said Thomas Martin, deceased, in the articles; and that the same, with interest, might be brought into the account of the personal estate of Thomas Martin at the time of his death, and that an account might be taken of the debts and funeral expences of Thomas Martin; *and that the respondent might pay and transfer to the appellants one full moiety of the clear surplus of the personal estate and effects of said Thomas Martin, deceased, including all such particulars as aforesaid, and of all the interest or dividends accrued due thereon, and for further relief."*

The respondent appeared and put in his answer to the bill, and thereby admitted the appellants marriage, and the execution of the articles previous thereto; and also stated,

"That at the time of the execution of the said articles, Thomas Martin, the respondent's father, was seised of certain real estates, besides the freehold estate comprized in the articles, which he intended for the respondent, his only son.

"That for some particular reasons Thomas Martin did, after the marriage of the appellants, sell divers parts of his said other real estates, for different sums, amounting in the whole to £3072 5s., the whole of which was laid out by his father, Thomas Martin, in the purchase of bank stock.

[443] "That the respondent's father, soon after the marriage of the appellants, (besides the provision made or covenanted to be made for them by said articles), gave the appellants a considerable quantity of household furniture, plate, and other property, to the amount of £200 and procured other benefits by way of advancement for the appellant, James Jones, of the value of £100 per annum at the least; but that Thomas Martin, the respondent's father, (except as to the bank stock after mentioned to have been transferred to the respondent), only gave the respondent, for his advancement in the world, out of his personal property, some trifling sums and articles of small amount in the whole.

"That upon the occasion of the execution of the articles, James Jones the elder, the appellant James Jones's late father, assured Thomas Martin, the respondent's father, that the estate, which he thereby covenanted to devise to the appellant James Jones, was free from incumbrances, but that such estate was then mortgaged to nearly its full value, and that two or three years afterwards he died insolvent. and that the appellants or their issue did not, nor could derive any advantage from the covenants contained on the part of the said James Jones the elder in said articles; and in consideration of which covenants Thomas Martin, deceased, did enter into the several covenants which were contained on his part in said articles.

"That the respondent's father being desirous that the respondent should, after his decease, have the produce of the real estates so sold by him, and that the respondent should have a participation of his property equal at the least to what the appellants had received, or were to receive thereout, consulted counsel as to his ability so to do, without committing any breach of his covenant in the articles: and that in consequence of the opinion of such counsel [Ll. Kenyon and Sir John Scott. See Anstr. 883], transferred to the respondent bank stock, to the amount of £4448, and which, according to the market prices of such stock at the respective transfers thereof, was of the value of £5735, and that £3072 5s., part of that sum, arose by sale of Thomas Martin's real estates; and that he considered the residue of the £5735 to be an advance to the respondent out of his personal estate, and which was not equal to the amount of the sums paid by Thomas Martin in his lifetime to the appellant James Jones, on account of the annuity of £100, secured in the articles to be paid by him, and the value of the furniture, plate, and other things given to the appellants.

"That such bank stock was transferred to the respondent absolutely and unconditionally, and not in any manner upon trust for the benefit of his father, or any other person, except that the respondent did, previous to the transfer thereof, verbally consent and agree, that his said father should receive the dividends that should accrue thereon in his lifetime, for his better support and maintenance. he being at that time much advanced in years, but that the respondent never entered into any agreement in writing to that effect, nor did he ever by any deed, or otherwise, declare [444] or acknowledge any trust concerning any sums in bank



stock, for the benefit of his father, his said father relying on the duty and affection of the respondent for the receiving the dividends during his life.

"That after the transfer of the bank stock to the respondent, he, residing at a great distance from London, gave a power of attorney to Abraham Newland to receive the dividends, and that the respondent, by a letter sent to Abraham Newland, authorized and directed him to remit or pay such dividends, as he should receive the same, to his, the respondent's father; in consequence of which the dividends were paid to the respondent's father up to Michaelmas 1789, when the bank stock was sold by the respondent for £8,050 17s. 8d., which sum was laid out by the respondent's directions in the purchase of different sums in East India stock in his name, amounting together to £4,675, and the dividends which accrued due thereon had ever since been received by him, or some person empowered by him; and the respondent, from Michaelmas 1789, until his father's death, remitted to him, half-yearly, a sum equal to the dividends which would have been produced by the bank stock, in case the same had not been sold."

The respondent insisted, "That according to the true construction and meaning of the articles, the parties did not thereby preclude themselves from disposing of any of their personal property in their lifetimes, in such manner as they might think proper, for the benefit of any other child or children; and that the covenant on the part of Thomas Martin, with respect to bequeathing by will to the appellant, Elizabeth Jones, an equal share with her brother and sister of his personal estate, to be had and enjoyed immediately after the decease of said Thomas Martin and Elizabeth his wife, and not before, did, according to the true and fair construction of such covenant, only relate to such personal estate as he might be possessed of at his death.

"That Thomas Martin transferred the bank stock to the respondent in order that he might render, what he considered to be, justice to him as his son, by not suffering the appellant, Elizabeth Jones, to have an undue preference to his prejudice, and for no other reason, and that he did not thereby intend to defeat, or to act in fraud of the covenant on his part in the articles, nor conceive that he did so; and as evidence thereof, the respondent said, that his father in his lifetime wrote, in his own hand-writing, and subscribed a declaration or memorandum, dated 16th February 1786, wherein there is a passage in the words, or to the purport and effect following; that is to say, 'For particular reasons I sold several real estates which I always intended my son should possess, and therefore I thought it would be doing him injustice if I did not give him the value of them in my lifetime, and this I did not mean to preclude myself from doing by the said marriage articles, the estates and produce are herein mentioned; by the clause in the articles, I meant to retain a power of giving to my son or younger daughter, any time during my life, whatever [445] sum or sums of money I thought proper, provided I performed every part of the said marriage articles, such a power is conveyed by the clause, since it excludes any retrospect to what I had done for my children in my lifetime, and relates only to an equal division of my personal property at the time of my decease.—I never meant, which cannot be supposed of any father in his right senses, to render myself accountable to any of my children for the disposal of my property during my life, and in this particular my elder daughter should be the last to complain, since I gave to her and hers in my lifetime, over and above what I had covenanted, to the amount of £200 and upwards.' And another passage in the words, or to the purport or effect following; that is to say, 'And she has still less reason to complain, because I had, with some difficulty and to the prejudice of my son, procured for her husband a handsome sinecure place under government, which certainly was no part of the marriage articles.'

"That the respondent's father wrote, in his own hand-writing, a declaration or memorandum, or a supplement to the said declaration or memorandum, dated 20th May 1786, in which there is a passage in the words, or to the purport or effect following; viz. 'But in case of a suit, which was rather prematurely threatened by Mr. Jones, and in case also any doubt should arise of my intent or meaning in the aforementioned clause of the articles, I do declare, that the literal and obvious construction of it was precisely my meaning; viz. that all the personal estate I should be possessed of at the time of my decease, should be equally divided between

my children; and I moreover declare, that what personal property I gave to my son in my lifetime (exclusive of the produce of the estates I sold) I deemed no more than equivalent to the settlement of real estates I made upon my elder daughter, (which I consider as taken from my son), and the amount of the stated payments of money her husband received in virtue of the said articles, in strict conformity to those, I have, by my last will and testament, given to my said daughter a full and equal share with my son of all the personal property I shall be possessed of at the time of my decease.'

The respondent further insisted, "That the transfer of the bank stock to him by his father, was in every respect a fair transaction, and ought not to be considered as having been done in fraud of the covenant in the articles on the part of his father, and that the respondent was entitled to the full benefit of such transfer, and was not in any manner accountable to the appellants for any part of the produce thereof; and that the produce of the bank stock, or the East India stock purchased therewith, ought not to be considered as having composed any part of the personal estate belonging to his father at the time of his death, and especially inasmuch as his father, instead of transferring the bank stock to him, might, if he had thought proper, have sold it, and laid out the produce in the purchase of freehold estates, which would, [446] if purchased, have descended to the respondent as heir at law to his father, or his father might have disposed thereof as he thought proper."—The answer then went on to state,

"That the bank stock transferred to the respondent by his father, was previous to the transfers thereof, the property and parts of the personal estate of his father, and stood in his name in the books of the governor and company of the bank of England. and that the respondent did not give any consideration for the transfer thereof.

"That other property and effects, which composed part of Thomas Martin, deceased's, personal estate at the time being, were, after the marriage of the appellants, given, paid, assigned, or transferred to respondent for his own use, but not vested in him for any other purpose.

"That the appellants, upon or soon after the death of Thomas Martin, entered upon the real estate, comprized in said articles, and that they had ever since been, and then were, in the possession or receipt of the rents and profits thereof, and which real estate was, at Thomas Martin's decease, of the value of £1400 or upwards, to be sold.

"That Thomas Martin, in his lifetime, fully performed the covenants contained in the articles on his part, by his having fully paid the annuity of £100 in the articles mentioned, unto or for the use of the appellants from the time of the execution thereof down to the death of Thomas Martin, amounting in the whole to the sum of £2450 or thereabouts, and by his having by his will devised the real estates, comprised in the articles, and one moiety of his personal estate, agreeable to his covenant in the articles.

"That the respondent, when he visited his father, which was not oftener than once or twice in a year, the respondent residing about fifty miles from his father's residence, they occasionally had conversations together, in relation to the articles and the effect thereof; when his father generally mentioned, that he intended to do justice to the respondent, and secure to him the proceeds of the real estates sold, and to give him an equivalent for the personal property that the appellants had received from him, or to that effect.

"That Mr. John Spurgeon, the attorney employed by Thomas Martin, deceased, did, by his privity and direction, (but without the knowledge or privity of the respondent), in 1783, lay a case before counsel for his opinion relating to Thomas Martin's covenant in the articles, and that such counsel gave an opinion thereon, dated 14th July 1783, and that the appellant, James Jones, having asserted, in the presence or hearing of Thomas Martin, that he would, after the decease of Thomas Martin, file a bill in equity against the respondent, or to that effect, Mr. Spurgeon, and Jacob Preston his partner, by the desire of Thomas Martin, and with the privity of the respondent, laid another case before another counsel for his opinion relative to the covenant, and the operation thereof; and that such counsel gave an opinion thereon, dated 28th Decem-[447]-ber 1788, and that such cases and opinions were in the respondent's custody or power.

"That the respondent claimed to be entitled to one clear moiety of the residue of the personal estate belonging to his father at his death, which should remain after payment of his debts, funeral and testamentary charges.

"That the respondent was then, and had always been ready and willing to come to a fair account for all the personal estate belonging to his father at his death, which had come to his hands or use, and for his application thereof; but insisted *that no part of the personal property which might appear to have been actually given by the respondent's father to the respondent, his wife or children, after the marriage of the appellants, ought to be declared to have been given in fraud of the appellants, or of the respondent's father's said covenant*; and that no part thereof ought to be brought into the account of the personal estate of the respondent's father at the time of his death; and that the appellants were not entitled to call the respondent in any manner to an account respecting the same."

The father of the appellant James Jones was a surgeon and apothecary of eminence, at Fakenham, in the county of Norfolk; and the appellant, James Jones, having been bred to the same profession, was for some years before, and at the time of his marriage, in the receipt and enjoyment of half-pay, as apothecary to his majesty's forces in Germany.

The said Thomas Martin (the father of the appellant Elizabeth Jones, and of the respondent) was, during the greatest part of his life, a considerable merchant, and an alderman of the borough of Great Yarmouth, in the county of Norfolk.

The said Thomas Martin the father, during his life, paid the said annuity of £100 to the appellant James Jones, in pursuance of the said articles of agreement.

The said James Jones the elder, died on the 4th day of February 1770, insolvent, and the appellants never derived any benefit from his covenants in the said articles of agreement, with respect to his real estates therein mentioned, the same having been before, and at the date of the said articles, mortgaged, and the money arising by sale thereof not being sufficient to discharge the principal money and interest due to the representatives of the mortgagee.

Upon the death of the said James Jones the elder, the said Thomas Martin, the father, procured the appellant, James Jones, to be appointed one of his majesty's patent king's waiters in the port of London, (which place has produced, *communibus annis*, the yearly sum of £100 or thereabouts), upon which the appellant James Jones was obliged to relinquish his half-pay aforesaid, so that he did not receive much benefit from the last-mentioned appointment.

Some time in the year 1774, the said Thomas Martin, the father, was appointed collector of the customs, within the borough of Great Yarmouth aforesaid, (the clear annual profits whereof amounted to £400 or thereabouts), and he thereupon left off, [448] and relinquished the trade and business of a merchant, and afterwards sold his stock in trade, and the greatest part of his real estates, then remaining unsold, and part of the money arising therefrom was laid out in the purchase of stock. In 1784 he resigned this office.

The said John Franklin having survived the said Morgan Powell, his co-trustee in the said articles, died in the month of March or April 1785, having duly made and published his last will in writing, and thereof appointed William Foster, gentleman, and the respondent, executors.

The said Thomas Martin, the father, died in the ninetieth year of his age, on the 26th day of March 1792; and thereupon the respondent duly proved the will, and possessed the personal estate of his father.

Upon the death of the said Thomas Martin, the father, the annuity which he had covenanted to pay to the appellant, James Jones, ceased, and the appellants became entitled, under the said articles of agreement, to the real estates therein mentioned, to them and their heirs.

On the 17th day of August 1792, the respondent sent to the appellant, James Jones, a paper writing, purporting to be an account of the personal estate of the said Thomas Martin, the father, possessed by the respondent, and of his disbursements thereout; by which it was stated, that the clear surplus of such personal estate, remaining in the respondent's hands, amounted only to ninety pounds, or thereabouts, and consequently that the appellant's moiety thereof amounted to no more than *forty-five* pounds, or thereabouts.

This account confirmed the appellants in the suspicion, which they had for some time entertained, that the respondent had used an undue influence over his father, with regard to the distribution of his personal property; and the appellants, soon after receiving that account, caused searches in the proper offices, and other enquiries to be made for information concerning the personal property of the said Thomas Martin, the father; and thereupon they discovered that the said Thomas Martin, the father, towards the close of his life, and at different times, when, from his great age, both he and the respondent must have been in continual expectation of his speedy dissolution, had, without any consideration, (by his agent Mr. Abraham Newland, chief cashier at the bank), transferred the following sums, in bank stock, into the name of the respondent, viz.

|                           |   |   |   |   |   |       |   |   |
|---------------------------|---|---|---|---|---|-------|---|---|
| 1783, July 29th           | . | . | . | . | . | £2000 | 0 | 0 |
| August 14th               | . | . | . | . | . | 1000  | 0 | 0 |
| 1785, April 22d           | . | . | . | . | . | 348   | 0 | 0 |
| June 9th                  | . | . | . | . | . | 800   | 0 | 0 |
| 1788, April 22d           | . | . | . | . | . | 300   | 0 | 0 |
| Making together . . . . . |   |   |   |   |   | £4448 | 0 | 0 |

[449] The appellants also, by means of their said inquiries, discovered that all the said sums in bank stock, remained in the name of the respondent until the month of December 1789, when he sold the whole, at two different times, for £8050 17s. 8d. which sum was received, and immediately afterwards laid out by the said Abraham Newland, as agent to the respondent in the purchase of several sums in East India stock, amounting together to £4675, in name of the respondent. But the sale of the said bank stock was not disclosed by the respondent to his father, nor was it ever known by him.

The appellants also discovered that the dividends of the said bank stock, amounting to the yearly sum of £311 7s. 2d. were regularly remitted by the said Abraham Newland, *not to the respondent*, but to the said Thomas Martin the father.

The appellants also discovered that the dividends of the said East India stock, amounting to the yearly sum of £374, were regularly received by the said Abraham Newland, and by him remitted to the respondent; and that the respondent (for the purpose of concealing from his father the purchase of the said East India stock) actually remitted to him, during the remainder of his life, no more than the amount of the dividends of the said bank stock, viz. £311 7s. 2d. retaining the annual sum of £62 12s. 10d. (being the difference between the dividends of the two stocks) in his own hands.

*The following is the copy of the case laid before Lord Kenyon, with his opinion thereon.*

#### CASE.

Thomas Martin esquire, being seised and possessed of a *considerable* real and personal estate, and having one son and two daughters, did, previous to, and in consideration of a marriage of Elizabeth, his eldest daughter, with Mr. James Jones, by articles of agreement, bearing date 15th September 1767, (a copy whereof is hereto annexed) covenant, that he would, by his last will and testament, in writing, duly executed, give, will, and devise, convey and assure, in such manner as the law directs, divers messuages and premises (part of his real estate) therein particularly described, to and for such uses, intents, and purposes, as are therein expressed and declared. "And further, that the said Thomas Martin shall, and will, at the time of his decease, by his will, give and leave unto the said Elizabeth, his daughter, (the intended wife of the said James Jones), a full and equal share with her brother and sister, of all the personal estate of him the said Thomas Martin, to be had, held, and enjoyed immediately after the deceases of them, the said Thomas Martin and Elizabeth his wife, and not before."

*The marriage* took effect, and Mr. and Mrs. Jones have several children. Mr. Martin's youngest daughter is since dead, without [450] issue, but his son is still living, and has a numerous family, to whom Mr. Martin always intended to give all his

real estate, not covenanted by the said marriage articles to be settled, but he has lately sold divers parts thereof, and thereby considerably increased his personal estate.

Mr. Martin wishes to be advised, whether he is compellable, by the last-mentioned covenant, to leave Mrs. Jones *more than one-third part* of his personal estate. And whether the money raised by the sale he has made of part of his real estate, intended for the son, may not, by the will, or otherwise, be given by him to the son, without being liable to be divided with the rest of his personal estate, pursuant to the said covenant. And,

2dly, *Whether*, in case his personal estate, by savings, or otherwise, should increase, he may not in his lifetime give such increase to his said son, or his children, or any other relations or friends, for his or their own use and benefit, without breach of the said covenant.

*Answer*—*The covenant* is not framed so accurately as one could wish. I think it extends to give Elizabeth a moiety of what shall be the obligor's personal estate at the time of his death, as the youngest daughter is dead. But Mr. Martin is not, as I conceive, restrained from investing any part of his personal property in real estates during his life, and disposing of such real estates at his pleasure; or he may, in his lifetime, absolutely give away any part of his personal estate, *provided the gift shall take effect in his lifetime*.

Ll. Kenyon, 14th July 1783, Lincoln's Inn.

*The following is a copy of the declaration of the said Thomas Martin the father, dated 16th February 1786.*

On the marriage of my elder daughter with Mr. James Jones, of Fakenham, in the county of Norfolk, I settled upon her certain real estates, and engaged to pay her husband, during my life, a sum of money annually, as specified in the marriage articles; and I moreover engaged to leave my said daughter, at the time of my decease, a full and equal share with my son and younger daughter, of all my personal estate. *For particular reasons* I sold several real estates, which I always intended my son should possess, and therefore I thought would be doing him injustice, if I did not give him the value of them in my lifetime, and this I did not mean to preclude myself from doing by the said marriage articles. The estates and produce are herein mentioned. By the clause in the articles I meant to retain a power of giving to my son or younger daughter, any time, during my life, whatsoever sum or sums of Money I thought proper, provided I performed every part of the said marriage articles. Such a power is conveyed by the clause, since it excludes any retrospect to what I had done for my children in my lifetime, and relates only to an equal division of my personal pro-[451]-perty at the time of my decease. I never meant, which cannot be supposed of any father in his right senses, to render myself accountable to any of my children for the disposal of my property during my life; and in this particular my elder daughter should be the last to complain, since I gave to her and hers, in my lifetime, over and above what I had covenanted, to the amount of *two hundred pounds and upwards*.

I likewise never meant to consider my son's church preferment as any equivalent or compensation at all for what I had engaged to do for my elder daughter, since I did not purchase it. And therefore she was no more a loser by that circumstance, than if I had procured it for any other clergyman. And she has still less reason to complain, because I had with some difficulty, and *to the prejudice of my son*, procured for her husband a handsome sinecure place under government, which certainly was no part of the marriage articles.

So far have I been from violating those articles, that I have done a work of supererogation.

It is a very disagreeable circumstance to me that I should be under the necessity of explaining myself upon this subject, and in this manner; but the necessity arose from a declaration of my daughter's husband in my hearing, that "he would file a bill in chancery to compel my son upon oath to give an account of what sums of money he has received from me from the date of the said articles, to the time of my decease." Whether such an interrogatory be allowable or not, I leave to the wisdom and equity of that court to determine. But in case of a suit, which is threatened on

the side of my son-in-law; and in case also there should be any doubt of my intent and meaning in the clause of the articles alluded to, I do declare that the literal and obvious construction of it was precisely my meaning; that is, that the personal estate I should be possessed of at the time of my decease, should be equally divided between my children.

To this paper, which contains my true sentiments and meaning, I willingly and deliberately set my hand.

THO. MARTIN.

Yarmouth, Feb. 16, 1786.

I do attest the above writing and signature to be of the proper handwriting of Thomas Martin, esq. as he personally acknowledged to me this 16th day of February 1786.

JOHN SPURGEON.

Account of several estates which I sold, and which I always intended for my son (Thomas Martin), the produce of which I gave him in my lifetime, and are as under-mentioned:

|  |       |    |   |
|--|-------|----|---|
| A landed estate in Hemsby, in Norfolk, sold to Mr. Proctor in or about the year 1763 . . . . .   | £660  | 0  | 0 |
| Sold Mr. John Smith, large fish office, tann office, etc. in Yarmouth, in the year 1775 . . . . .                                      | 850   | 0  | 0 |
| [452] Sold John Reynolds, esq. dwelling-house, two fish offices, yard, coach-house and stable, all joining, in the year 1775 . . . . . | 500   | 0  | 0 |
| Sold to the said Mr. Reynolds, two single malting offices, in Yarmouth, in the year 1775 . . . . .                                     | 120   | 0  | 0 |
| Sold Mr. William Hooper, a fish office, in Yarmouth, in the year 1778, for 110 guineas . . . . .                                       | 115   | 10 | 0 |
| Sold Mr. John Nolbro, a fish office, in Yarmouth, in the year 1778, for 100 guineas . . . . .  | 105   | 0  | 0 |
| Sold Mr. William Palmer, a fish office, in Yarmouth, in the year 1780, for 60 guineas . . . . .  | 63    | 0  | 0 |
| Sold Mr. Nat. Palmer, a small room, old, without any furniture, in Yarmouth, five guineas, 1780 . . . . .                              | 5     | 5  | 0 |
| Sold Messrs. Hammond and Green, a double malting office, and small tenement, in Yarmouth, 1784 . . . . .                               | 120   | 0  | 0 |
| Total  | £2538 | 15 | 0 |

Yarmouth, Feb. 16, 1786.

THO. MARTIN.

I do attest the above writing and signature to be of the proper hand-writing of Thomas Martin, esq. as he personally acknowledged to me this 16th day of February 1786.

JOHN SPURGEON.

[It appeared by evidence that the amount of the estates sold was actually upwards of £3100, and that Mr. Martin gave his son real property to the value of £440, and that others descended to him of the value of about £150.]

*Copy of the further declaration of Thomas Martin the father.*

On the marriage of my eldest daughter with Mr. James Jones, of Fakenham, in the county of Norfolk, I settled upon her certain real estates, and engaged to pay her husband, during my life, a sum of money half-yearly, as specified in the marriage articles; and I moreover engaged "to leave my said daughter, at the time of my decease, a full and equal share with my son and younger daughter, of all my personal estate."

For particular reasons I sold several estates, which I always intended my son should possess, and therefore I should have done him injustice if I had not given him the produce of their sale in my lifetime, because he had a right to them prior to the said articles; and, if I had left unsold, had been his property.

Consequently I did not deem this gift to him as any part of my personal property at all, and much less did I mean it as in any degree an equivalent for what my daughter had received, or might hereafter receive in virtue of the said articles. The estates, and produce of their sale, are specified in the annexed paper.

It has been given out that I promised to make my children equal sharers of my property. With respect to my real property the assertion is not true, for long before I knew Mr. Jones, my [453] intention was to give my son not only the estates I sold but also my mansion-house, etc. which I settled upon Mr. Jones's wife, to which settlement however I was induced to consent by a pretended equivalent to be given by his father.

As to my personal property, granting that I did intend my children should first and last equally share it, yet surely, during my life, I, and not they, was to adjust that equal distribution.

If for my elder daughter's settlement, and what she might receive of me in money during my life, I had put it out of my power to make a compensation to any other child, I should have acted very partially indeed; and therefore, by the above mentioned clause of the articles, I did not preclude myself from giving to my son and younger daughter, any time during my life, whatever sum or sums of money I thought proper, provided I performed every part of the articles according to the stipulation therein expressly declared. Such a power I meant to retain, and such is evidently conveyed by the said clause, since it excludes any retrospect for what I had done for my children in my lifetime, and relates only to an equal division of my personal property at the time of my decease. No fair and equitable construction therefore of the clause can fix such a meaning upon it as to infer that I bound myself to perform, in my lifetime, certain engagements to one child, at the expence of the rest. However, with regard to the disposal of my personal property in my lifetime, my eldest daughter had no reason to complain, since I gave to her and hers, over and above the covenant, to the amount of more than £200. This certainly was no part of the articles.

It has also been insinuated, that my son's church preferment ought to be considered as some equivalent for what I had done for my eldest daughter. Of the rectitude of my conduct, I flatter myself the candid and impartial will think that I was as competent a judge as the complainant; and therefore I declare that the preferment was given to my son on no such condition. I did not place it to his account for this just reason, because I did not purchase it; and therefore my daughter was no more injured than if I had procured it for any other clergyman. Besides such an objection, if it can be so called, is not only extremely invidious, but insane also, since it commits self-murder, for I had with some difficulty, and to the prejudice of my son's interest, procured for Mr. Jones a handsome sinecure place under government. This likewise was no part of the articles. So far was I then from violating those articles, that I did a work of supererogation.

It is a very disagreeable circumstance that I should be under the necessity of explaining myself upon this subject, and in this manner, but the necessity arose from a declaration of Mr. Jones in my hearing, that he would file a bill in chancery to compel my son to give an account of the personal property he has received from me from the date of the said articles to the time of my decease. Whether such an interrogatory be allowable or not, I [454] leave to the wisdom and equity of that court to determine. But in case of a suit, which was rather prematurely threatened by Mr. Jones, and in case also any doubt should arise of my intent and meaning in the aforementioned clause of the articles, I do declare that the literal and obvious construction of it was precisely my meaning, (viz.) that all the personal estate I should be possessed of at the time of my decease, should be equally divided between my children; and I moreover declare, that what personal property I gave to my son in my lifetime (exclusive of the produce of the estates I sold) I deemed no more than equivalent to the settlement of real estates I made upon my eldest daughter, (which I considered as taken from my son), and the amount of the stated payments of money her husband received in virtue of the said articles. *In strict conformity to those, I have, by my last will and testament, given to my said daughter a full and equal share with my son of all the personal property I shall be possessed of at the time of my decease.* That I have appointed my son to execute my will can wear a suspicious appearance to those only who are prone to think evil; it may therefore be needful to declare, which however I solemnly do, that I had no sinister motive in favour of my son, since he neither had, nor would accept, any gratuity for his trouble.

My motive was a natural one, and I thought it would have been a discredit to him,

if I had made any other person my executor, especially as he is equally bound to give a true and just account of the disposal of my personal property *from the time of my decease*.

To this paper, which contains my real sentiments and meaning, I readily and deliberately set my hand.

THO. MARTIN.

Yarmouth, in Norfolk, May 20, 1786.

*Copy of the case which, with the respondent's privity, was laid before Sir John Scott, with his opinion thereon.*

#### C A S E.

Thomas Martin, esq. being seised and possessed of a considerable real and personal estate, and having one son and two daughters, did, previous to and in consideration of the marriage of Elizabeth his eldest daughter with Mr. James Jones, by articles of agreement, bearing date 15th September 1767, (a copy whereof is hereto annexed) covenant that he would, by his last will and testament, in writing duly executed, give, will, and devise, convey and assure, in such manner as the law directs, divers messuages and premises (part of his real estate therein particularly mentioned and described) to and for such uses, intents, and purposes, as are therein expressed and declared. *And further*, that he the said Thomas Martin should, at the time of his decease, by his will, give and leave unto the said Elizabeth his daughter, the intended wife of the said James Jones, [455] a full and equal share with her brother and sister, of all the personal estate of him the said Thomas Martin, to be had, held, and enjoyed, immediately after the decease of the said Thomas Martin and Elizabeth his wife, and not before.

The marriage took effect, and Mr. and Mrs. Jones have several children. Mr. Martin's youngest daughter is since dead, without issue, but his son is still living, and has a numerous family, to whom Mr. Martin always intended to give all his real estate, not covenanted by the said marriage articles to be settled. But he has since, at different times, sold divers parcels of his real estate, and having for many years left off all trade and business, has invested the money arising by such sales, *together with other monies, part of his personal estate*, in bank stock, which a few years ago he gave and transferred to the reverend Mr. Thomas Martin his son, whose broker in London regularly received the dividends by letters of attorney from him, and by his order remitted the same to his father, *it having been verbally agreed between the father and the son, at the time the stock was given, and transferred as aforesaid, that the father should, notwithstanding, have the benefit of the dividends during his life*.

Mr. Martin, the father, has made a will, by which he refers to his covenant in the said marriage articles, and in pursuance and performance thereof, has given and bequeathed all the personal estate he shall die possessed of equally between his son and daughter; but the daughter and her husband having given out that the transfer of the said stock, and any other part of Mr. Martin's personal estate, which he has or may give in his lifetime to his son, ought to be deemed fraudulent, and done with intent to deprive them of the full benefit of the said covenant, and that upon the father's death they will sue in equity to compel the son to account to them for a moiety of the said bank stock, and other monies which his father has, or may give him in his life.—But—

Query—Has not Mr. Martin, notwithstanding his said covenant, a power of giving or disposing as he pleases, in his lifetime, any part of his personal estate to his son; and has not the son an absolute right to hold and enjoy the said stock so given and transferred to him, without being accountable to his sister for a moiety, or any part thereof, *or is there any, and what other method advisable for Mr. Martin to take, in order to secure to his son the provision he has made for him?*

Answer—I do not find myself able to form any satisfactory opinion upon this case, and I cannot be at all confident, that, if the construction of these articles should come before a court, the opinion which I incline to entertain concerning the meaning of them would be adopted. If it is therefore important to Mr. Martin to have a reasonable assurance upon the point, he must take several opinions upon the construction of the articles, and act according to the sense which the greatest number of



those whose opinions are asked, shall entertain concerning them. The inclination of my [456] opinion is, that notwithstanding the covenant, he was at liberty to give (*bona fide*) to his son, such provision in his lifetime as he may think proper, *intending no fraud upon this covenant.*

By the articles Mr. Jones agrees to give his son one hundred pounds a year. He agrees also, by his will, or otherwise, to convey certain real estates after the death of himself and his wife, if there are children, to his son and wife in fee; if there are none, to them successively for life, *with remainder* to himself in fee; and he agrees to bequeath to his son various specific things, and also a full and equal share of all his personal estate, to be enjoyed immediately after his and his wife's decease.

Mr. Martin agrees, by will or otherwise, to convey certain real estates, and certain personal things, after his and his wife's death, to Jones and wife in fee, if they had children; and if they had not, then to them successively for life, *with remainder* to his own right heirs; and he also enters into the covenant, the meaning of which is in question; and also a covenant during the life of him and his wife, to pay Jones and his wife, if they are both living, or their children, £100 per annum.

I think it could hardly be intended that Mr. Martin, or Mr. Jones, should not be at liberty to give any thing to their other children previous to their respective deceases, although they each gave to the children married, when these articles were entered into, considerable interests both in real and personal estate. *This construction seems very unjust.* If this construction is not the true one, then the covenant must either leave the father at liberty to give the other children parts of his personal estate in his lifetime, as he should think proper, dividing equally what he had at his death; or it must be understood to mean that the father, at his death, should give an equal share to his children of his personal estate, regard being had to what they had respectively received in the lifetime of the father, so as to make them upon the whole equal. I rather think the words of the covenant are not sufficient for this latter purpose, but there is an equity in so construing the covenant, which may lead to incline a court to adopt it. *The transferring a great part of the property to the son in the father's lifetime, reserving to the father an interest for his own life, is a transaction, which exhibits upon the face of it, something like a purpose to defeat the covenant, and for that reason is a hazardous experiment.* But, on the other hand, it must be observed, that the settlement in question has provisions of a like kind. Upon the whole I have stated the inclination of my opinion, but this is a case which I can write upon with no degree of confidence. The parties themselves must know what they meant by this improvident covenant; but whatever they meant, there is so much uncertainty in the manner in which they have expressed that intent, that it may probably eventually turn out to be prudent, if this family could come to some amicable arrangement.

J. SCOTT, Lincoln's Inn, Dec. 28, 1788.

[457] On the 7th February 1794, the appellants caused several amendments to be made to their said bill, stating,

"That the appellant, James Jones, before his acquaintance with his father-in-law, and until his appointment to his aforesaid place in 1770, was in the receipt of half-pay, as apothecary to his majesty's forces in Germany, which half-pay produced to him about £86 a year. And that in order to his having such place, he was not only obliged to relinquish his half-pay, but also to lay out about one hundred pounds in defraying the necessary expences attending his said appointment, so that a very inconsiderable advantage has accrued to him from his aforesaid place.

"That upwards of twenty-four years ago the said Thomas Martin, deceased, did, by his interest, procure the respondent to be presented, instituted, and inducted into the consolidated rectory of Tivetshall, Saint Mary, and Saint Margaret, and also to the consolidated rectory of Colkirk and Stibbard, in Norfolk; and that the respondent hath ever since enjoyed the said rectories, the yearly income whereof amounts to about *six hundred pounds.*

"And that the declaration of Mr. Martin the father, dated 16th February 1786, was suggested, written, or prepared by or under the procurement or advice of the respondent; and that his father was prevailed upon by the respondent's influence or importunity, or by undue means used by him, to sign the same, when he was upwards of *eighty-four years of age*; and that the said writing was taken and kept by the respondent."

On the 30th May 1794, the respondent put in his answer to the said amended bill, in which are several passages to the following effect, viz.

"Admits that the said East India stock now remains in his name, and that the produce of the said bank stock was laid out in the purchase of the said East India stock *without the knowledge of his father*, who was not consulted thereon, or informed thereof, except that the respondent believes (*but is not certain*) that he informed his father that he had changed the security on which the said monies had been invested, or to that effect.

"Saith, that he remitted or paid to his father from the sale of the said bank stock, till his death, money equal to what would have been the amount of the dividends of the said bank stock, in case the same had not been sold.

"Admits that the appellant, James Jones, before his acquaintance with the respondent's father, and until his appointment to his aforesaid place in 1770, was in the receipt of half-pay as aforesaid, which produced about £86 per annum; and that in order to enable him to hold such place, the appellant, James Jones, was obliged and did give up his said half-pay; but the respondent believes that the appellant, James Jones, while he received his said half-pay was liable to be called abroad to attend his duty there, which would have obliged him either to relinquish his said [458] place, or to abandon his practice and establishment in this kingdom.

"Believes that said place was obtained for the appellant, James Jones, with great difficulty, and by the interest of the respondent's father with the right hon. Charles Townshend; and conceives that by the exertion of such interest his father deprived himself of the means of obtaining any preferment, *or place under government*, for the respondent, in which respect he has great reason to think he may have been prejudiced by the said appellant, James Jones's said appointment being obtained as aforesaid. *But the particular prejudice he sustained by such appointment, he is not able to set forth, further than as aforesaid.*

"Admits that in 1765, his father, through his interest with lord Walpole, procured the respondent to be presented, instituted, and inducted into the consolidated rectory of Tivetshall, Saint Mary, and Saint Margaret aforesaid, of which he is now the incumbent; and that the yearly income thereof, till 1782, was about £200, and from thence till 1792, £274, and since that time hath been about £290. But that the outgoings therefrom have amounted upon an average to about £70 a year, exclusive of the repairs to the parsonage-house, barn, stable, and chancels, which have cost about £300, and will hereafter require further repairs.

"Admits that in November 1769, his father, through his interest with marquis Townshend, procured the respondent to be presented, instituted, and inducted into the consolidated rectory of Colkirk and Stibbard aforesaid, of which he is now the incumbent; and that the gross yearly income thereof did not, till 1793, exceed £230, and that the same did not in 1793 exceed £300, and that the outgoings have amounted to £40 a year, exclusive of repairs; and that the parsonage-house was, some years ago, rebuilt by the respondent.

"Saith, that the present net annual proceeds of both the said consolidated rectories, except as to the repairs, amount to *four hundred and eighty pounds*.

"Saith, that in a conversation with his father it was observed, that as there might probably be a dispute after his father's death, it might be necessary for him to state, under his own hand, the value of the real estates he had sold, and to leave a declaration of his meaning relative to the said articles. *And that he, the respondent, did suggest, and with his father's privity and consent prepare and draw up said declaration, dated 16th February 1786; and that his father copied and signed the same, when he was about eighty-four years of age.*

"Saith, that *some mistakes* in the said declaration, with respect to the estates sold by his father, were discovered *after his father's death*; and that he, the respondent, hath particularized such mistakes in the margin of the copy of said declaration, left with his clerk in court."

[459] The appellants having replied to the respondent's answers, witnesses were examined on both sides.

The cause came on to be heard before all the barons of the exchequer, on the 17th, 18th, 21st, 23d, and 24th days of November 1796; and on the 4th day of March 1797, the court pronounced the following decree, (viz.) "That the testator's will should be established as to his real estate, thereby devised to the appellants; and that it

should be referred to the deputy remembrancer to take an account of the personal estate which the said testator was possessed of, interested in, or entitled unto at his death, and which hath been possessed or received by or by the order, or for the use of the respondent; and also an account of the said testator's debts and funeral expences. And the court declared *that the East India stock in the pleadings mentioned, made no part of the said testator's personal estate at his death, and thereupon decreed that so much of the appellant's bill as sought an account of the said East India stock, with the dividends accrued due thereon, and payment of a moiety thereof to the appellants, should be dismissed out of the said court.* And also that so much of the appellant's bill as prayed that all articles of personal property which might appear to have been given by the said testator to the respondent, his wife, or any of his children, after the marriage of the appellants, might be declared to have been given in fraud of the appellants, and of the said testator's covenant in their marriage articles; and that the same, with interest, might be brought into the account of the said testator's personal estate at his death, and as prayed payment of a moiety thereof to the appellants, should be dismissed out of the said court. And it was also decreed, that the said deputy remembrancer should ascertain the clear surplus of the testator's said personal estate, and that the respondent should thereon pay to the appellants one moiety thereof. And it was further ordered, that all parties should abide by their own costs of the said suit." And the usual directions were given for taking the said accounts.

The appellants conceiving themselves to be aggrieved by that part of the said decree which declares "that the East India stock in the pleadings mentioned, made no part of the testator's personal estate at his death, and which decrees that so much of the appellant's bill as sought an account of the said East India stock, with the dividends accrued due thereon, and payment of a moiety thereof to the appellants, should be dismissed out of the said court," appealed therefrom. And prayed that such parts of the said decree might be reversed, and that the house would give directions relating to the said East India stock, and the dividends thereon, agreeable to the prayer of the appellant's bill relating thereto, (*viz.*) that a moiety of the said £4675 in East India stock, and of the dividends arisen thereon, be by the respondent transferred and paid to the appellants, or that the whole thereof may be considered and applied as part of the personal estate and effects of the testator at the time of his death. In support of this appeal it was strongly urged (*J. Scott, J. Mitford, W. Ainge, G. N. Best*);

[460] I. That marriage, which is the consideration of the covenant on the part of the testator, whereon this case arises, is a consideration of the highest nature, and such as ought to give full effect to all covenants or bargains founded upon it, and to avoid all acts done with a view to defeat them. And it is admitted that the transfers of the sums in bank stock, by the testator to the respondent, were made without consideration, and that the respondent had notice of the covenant.

II. That it was made out in evidence beyond a possibility of doubt, (and indeed admitted by the respondent), that the transfers of the bank stock to the respondent were made with an express view and design, and in execution of a concerted plan for securing the capital of the said sums to the respondent after the death of the testator, *in fraud of the testator's covenant*; and that by the reservation to the said testator during his life of all the dividends thereon, he retained to himself the full benefit which he could reasonably receive therefrom personally; and from the great age of the testator at the time of such transfers, (he being upwards of eighty at the time of the first of them), it is manifest that the parties had in contemplation the probability of the testator's speedy dissolution, though it happened (miraculously as it may be said) that he survived some years; and the gift to the respondent (if it can be considered as such) may be deemed as in the nature of a testamentary donation, *mortis causâ*, contrived and executed with a deliberate and avowed intent to defeat the covenant which the testator had solemnly entered into. The respondent was not only informed of that intent, but an active party in, if not the suggestor of the transaction; and now seeks to retain the benefit of that contrivance, which in the testator must be deemed to have been fraudulent, and which so far as the respondent was concerned in it, does not deserve a better, and perhaps merits a still harsher appellation.

III. That the transaction being clearly intended to defeat the covenant, the sole question which can be made in favour of the respondent, is, whether a court of equity can interfere to prevent the covenant being so defeated. The answer to this question, if there had been no precedent in point, seems to be another question, "Can a court of equity interfere to make men keep good faith in their transactions?" And it is conceived, that whenever the person seeking to take advantage of a breach of faith is a mere volunteer, and especially when he is cognizant at the time of the transaction that it is a breach of good faith in the principal actor, his conscience is equally bound with that of the principal, and he shall be compelled to relinquish all advantage gained by such a transaction, of which he cannot with good conscience avail himself; but there are ample precedents in point to warrant the interference of a court of equity, and especially in a variety of cases on the old custom of London, with regard to the distribution of the personal estates of freemen at their deaths. Acts of a nature very [461] similar to the acts in the present case, done by freemen relating to particular parts of their personal estates to the prejudice of their widows or particular children, by screening such particulars of personal estate from the custom, have been declared to be void, and have been relieved against in equity. This case is stronger than cases on the old custom of London, because that custom laid an obligation on the freeman and on his personal estate, which arose rather from an implied than a direct contract; but in the present case, the obligation on the testator and on his personal estate, arose under his own act and bargain, which was entered into upon the view of the state of his family and affairs, and on the most solemn and valuable of all considerations, and which he might have declined entering into, if he had thought fit. This case too extends, in effect, to an alienation of the whole of the property bound by the covenant; and the cases which have been determined on the old custom of London, appear to have been generally cases where the attempt to avoid the custom had affected part only of the freeman's property. In the case of *Turner v. Jennings*, 2 Vernon, 612, 685, the *greatest part* indeed of the freeman's property was attempted to be conveyed; and the general purpose of the transaction, perhaps, was not blameable; but the lord chancellor in that case declared, that either the custom must be entirely given up, or that deed must be looked upon as made in fraud of the custom.

IV. That if the acts done by the testator in this case, in concert with the respondent, his son, are not to be declared void and relieved against, all covenants and agreements similar to the present, in marriage articles or settlements, will really become vain and fruitless, because nothing can be more easy than by such or the like mode, as has been practised in the present case, and by many others in the power of fraud to invent, to protect the covenantor's estate from the effect of such covenants or agreements after his death; and covenants of this kind are very far from being uncommon in marriage settlements; and they are very convenient in cases where the parents or husbands, being concerned in trade, or on other accounts, wish to be excused from locking up their property during their lives; and it must be presumed in all such cases, that such a covenant was accepted under a reliance, that no fraudulent or improper disposition should be made by the covenantor of any part of his personal estate in his lifetime, with a view to defeat the covenant.

V. That the several transfers made by the testator to the respondent were clearly transfers in confidence, and were not intended to confer any benefit on the respondent till after the father's death; they ought therefore to be considered not as absolute acts: and as the sale of the bank stock, and the purchase of the East India stock by the respondent was done clandestinely in his father's lifetime without the father's knowledge, and he continued to pay the father the supposed income of the bank stock as if it had remained [462] unsold, the East India stock ought to be considered as part of the personal estate of the father at the time of his death, and subject to the operation of his covenant, as it would, it is presumed, have been subject to the claims of other creditors of the father, if necessary for their satisfaction.

To the objection made on the part of the respondent "that part of the money wherewith the testator bought his property in bank stock, arose from the sale of real estates, which real estates, if they had not been sold, might have been devised to the respondent, and if not devised, would have descended to him as heir of his father. and therefore the disposition made by the testator of his said bank stock by the

transfers to the respondent only substituted such bank stock in the hands of the respondent, in lieu of such real estates:" *It was answered*, that "this is really no objection, because the sale of the real estates were voluntary acts of the testator long before he thought of defeating his covenant. But the furthest that the objection can be carried, with any degree of plausibility, is to the amount of the sums raised by sale of all the real estates sold, which amount was only £3072 5s. and the respondent, in his first answer, admits that the value of the sums in bank stock, transferred unto him, at the times of the respective transfers, was upwards of £5735, so that at least the appellants would be justly entitled to a moiety of the difference. And as to so much of the said bank stock, the value whereof was equal to the purchase money for the real estates sold, supposing there might have been any ground for the objection, if the bank stock had been transferred to the respondent shortly after the sale of the real estates, yet the objection, even as to that part, vanishes, when it is considered that by far the greatest part of the real estates were sold many years, and a considerable part twenty years before the first of the transfers of bank stock, and whilst the testator was engaged in trade: wherefore there is not the least ground to look on both the several kinds of acts (that is to say) the sale of the real estates, and the transfers of the bank stock, as being done in execution of one entire intention to sell the real estates, and vest the purchase money in the respondent, in lieu thereof, subject to a right in the testator to receive the income thereof during his life; but the acts of selling the real estates must be considered as entire and compleat acts, done at various separate and distinct times, and with independent views, merely to turn such estates into personal estate, for the convenience of the testator's trade, to produce a greater yearly income, or to avoid the trouble of collecting the rents, great part of the estates having consisted of fishing offices at Yarmouth. The transfers of the said bank stock to the respondent must also be considered as entire and compleat acts, wholly independent of the sales of the real estates, and in pursuance of an intent, probably suggested to the testator, unfavourable to the appellants.

*To the other objection of the respondent* "that the amount of the annuity of one hundred pounds, paid by the testator to the appellant [463] James Jones, from his marriage to the time of the testator's death (amounting to £2450) and the value of the real estates, settled on the appellants (worth about £1000) are more than equal to the value of the bank stock, after deducting out of the value of the bank stock the amount of the purchase money for the real estates sold; and that if the East India stock is to be now divided between the two children, the appellants will have a much greater part of the testator's fortune than the respondent." *It was answered*, that the clear income of the two church livings procured for the respondent by the testator, having been about £480 a year, and which the respondent had enjoyed near twenty-five years before the testator's death, the money which the respondent in that time received from those livings greatly exceeded the amount of the money paid to the appellants for the said annuity, and the value of the said estate, without bringing into the account the great value of the respondent's right to the income of those livings, during the now remainder of his life. Besides which, it appears that the respondent and his family received from his father, in his lifetime, and at his death, in real and personal property, the sums of £1125 5s. 6d. and £592, making together the sum of £1717 5s. 6d. over and besides the said East India stock, and the dividends thereof, retained by him in his father's lifetime, amounting together to £8176 3s. 4d. And though the church livings were not part of the testator's estate, but were only procured by the testator's interest with his friends, yet they are of such a kind as might be, and would be, and ought to be brought into the scale by every reasonable and prudent father, in making a distribution of his own estate between two or more children, where such father (as is the case here) was not of such consequence, in point of birth or family, as to make it reasonable for him to give near the whole of his fortune to his eldest or only son. And the circumstance of the amount of the annuity of £100 being so large as £2450 was occasioned by the testator's living to so great an age as ninety, the consequence of which was, that the appellants were so long kept out of possession of the real estate, which the testator covenanted to settle on them; and also out of the benefit of his covenant, as to a share of his personal estate. And if the whole of the East India stock in question, and the dividends thereon were to be now divided in equal moieties between the appellants and

respondent, the provision made for the respondent by, or by the procurement of his father, will be much more considerable than that made for the appellants.

On the part of the respondent the following reasons were shortly stated (J. Mansfield, T. Plumer, J. Stanley):

1st. The covenant in the articles was confined merely to the personal estate which Thomas Martin might happen to be possessed of at his death; leaving the respondent's father the absolute dominion over the whole of his property during his life, with a compleat [464] power of disposition at any time before his death. The East India stock might have been sold and re-invested in the purchase of real estate; in which case it is submitted, the appellants could have taken no interest in it, nor supported a claim to any part of it under the articles. The children had no interest in their father's property during his life, and the respondent's father was at liberty, notwithstanding the articles, to prefer any one child to another, by making partial advancements out of his fortune; and there is nothing in the articles expressing or indicating any agreement or intention that the children of the respondent's father should have an equal participation in all the property which he was then possessed of.

2d. A considerable part of the personalty claimed by this bill was the produce of the real estates sold after the articles of 1767, and consequently could not, at the time of the articles, form any part of the covenant relied upon, or be in the contemplation of the parties to it; and to decree an equal division of this produce, whilst the appellants are allowed solely to enjoy the real estate given by the respondent's father to the exclusion of him, would be to destroy the equality which it is pretended to be the object of this suit to produce, and to place an only and favourite son on a worse footing than his sister.

3d. The gift of the money to the respondent by his father was a fair transaction; the gift of the capital was absolute and made *bona fide*; the dominion over it was wholly parted with, and there is no evidence tending to disprove the positive denial in the answer, that the respondent was to hold the principal, subject to any trust for the benefit of his father. The money could not have been recovered back from the son, and the capital, subject to the life interest of the father in the dividends or annual produce, would, it is submitted, have been assets for the payment of the respondent's debts, in case of his death in his father's lifetime.

BUT after hearing counsel, it was ORDERED and ADJUDGED, that so much of the decree as declares, that "the India stock in the pleadings mentioned, made no part of the testator's personal estate, and thereupon decrees that so much of the appellants bill as seeks an account of the said India stock, with the dividends accrued thereon, and payment of a moiety thereof to the appellants, should be dismissed out of court," be and the same is hereby reversed: And it is further ORDERED, that in taking the account of the personal estate of the testator, the East India stock, and the dividends arisen thereon, be considered and applied as part thereof, and subject to the covenant in the articles on the marriage of the appellant. (MS. Jour. *sub anno* 1798.)

[465]

## SET-OFF.

R. HOTCHKIS (Assignee of ADAM KEIR),—*Appellant*; The Governor and Company of the Royal Bank of SCOTLAND,—*Respondents* [27th November 1797].

[1 Scots R.R. 805.]

A bye-law of the bank of Scotland, "That no proprietor, who is or shall become a debtor to the bank, shall be allowed to transfer his stock, or any part thereof, but in presence of a court of directors; to the end such court of directors, if they think fit, may stop such transfer until such proprietor find security to the bank, for what he owes to them to their satisfaction." is good; and under it the bank may, in case of debts due to them from a partnership, retain not only the stock standing in the firm of the partner-

ship, but also such stock as is standing in the names of any of the partners individually.

INTERLOCUTORS of the Court of Session in Scotland AFFIRMED.

Pursuant to an act of parliament 5 Geo. I. c. 20. (A. D. 1725), his majesty, by letters patent under the great seal of Great Britain, incorporated the proprietors of certain debts and sums of money amounting to £248,550 0s. 9½d. (being part of the money payable to Scotland by the treaty of union as an equivalent for that kingdom being made subject to the public debts of England), and their successors, into one body politic and corporate, to be called the *equivalent company*, with perpetual succession, and all the usual powers; and particularly his majesty for himself, his heirs and successors, did thereby "covenant, grant, and agree, to and with the said corporation or body politic, and their successors, that he, his heirs and successors, should, from time to time, and all times thereafter, upon the humble suit and request of the said corporation or body politic, and their successors, give and grant unto them all such further powers, privileges, and authorities, and things for rendering more effectual their said grant, according to the true intent and meaning of the said act and of the said grant, which he could or might lawfully grant."

Upon the application of the said corporation to his majesty, requesting he would be graciously pleased, by letters patent under the great seal of Scotland, to enable such of the proprietors of the said corporation as should subscribe their stock for that purpose, to have the power of *banking in Scotland*, with liberty to borrow and lend upon securities there; and that the said corporation might for that purpose be empowered to take subscriptions at Edinburgh from their members for such share of the stock as they should incline to subject to such trade or banking, under such regulations *as they by bye-laws should appoint*, and that such subscribed stock only should be affected by the transactions relating to banking, and should (after being so subscribed) become transferrable from the other stock of the company, and at Edinburgh only, and would erect such subscribers [466] into a corporation for that purpose: his majesty, by charter or letters patent, dated 31st May 1727, under the seal appointed by the treaty of union to be kept in Scotland in place of the great seal thereof, authorized the directors of the equivalent company, or any three of them, in such way as the majority of them should direct, to receive at Edinburgh all such voluntary subscriptions as should be made on or before the 29th September 1727 by the proprietors of the said equivalent company, who should have credit for stock in the books of the said company at Edinburgh at the time of such subscription of all or any such part or share of the stock of the said equivalent company as they should think proper, and towards raising a fund for the more effectually carrying on the said trade and business of banking there; the stock so subscribed to be under the management of the company thereby established, and the subscribers "to be called one body politic and corporate of themselves in deed and name, by the name of *the royal bank of Scotland*," and by that name to have perpetual succession, to use a common seal, and be capable in law to sue and be sued, to purchase and sell lands, etc.

And his majesty did thereby "grant unto the said company of the royal bank of Scotland, and their successors for ever, full power and liberty to exercise the rights and powers of banking in that part of his united kingdom called Scotland only:"

And ordained, "That there should be from time to time a governor, deputy governor, nine ordinary directors, and nine extraordinary directors, to be chosen out of the members of the said company; which said governor, deputy governor, and nine ordinary directors, or any five or more of them, should be, and be called a court of directors, for ordering, managing, and directing all the affairs of the said corporation:"

And "That it should and might be lawful to and for all and every the members of the said corporation or body politic thereby established, from time to time to assemble and meet together at any convenient place or places in Edinburgh, for the choice of their governor, deputy governor, and directors, and for making of *bye-laws, ordinances, rules, orders, and directions for the government of the said corporation*, certain notices being first given."

"That the method and manner of making all assignments and transfers of the

said capital stock, or any part thereof, should be by an entry in such book or books to be kept as aforesaid, signed by the parties so assigning and transferring, in the words or to the effect following, viz. 'I A. B. this                      day of                      in the year of our Lord                      do assign and transfer                      being all my interest or share, or (as the case may be) part of my interest or share in the capital stock or fund of the royal bank of Scotland, and all benefit arising thereby, unto C. D., his executors, administrators, and assigns; and that the entry signed as aforesaid, *and no other way or method*, shall be the manner and method used in the passing, assigning, and transferring the interest or shares in the said capital stock or fund."

[467] Provided, "That any person having any share or any interest in the said capital stock or fund, might dispose and devise the same by his or her last will and testament; but, however, that the executor or administrator should not transfer the same, or be entitled to receive any dividend, until an extract of the testament be delivered to the company, and until an entry or memorandum of so much of the said will, as relates to the said stock or fund, be made in the book or books to be kept by, or by order of, the said corporation for that purpose."

Provided also, "That the shares or interests of the several proprietors in the said company are and shall be deemed and taken to be personal or moveable estates, and, upon death, shall go to executors or administrators, and not to be descendible to heirs; and the same should not be liable to any arrestment or attachment that shall be laid thereupon, any law, usage, or custom to the contrary notwithstanding."

And his majesty declared, "*That these his letters patent should be in and by all things valid and effectual in the law, according to the true intent and meaning of the same, and should be taken, construed, and adjudged in the most favourable and beneficial sense for the best advantage of the said corporation, notwithstanding any misrecital, defects, uncertainty, or imperfection in these his majesty's letters patent.*"

The stock of the royal bank of Scotland has been at different times augmented, in consequence of royal charters or letters patent, in terms similar with those above stated.

Soon after the first charter was obtained, there were several bye-laws made by a general court of proprietors, by virtue of the powers for that purpose contained in the charter. One of these bye-laws is in these words: "*That no proprietor, who is or shall become a debtor to the bank, shall be allowed to transfer his stock, or any part thereof, but in presence of a court of directors, to the end such court of directors, if they think fit, may stop such transfer until such proprietor find security to the bank, for what he owes to them, to their satisfaction.*" Bye-law, March 5, 1728.

In consequence of this bye-law, founded in the terms of the different charters in favour of the royal bank, and agreeable also to the principles of the common law of Scotland, the officers of the bank have uniformly and frequently exercised the right of retention of the stock of insolvent partners, and have declined to transfer the stock of such partners until their debts and engagements to the bank, at the period of insolvency, were discharged. And this right, frequently exercised, never was disputed from 1728 down to the present period.

Messrs. Bertram, Gardner, and company, bankers in Edinburgh, were debtors to the royal bank of Scotland to the amount of near £30,000 sterling, when they became bankrupts. They were, at the same time, partners of the royal bank to the following extent:

The company of Bertram, Gardner, and company, held the sum of £600 of the capital stock of the royal bank, with the privilege [468] of subscribing proportionally to a new augmentation of the capital of the bank. John Gardner, one of the partners of Bertram, Gardner, and company, held the sum of £1000 of the capital stock of the royal bank, with the like privilege of subscribing proportionally to the new augmentation of capital; and Adam Keir, another of the partners of Bertram, Gardner, and company, held the sum of £2000 of capital stock of the royal bank, with the like privilege of subscribing proportionally to the new augmentation of capital.



Upon the faith of the security arising to the royal bank from the shares of stock held by the company, and by the individuals of the company of Bertram, Gardner, and company, the bank's advances and engagements for that company had been influenced; the directors trusting to their right of compensation or retention of the stock for payment of the sums due to them.

The estates of Bertram, Gardner, and company, and also the separate estates of the individual partners, having been sequestrated by the court of session in terms of the bankrupt statutes, the appellant, who was appointed trustee of those estates for the benefit of the creditors, thought proper to apply to the directors of the royal bank to permit a transfer of the different shares of stock, which belonged to Bertram, Gardner, and company, and to the partners of that house, to be made to him, but the directors declined granting such transfer, until the debts and engagements of Bertram, Gardner, and company, to the bank were discharged; whereupon the appellant brought three different actions against the royal bank, one as trustee for the company of Bertram, Gardner, and company, another as trustee for Adam Keir, one of the partners of that company, and a third as trustee for John Gardner, another of the partners of that company, concluding that the bank should be decerned, and ordained "to transfer, or allow a transference in their books of the capital stock standing in the name of the said Adam Keir, one of the partners of the house of Bertram, Gardner, and company, with the privileges, dividends, and whole other benefits and accessories thereto belonging, to be made to the pursuer (appellant) as trustee foresaid; and that it ought and should be found and declared by decret, foresaid, the said defenders (respondents) have no right of retention of the said stock, privilege, and benefit thereto belonging, or claim thereupon, for any cause or pretence whatever, but that the same do pertain and belong to the pursuer as trustee foresaid, for behoof of the creditors of the said Adam Keir, free of all burdens or incumbrances whatever."

In the action which respected the stock standing in the name of Keir, the court of session gave the judgement now appealed from.

The question having been argued before the Lord Methven ordinary, was reported to the court upon printed informations, and their lordships pronounced the following interlocutor: "Upon report of Lord Methven, and having advised the informations for the parties, the lords sustain the defences, assoilzie the defenders, [469] and decern." And a petition, reclaiming against this interlocutor, was rejected by the court without an answer.

The appellant appealed against these interlocutors, and prayed that the same may be reversed, varied, or amended. Their reasons depended on their mode of stating the case; and will be best understood by a perusal of the reasons offered by the respondents counsel in affirmance of the interlocutors.

I. It is clearly established (J. Scott, W. Alexander) in the law of Scotland, that when a person is disabled by bankruptcy from discharging the obligations he owes to another, payment or transference cannot be demanded of any money which that other owes him, either by himself or any person claiming in his right. The solvent person is entitled to compensate and retain for his payment and security any effects of the bankrupt he has legally got in his possession; and this holds, even if the solvent party is merely a cautioner or surety for the bankrupt, it being unjust that a creditor should be compelled to divest himself of the funds of his debtor, until he has received satisfaction of what is due to him, or indemnity against what he may be obliged to pay. (See Lord Bankton, B. 1. Tit. 24. sec. 34. Mr. Erskine, B. 3. Tit. 4. sec. 21. and many decisions.)

To an objection made by the appellants, "That the case of a body of stockholders is totally different from that of a private partnership. In the latter no partner has any distinct or specific quantity of property which he can call his own, or convey to another. The amount of his interest depends on the state of the account between him and his partners; and he can draw nothing out of the joint fund but the balance due to him after the account is adjusted, and all proper allowances made. But the shares of stock are not thus blended and mixed together; each stockholder is made the absolute and unlimited proprietor of a definite and ascertained quantity of stock; and it is that specific quantity, and not the balance of his account, that he is authorized to transfer away at his pleasure."—*The following answer was given:*

The respondents do not admit that there is any such distinction between a private co-partnership and a corporation. But if they were to admit the whole of what is stated in this objection, it would amount to nothing. The plea of the respondents is a plea of retention, which is competent to mere strangers. It is not necessary to that plea, that the persons using it should be co-partners, or have a joint property in the subject retained; it is sufficient that they have the possession. Now the corporation has all the possession of which the thing is capable; it has the real and efficient possession of the bills, notes, cash, and other stock. It is the hand to pay the dividends; it has the books, which is the sole evidence of the title, and a physical control over the transfer; it has, in every sense and every view, the possession; it has also a debt due to it, and is therefore armed with all the circumstances necessary to the plea of retention and its consequences, compensation. The principles upon which questions of this nature are decided in cases of co-partnership, it is true, are somewhat different; there is no occasion there to resort to [470] lien or retention; the co-partner has nothing distinct or specific which he can demand; the whole stock of the co-partnership is in common; each has as much right to every part as the other; nothing therefore can be separately demanded but the balance; whereas, in cases to which lien or retention is applied, there is a distinct and clear demand, but a demand inefficient for the moment, on account of a cross demand; and nothing more is necessary to raise the common law right to lien and retention, but possession and the cross demand. For which reasons the respondents contend, that the appellant would prove nothing material if he were to shew that a corporate body and a private co-partnership differ in the respect stated in the objection. But the respondents submitted that the cases do not differ. In a partnership incorporated, as in a partnership *not* incorporated, the real stock is the joint property in the possession of the persons who manage. The real right is to a proportional share of that stock of that joint property. So it would be found upon a bankruptcy of the corporation. The entry in the book is nothing but the title, the muniment. The habit of assigning it has led mankind to consider it as something substantial and distinct, whereas it is nothing but evidence that the holder is entitled to a joint share in the joint property, which is precisely the situation of a co-partner in a private trade. It would seem, therefore, that the same principle which is applied every day to a private co-partnership ought to be applied to the present case, unless the general law be in this instance controlled by particular circumstances.

II. The operation of the bye-law of the 5th of March 1728, is *per se* decisive of the present question; it has been acted upon ever since without dispute. It is not pretended that Mr. Keir was or could be ignorant of that regulation. He purchased and held the stock therefore with full knowledge that it was not transferrable if he should become, or while he remained, indebted to the bank; and the appellant's or Mr. Keir's creditors must be affected by whatever affected him. The bank advanced him money, on the faith that the stock was pledged for the repayment, and he must be held to have virtually made that pledge. The appellant, or Mr. Keir's creditors, can take it no otherwise than he had it.

The appellant admitting, that if the proprietors of the bank had a right by their charter to make the bye-law, or if it is in consistency with the charter, there is then an end to the question alleged, that it is not consistent, or that it is repugnant. Finding in the charter a proviso, that the stock "shall not be liable to any *arrestment* or *attachment* laid thereon, any law, usage, or custom to the contrary notwithstanding;" he contends, that if an arrestment is excluded, *a fortiori* must the right of retention, which he calls a species of arrestment; and that the proviso prohibits not only arrestments but *attachments*. 2dly, He observes, that a right of retention was given to the bank by the charter in two particular cases, 1st, for calls on the subscribers to the stock to make good the sum subscribed; and 2dly, for fines imposed by a general court; [471] and from thence the appellant argues, that if it was necessary to give a power of retention in these special cases, it must have been implied or understood that there was no such right for debts in general. This objection was thus answered:

The reason for not permitting stock to be affected by arrestment is obvious. The unavoidable consequence would have been competition and distribution of

stock, involving the bank in embarrassment with third persons, who were not proprietors. But the reason did not extend to the bank's legal right of retention of the stock, for security and payment of the debts due to the bank by an insolvent partner. Whether the stock is of large or small extent; whether the debt due to the bank by the stockholder is of large or small amount, the bank, without the aid of legal diligence, without arrestment or attachment of any kind, simply retains the whole stock of the proprietor, until his engagement to the bank is discharged. There is no embarrassment, no competition, no subdivision of a stockholder's share into fractional parts, in consequence of this legal right, which is even fortified and simplified still more by this provisional clause, prohibiting arrestments and all other attachments by third parties. As the object of the clause therefore did not naturally affect the bank's right of compensation and retention, neither do the words of the clause admit of that construction. If it had been intended to exclude the bank's legal right of compensation and retention upon stock; if those applying for a royal patent had been unwise enough to renounce the interest of the bank in one of the plainest rights arising under the common law of Scotland; nothing could have been more natural, and nothing more necessary, than to have declared, that the stock of the bank was neither to have been affected by the diligence of arrestment, at the instance of third parties, nor by the bank's legal right of retention. The words used in the clause clearly show, that the bank's legal right of retention was not in view, nor meant to be affected by the prohibition.

The word *arrestment* and the word *attachment* are evidently used as synonymous. The last is not a Scots technical term; it is English, and has crept into the charter of the royal bank, merely because it was used in the letters patent to the equivalent company, which was an English corporation, or a mixture; and the seat of its government being London, though its funds were more properly in Scotland, it appears to have been thought proper not only to prohibit the stock being affected by the Scots mode of proceeding, but by that peculiar to the city of London.

And as to the clauses expressly allowing retention, no conclusion can from thence be drawn to bear upon the present question. It frequently occurs, (in deeds both private and public), that particular cases are, *ob majorem cautelam*, guarded with provisions, which independently would be fully guarded by the law; but it is illogical and unfair to conclude, that the common or statute law of the realm is abrogated in all cases where it happens to be fortified by anxious provisions in particular instances. At the same time it [472] might reasonably be supposed, that in these two instances of calls upon proprietors of stock beyond what they had originally subscribed, and fines imposed upon the proprietors to which they had not submitted, that these debts not being voluntarily contracted by the stockholder himself, and not being authorized by the common law, but being merely created by the charter, that it required the same charter to provide a special security and provision for that which the common law certainly afforded, if the debt had been voluntarily contracted, (namely) that the bank should have a right of retention over the defaulter's stock. This seems to be the legal and just construction of these clauses; and if a more liberal construction was essential for the interest of the bank, it might be observed, agreeably to what the charter itself enjoins, that these clauses are and must be taken, construed, and adjudged, in the most favourable and beneficial sense, and for the best advantage of the said corporation.

Two cases which occurred in England were referred to by the appellant in the court of session. The first was between the assignee of the bankrupt estate of Evance against the Hudson's Bay company (*Gibson v. Hudson's Bay Company*. 1 Stra. 645. more fully stated in 7 Vin. 125. ca. 2. and 2 Eq. Ab. 122. (O) c. 2), thus treated in Strange's Reports: "The plaintiff, as assignee of the effects of sir Stephen Evance, a bankrupt, brings his bill against the company, to oblige him to suffer him to transfer stock. The company insist that sir Stephen Evance was their banker, and greatly indebted to them; and that upon the clause in the bankrupt's act, which directs the commissioners to state the account between mutual dealers, they shall be allowed to hold the stock, and account only for the balance, if any shall appear against them. And of this opinion was the court, and decreed accordingly." The appellant admitted, that upon the first view of this case, it was adverse to his plea; but then he pretended that the judgement sustaining the Hudson's Bay company's

right of retention, proceeded upon the ground of a bye-law, enacted by the company under a general clause in the corporate act, authorizing the company to make bye-laws. To the respondents it appeared, that the decision proved, in the first place, that there is nothing in the erection of a body corporate so different from that of a private partnership, as to prevent the right of retention by bodies corporate over their stock, for payment of the debts of the stockholders. 2dly, It proves that such a bye-law, as that made by the royal bank, is understood to be perfectly consistent with, and sufficiently warranted by, the general clause in the charter of a corporation, authorizing them to make bye-laws which are not repugnant, but agreeable to the laws, statutes, and customs of the realm. And 3dly, It proves that the English courts have given effect to a similar bye-law with the present, upon the very point of retaining the stock of a corporation for payment of money owing by the stockholder to the corporation.

The other case which the appellant quoted, was that betwixt the assignees of sir Justus Beck and the Royal Exchange insurance company in 1728 (*Melioruschi v. Royal Exch. Comp.* 1 Eq. Ab. 8. c. 8), in which, he said, that the distinction was drawn by [473] the English court betwixt a body corporate and a private partnership, in regard to the power of retaining the stock of the company for payment of the debts due to the company. But from the report of that case it would appear, that there were no grounds for the right of retention, as the money, which had been lent to sir Justus Beck, was not by the insurance company in their corporate capacity, but by the partners of that company for their several private and individual interests. The reporter states, That "the court held this was not like the case of partnership; where, if any of the partners borrowed any of the partnership money, his own share should be answerable for it, and he should not be permitted to come into a court of equity, and pray an account of his share of the partnership stock and effects, without making satisfaction for the debt he owed to the partnership; for this was a transaction between them as *private persons*, and on a mutual credit and trust: but the loan of the £12,000, in the present case, to sir Justus, was not in their corporate capacity, wherein only he stood related to them and held his stock, *but was a loan by them as private persons, for which they could not stop his stock which he held as a member of the company in their corporate capacity.*" Indeed, it must be evident, that the lending of money could not be within the object and constitution of this company in its original establishment, for it was incorporated as an *assurance company*, and the loan obtained by one of the partners or stockholders from the rest, could therefore be only considered as a private transaction amongst individuals, and not falling under the business of the establishment, so as to give the other partners a right to plead retention or compensation in their corporate capacity.

The reasons for reversing the judgement were thus shortly stated (W. Grant, W. Adam, J. Clerk) in the printed case of the appellant:

I. The bank has at common law no lien or right of retention over the stock belonging to the stockholders for debts due by them to the corporation.

II. Although the bank has a general power of making bye-laws, it is especially provided, "That such bye-laws may not be contrary to the intent and meaning of their charter, or repugnant to the laws of his majesty's realm." But the bye-law in question, by which the bank assume the power of retaining or stopping the transfer of stock for debts due by the stockholder to the corporation, is repugnant to the bank's own charter, and to the nature of the stock. It is repugnant to the general provisions of the acts of parliament and charters establishing that company; and the repugnancy is strongly confirmed by the special cases excepted in the charters in which a transfer of the stock or payment of the dividends may be stopped.

III. The bye-law was little known, and not observed in practice; and, at any rate, the former practice of an individual company, contrary to law, will not authorize the continuance of such illegal practice when it comes to be objected to.

[474] IV. The debt is due to the bank by Bertram, Gardner, and company. The stock in question belongs to Mr. Keir individually.

But it was ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors complained of, be affirmed. (MSS. Jour. *sub ann.* 1797.)

## SHIPS.

JOHN JAMIESON and Co., Merchants,—*Appellants*; JAMES LAURIE, (Ship Owner),—*Respondent* [10th November 1796].

[Mews' Dig. xiii. 459; 1 Scots R. R. 763.]

By the custom of merchants, the demurrage of a ship ceases on the day of her sailing from the port of her lading; and if a ship afterwards puts back by contrary winds and is detained, (by frost for example), the same is considered as a *casus fortuitus*; that must affect the owners of the ship and not the freighters by whom she was hired: and it seems to make no difference whatever might have been the previous cause of her detention, or to whomsoever it was attributable. The owner and not the freighter is, in such case, to take the consequences of any neglect, misapprehension, or ill conduct of the captain.

INTERLOCUTORS of Scotch Court of Admiralty and Session REVERSED.

INTERLOCUTOR of the Lord Ordinary AFFIRMED.

The question in this cause arose from a claim for freight, demurrage, and damages, on account of a voyage from Leith to St. Petersburg, performed by the ship *Bell*, freighted by the appellants, and belonging to the respondent.

The appellants carried on a considerable trade in the town of Leith as Baltic merchants and imported large quantities of tallow from Russia, to be manufactured in Scotland.

At different times the appellants had given commissions to Hugh Atkins and son, of London, for cargoes of this commodity, which they executed by means of a branch of their house established in Russia, under the firm of Atkins, E. Rigail, and Co. On the 17th of April 1787, Hugh Atkins and son wrote a letter to the appellants in these words: "We have now chiefly to inform you, that our house in St. Petersburg has lately made a purchase of a quantity of Siberia soap-tallow, *deliverable the beginning of August*, at 33 Rs. per exchange, money down, for which they draw on us 9-20 ult. at 41d. per R. exchange, which will make it stand much cheaper than any that has been done since the beginning of this season; and as we observe you have still room for a considerable quantity, we should think the above would suit you; in which case we shall immediately wait on you. You will, no doubt, be acquainted with the quality of this tallow, which is much superior to common [475] Millen, and nearly equal to candle-tallow." To this letter the appellants returned an answer on the 24th April 1787, mentioning, that they agreed to take 100 tons of this tallow at the price fixed upon it; and they promised to put Messrs. Atkins and son in cash for the same, against the time that the draught from the St. Petersburg house for the prime cost should become payable, namely, on the 20th June 1787; and accordingly, on the 4th of May, the appellants remitted to Messrs. Atkins and son at London, bills to the amount of £3551 12s. 6d. to enable them to answer the draught of their house at St. Petersburg.

That no mistake might arise in this transaction, the appellants, on the 27th of April, wrote a letter to Atkins, E. Rigail, and Co. of St. Petersburg, in these words: "We accepted 100 tons of Siberia tallow from your London house, two posts ago, of which this may probably be the first advice." And to this letter they received an answer, dated 18th May O. S. 1787, in these terms: "Our partners had informed us of your having accepted of 100 tons of Siberia tallow, at R. 33, at 41d. exchange, which is, no doubt, a low price. *We shall expect shipping for it next August.*"

On the faith of this bargain, by which (as the appellants insisted) both the house at London and that at St. Petersburg stipulated to deliver the tallow in August, the appellants, in the beginning of July, engaged the ship *Bell*, John Anderson master, belonging to the respondent, to sail to Cronstadt, and there take on board the quantity of tallow which the appellants had purchased. Upon this occasion no charter-party was executed between the appellants and the respondent for the use of the vessel; but the bargain was suffered to rest entirely upon the letter of instructions, dated 5th July 1787, which the appellants delivered to John Anderson, the shipmaster, conceived in the following terms: "You will, on your arrival at St. Petersburg, deliver our

inclosed letter to Messrs. Atkins, E. Rigail, and Co. to whom we address your ship the *Bell*. They will ship 100 tons of tallow, and give you what deals and battens you may want to fill up your ship. You have a provisional order to Messrs. G. Scougal and Co. 40 tons of iron to Messrs. S. and R. Anderson, if they can ship it in time. You may apply to Messrs. Hill, Cazalet, and Co. to whom you have a letter: failing them, you may make inquiry through the factory; and if you can't get any, you'll directly load without it. *Observe, you must be clear and sail before the 1st September N. S.* as the premiums of insurance advance greatly after that date. About this we wrote particularly to Messrs. Atkins, E. Rigail, and Co. and we hope they will attend to it. We have no objection to your taking any goods on freight to the extent of 50 or 60 tons; but the ship must not be detained for them: and with respect to deals, you will be at great pains in wracking them."

Of the same date with the letter of instructions, the appellants wrote to Messrs. Atkins, E. Rigail, and Co. of St. Petersburg, in the following words: "This will be delivered to you by captain John Anderson, of the *Bell*, who comes out to your address to load [476] for our account, and is the last ship we send this season, by whom you will load the 100 tons of Siberia tallow contracted for, and fill him with what deals he may want; about these we gave the captain directions. He has a provisional order for 40 tons of iron from Messrs. George Scougal and Co. for Messrs. Samuel and Robert Anderson; if he gets it, he will be stiff enough; but if he is disappointed, he may apply to Messrs. Hill, Cazalet, and Co.; failing them, to any other house, but we can't receive any iron on our account at near the quoted prices. As our insurance advances greatly on the first of September, and again on the 15th ditto new style, you must have him cleared by that time. To this you will pay particular attention; and as deals are a bad article here, we wish to have as few of them as possible; therefore, wish you could help him to some goods on freight. What money captain Anderson wants, you may supply him with, taking his draughts for same at a saving exchange. For reimbursement of charges, etc. draw on London as formerly advised."

Immediately after the date of these letters the vessel proceeded on her voyage, and arrived at her port of destination on or about the 22d of July; but the cargo of tallow, which is brought from Siberia to the sea-ports by floating it down the rivers, was delayed by the dryness of summer 1787 in these climates, and did not arrive at Cronstadt till the beginning of October.

In the mean time a variety of correspondence took place between Anderson the master of the *Bell*, and Atkins, E. Rigail, and Co. relative to this delay. Anderson, adverting to the terms of his letter of instructions, to be clear by the 1st of September N. S. on the 19th of August O. S. took a protest against Atkins, E. Rigail, and Co. declaring, "That his lie-days by his letter of affreightment were expired, and that before the 1st of September N. S. he might have been fully loaded; and that at this date, as he had not yet got his cargo, he required me, the said notary, to go to Messrs. Atkins, E. Rigail, and Co. the shippers thereof, and to ask them why he had not yet got his loading? And thereupon I went to the aforesaid Messrs. Atkins, E. Rigail, and Co. and asked them the same question; to which they answered me, the said notary, that the goods for captain Anderson were not yet arrived. Whereupon I, notary public, have protested for all charges, damage, and detention, that may arise, that the same may be recovered according to justice." Anderson, however, still continued with the vessel at Cronstadt, where the whole of the cargo of tallow did not arrive till the 12th of October O. S.; after which he loaded his vessel with all expedition, and on the 16th O. S. he was loaded, had received the necessary papers, and was ready for sea. After the *Bell* was cleared out, she set sail from Cronstadt; but, after being at sea several days, she returned to that port, having met with contrary winds (as Anderson and several of the ship's company afterwards deposed in this action); after which the frost setting in that season much earlier than usual, she was frozen up for the winter, and was thereby detained till the month of May 1788, so that she did not arrive [477] at Leith till the beginning of June thereafter. A number of vessels which were cleared out from Cronstadt after the 16th of October O. S. one upon the 17th and several upon the 25th and 26th of that month, arrived in safety at their destined ports.

By the wintering of the *Bell* at Cronstadt the appellants suffered a very heavy loss on the cargo, to the amount of no less than £1200 sterling. But independent of this

the respondent brought a claim against the appellants for demurrage during the whole time the ship lay at Cronstadt; not only till the day the cargo was put on board and she was furnished with her passes, but for the whole period that she afterwards remained at Cronstadt after she had set sail from that port, and had put back by contrary winds, being at the rate of £3 per diem for the time the vessel was detained after the 1st of September till her arrival in the port of Leith. And the respondent further craved to be relieved of a claim made against him by Messrs. Anderson and Gundel, merchants in Leith, for damage sustained by them through the detention of goods shipped on board of his vessel.

These claims were not at first founded upon the footing of the *Bell* being a chartered ship, that is to say, a ship obliged to wait for the cargo till it should be delivered, in which case a demand would have been made for so much per month during the whole time that the ship was upon the voyage; but a charge was made, in the first place, for the usual freight that was paid for vessels from Leith to Cronstadt that season, and afterwards for demurrage, at the rate before mentioned of £3 per diem. The rate of freight had been amicably settled between the parties after the vessel returned to Leith; and, by an account fitted between them on that head, it was agreed, that after deducting £109 3s. 3d. paid to Anderson the master, there remained due by the appellants for freight a balance of £126 3s. 8d. sterling.

The appellants refusing to pay the demurrage, and to relieve the respondent from the claim of Messrs Anderson and Gundel, as craved by him; the respondent brought an action against them before the court of session in Scotland; and his libel concluded, that the appellants should be decerned to make payment to him of the sum of £235 7s. 10d. sterling, as the freight of the said vessel; 2d, Of the sum of £800 sterling, for demurrage or detention of her, with interest from the 8th day of June 1788, deducting £109 3s. 3d. paid on the 16th of February 1787 in part of freight; 3d, To be relieved of the claim made by Anderson and Gundel of Leith, for damage sustained by them through the want of goods shipped on board the said vessel; or to pay the respondent the sum of £100 sterling and interest, in order that he might relieve himself from that claim: And lastly, to make payment of the sum of £100 sterling of expences of process.

The respondent stated, as the ground of his action, that it had been owing to Messrs. Atkins, E. Rigail, and Co. the correspondents of the appellants, that the vessel had not been loaded in time to make out her voyage.

[478] The defence which the appellants stated against this action was two-fold: 1st, That the shipmaster, being bound by his instructions to wait on longer for the cargo than the 1st of September, was entitled, and even bound, to have set off on his homeward voyage, if he had thought proper on that day, after taking his protest against Atkins, E. Rigail, and Co. that his cargo was not delivered to him in terms of the letters of instruction; or, at least, 2dly, That if he thought proper to remain longer, he could only claim demurrage in the same way that any other shipmaster was entitled to do. And the appellants offered to prove, that, in the universal sense and understanding of merchants, the claim for demurrage must be at an end as soon as the cargo is put on board ship, and the vessel cleared for sailing; and though an accident should happen to the vessel the very next day after she was thus cleared, by which she might be detained for months, or even for years, no further claim could lie against the freighters. The appellants moreover stated, that, if there could be any doubt upon this head, it was fixed and established in mercantile law, that, from the time a vessel sailed after her detention, the claim of demurrage must in all events cease; because, though she was afterwards obliged to put back by contrary winds, and detained till either a frost set in, or some other accident happened, by which she was prevented from completing her voyage in a particular season, this was a *casus fortuitus*, which must fall on the owners of the vessel, and not upon the freighters, in whose service she then happened to be employed.

After sundry steps taken in this cause before the lord Dreghorn, ordinary, a proof was allowed by his lordship to both parties, of their respective averments. On the part of the respondent, various letters, etc. that passed between Anderson the shipmaster, and Atkins, E. Rigail, and Co., and between Anderson and the respondent, and other materials, were produced; and Anderson himself was examined upon oath relative to the transactions which happened between him and Atkins, E. Rigail, and

Co., and the consequent wintering of his ship at Cronstadt. Several of his ship's company were also examined on the same points. The appellants afterwards admitted some of the facts, which the respondent spent much time in proving.

On the part of the appellants, the correspondence with Atkins and Son, of London, relative to the original purchase of tallow, the letter of advice to Atkins, E. Rigail, and Co. St. Petersburg, and subsequent correspondence between the appellants and the houses of Atkins and Son, and Atkins, E. Rigail, and Co., and other documents, were produced, and a proof was taken in Russia, and afterwards in London. A commission was sent out to two eminent merchants in St. Petersburg, one named by each of the parties, who, having called before them four other merchants of great character, knowledge, and experience in matters of this kind, reduced their depositions into the shape of a report, which was confirmed upon oath before John Cayley, esq. the British consul in Russia.—This report is in the following words :

[479] “ That if ships are cleared at Cronstadt by the 17th day of October old style, they consider them in general *as ready in good time to get away that season* : That they conceive the *demurrage of a ship to cease on the day of her sailing from the port at which she has been loaded* : That ships are frequently detained at Cronstadt mole later than the end of October O. S. and yet make good their voyages that season : That a ship cannot sail after the expiration of her lie-days there, without passes from the custom-house and admiralty at St. Petersburg : That such passes are generally, if not always, procured by the person or persons to whom the ship is consigned : And that, to the following question put to the witnesses by the commissioners, ‘ If a vessel is cleared, and her papers delivered while the navigation at Cronstadt is open, is it not the practice of merchants to consider her claim for demurrage as at an end from that time, even although contrary winds may detain her till the frost sets in, so as to prevent her from sailing that season ? ’ they answered, that it was of too extensive a nature for them to give a specific opinion on it.”

The proof taken in London contained the depositions of several merchants and ship-owners, themselves engaged in the Russia trade ; and some of whom had vessels detained at Cronstadt that very winter 1787-8, by the accident of the frost setting in that season several weeks earlier than usual. These gentlemen were unanimous in delivering their opinions, and establishing the rule of mercantile law, that no claim of demurrage lies after the moment the papers are delivered ; inasmuch that they would not have claimed demurrage for their own vessels, if they had been cleared and ready for sailing before the frost actually set in, even though the vessel should be frozen up the very next day.—The following was the statement of this evidence.

Ralph Keddey, merchant and ship-owner in London, depones, “ That it is his opinion, and he believes it to be the general opinion and understanding among merchants and ship-owners in London, that the claim for demurrage upon a ship *ceases from the day she is cleared out, and is ready for sailing*. That if a ship is cleared out, and actually sails and proceeds upon her voyage, but is afterwards put back to the same or any other port, and is there detained by contrary winds or frost, depones, that in such a case it is his opinion and belief, and he believes it to be the general opinion of merchants and ship-owners in London, that *no claim for demurrage would lie on account of such detention*. Depones, that the deponent had two ships of his own which wintered in the year 1787 and 1788 at Cronstadt, viz. the *Favourite*, captain John White, and the *Thomas*, captain James Fletcher, which last-mentioned ship had actually sailed and put back again ; and the deponent was greatly out of humour with the said captain James Fletcher for his conduct on this occasion, as he is convinced his wintering there was owing solely to his indolence and neglect. And being further interrogated, depones, that when a ship has cleared out, and has her dispatches for sailing before she [480] is actually frozen, *no claim for demurrage will in such case lie, although the ship should be actually frozen up the very next day.*”

Samuel Marshall, captain of the ship *Expedition* of London, depones, “ *That he entirely concurs in opinion with the preceding witness, that the claim for demurrage on a ship ceases from the day she is cleared out and ready for sailing ; and that if a ship is cleared out, and actually sails and proceeds on her voyage, but is afterwards put back to the same or any other port, and is there detained by contrary winds or frost, that in such case no claim for demurrage can lie by reason of such detention.*” This witness further deposed, that he was at Cronstadt in October 1787 ; *that he sailed*



from that port on the 26th day of that month, old style (no less than ten days after the ship *Bell* was cleared); that he got home to the port of London that season, as six or eight other vessels, which he specifies, likewise did; and that the ship *Bell* was actually in company with him for several days, but that she put back and he proceeded.

George Abel, merchant in London, depones, "That he coincides, in all respects, with the two preceding witnesses in opinion, and believes it also to be the opinion of every merchant and ship-owner in London, that the claim for demurrage on a ship from the very day she is cleared out, and is ready for sailing, *entirely ceases*; and that if a ship is once cleared out, and actually sails and proceeds on her voyage, but is afterwards forced back to the same or any other port, and is there detained by contrary winds or frost, no claim for demurrage can or will in such case lie by reason or on account of such detention."

William Porter of London, merchant, depones, "That he is of the same opinion with Mr. Abel, and believes it to be the opinion of every merchant and ship-owner in London."

George Lyon of London, merchant, depones, "That he concurs in opinion with the two preceding witnesses, and believes that merchants and ship-owners of London, in general, are of the same way of thinking."

George Brown of London, ship-broker, depones, "That in his line of business, as a ship-broker particularly connected with the Baltic trade, he has occasion to be well acquainted with the custom of merchants and ship-owners with respect to demurrage, and the cases wherein it is allowed, and from his knowledge thereof, the deponent is of opinion that, whenever a ship has actually sailed, the claim for demurrage *ceases*, even although the ship should in the course of the same day be forced back into port by contrary winds, and there detained by *forst* or otherwise howsoever."

John Jacob Hertel of London, merchant, depones, "That he has made particular inquiries at the owners, captains, and merchants concerned in the following ships, viz. the *Jamaica*, Thomas Metcalf; *Friendship*, George Wintringham; *Harmony*, Thomas Blades; *Raikes*, Robert Jordan; *Berwick*, David Duncan; *Eagle*, Anthony Yates; *Harmony*, Michael Heavisides; and the *Diana*, Thomas Megget; which ships wintered at Cronstadt in the year 1787 [481] and 1788, whether any demurrage was claimed or paid on account of such ships so wintering, and being detained during the said winters 1787 and 1788; and he has been informed that no demurrage was claimed or paid on account of such wintering and detention: And depones, that he verily believes no demurrage was claimed or paid for the wintering or detention of such ships as aforesaid, and thinks that if any such claim had been made, he must have heard of it, as he is acquainted with almost all the captains of said ships, or merchants to whom they come."

The proof both of the appellants and respondent was reported to the lord Dreghorn, ordinary, and the import thereof debated before his lordship; but before any interlocutor was pronounced in the cause, the clerk of the high court of admiralty in Scotland appeared before the lord ordinary, and protested, that as this was a maritime cause, it ought to have originated in the said court of admiralty. All parties being satisfied, that the law was as stated in this protest, the original action before the court of session was discontinued, and a new one was commenced at the respondent's instance against the appellants before the high court of admiralty.

The libel and defences in this new action were similar to those in the former one; and it was agreed upon between the agents for the pursuer and defenders in this action, that the proof taken by authority of the court of session should be held of equal validity as if it had been taken by commissioners from the court of admiralty. It was accordingly received by the judge admiral in terms of this agreement, and made part of the proceedings before him; and after sundry steps of process, the judge of the high court of admiralty, on the 13th of May 1791, pronounced the following interlocutor: "Finds, that the extraordinary detention of the vessel in question at Cronstadt, and which ultimately occasioned her detention there as libelled, arose *ex culpa* of Atkins, E. Rigail, and Co., for whom the defenders (appellants) were answerable; and therefore finds the pursuer entitled to the damages he thereby sustained, and allows the defenders (appellants) to see and object to the account of these damages."

The appellants meaning to object to the principles on which this judgement pro-

ceeded, did not think it necessary to enter into a litigation on the *quantum* of damages; and the judge admiral accordingly, on the 22d of January 1792, decerned in terms of the libel.

This judgement was afterwards brought under the review of the court of session by a bill of suspension, and parties were heard singly upon the question, How far demurrage or damages were or were not due, without entering into the extent of them! The lord justice clerk, ordinary, before whom the cause came to be heard, on the 21st February 1792, pronounced the following interlocutor: "Finds, that by the original bargain of affreightment the ship ought to have been loaded and ready for sailing by or about the first of September: Finds, that it was by desire of Atkins, E. [482] Rigail, and Co. that the ship was detained beyond that time: Finds, that it was not owing to any fault of the master's, but to contrary winds and the frost setting in, that the ship did not make out her voyage; and that if the ship had sailed by the 1st of September, or soon after, it is presumable the disasters by which she was detained through the winter would not have happened; and that therefore any damage thence arising must fall upon the suspenders: And therefore, upon the whole, finds the letters orderly proceeded; and decerns."

This interlocutor the appellants submitted to the lord ordinary's review in two short representations, which were refused upon the 7th of March and 25th May 1792. But the appellants, however, made another representation to the lord ordinary; and his lordship, on the 11th December 1792, pronounced the following interlocutor: "Having considered this representation, with answers, in respect of the depositions of sundry merchants and shipmasters, who give it as their opinion, *that the demurrage of a ship ceases on the day of her sailing from the port of her loading, and that if a ship should thereafter be put back by contrary winds, and detained by the frost setting in, the same is considered as a casus fortuitus that must affect the owners*, and that no opinions to the contrary appear from the proof; alters the former interlocutor, and finds that the charge is not entitled to demurrage after the 29th of October 1787; and appoints parties to be ready to debate on the extent of the damage or demurrage, claimable upon the suspenders on account of the detention prior to that period."

Against this interlocutor, the respondent presented a long reclaiming petition to the whole court, which being followed with answers on the part of the appellants, the court, on the 16th January 1794, pronounced the following interlocutor: "The lords having advised this petition, with the answers: Find, that the opinion of merchants founded upon by respondents does not apply to this cause: Find, that, by the original bargain of affreightment, the ship ought to have been loaded and ready for sailing on or about the 1st of September: Find, that it was by desire of Atkins, E. Rigail, and Co. that the ship was detained beyond that time: Find, that it was not owing to any fault of the master, but to contrary winds and the frost setting in, that the ship did not make out her voyage; and that if the ship had sailed by the 1st of September, or soon after, it is presumable the disasters by which she was detained through the winter would not have happened; and that therefore any damage thence arising must fall upon the suspenders: And therefore, upon the whole, find the letters orderly proceeded; and decern and remit to the lord ordinary to proceed accordingly."

The appellants, conceiving themselves to be aggrieved by the interlocutors of the judge admiral of the 13th of May 1791, and 22d of January 1792, by the interlocutors of the lord ordinary of the 21st of February, 7th of March, and 25th of May 1792, and by [483] the interlocutor of the whole court of the 16th of January 1794, appealed therefrom. The respondents assigned (J. Scott, R. Dundas, G. Fergusson) the following reasons for their affirmance:

I. That, by the original bargain of affreightment, the ship ought to have been loaded and ready for sailing on or about the 1st of September.

II. That it was by the desire of Atkins, E. Rigail, and Co. that the ship was detained beyond that time. [*Of this there was strong evidence; and also a suspicion induced that they had been negligent in loading the ship.*]

III. That it was not owing to any fault of the master, but to contrary winds and the frost setting in, that the ship did not make out her voyage.

IV. That if the ship had sailed by the 1st of September, or soon thereafter, it is presumable the disasters, by which she was detained through the winter, would not have happened.

From all which it follows, in the *last* place, that all damage thence arising must fall upon the appellants.

On the part of the appellants it was contended (J. Adair, W. Adam), that these interlocutors ought to be reversed.

I. Because by the letter of affreightment delivered to the shipmaster, which was the basis of the contract between the appellant and respondent, he was not bound to wait longer for the cargo from the foreign merchants than the 1st of September N. S. but he was expressly ordered to *observe that he must be clear and sail before that day*. Lest he should not be able to get the cargo of tallow, he is by his instructions allowed to load his ship with other goods, and to execute orders for other merchants; but it is still expressly mentioned, that "*the ship must not be detained for them.*" And the shipmaster was fully sensible that, upon the cargo not being ready to be shipped in proper time, he had it in his power to return immediately after the said 1st of September; accordingly in his protest, taken upon the 30th of August 1787, he declares, "*that his lie-days by his letter of affreightment were expired.*" After this the shipmaster might either have returned home empty, or have advertised the ship as a general one, ready to take on board goods for freight, and to have returned home with these goods as soon as he found it convenient.

*To the objection* contained in the first reason assigned by the respondents, *it was answered*: That the same instrument which gives rise to this objection, gives positive instructions to the captain to sail on a particular day, without leaving any thing to his discretion. These instructions he was bound to obey; and if either from negligence or wilfulness, or a mistaken idea of the interest of the freighters, he delayed beyond that time, the freighters ought not to suffer. If the captain could at any time be considered as their agent, so as to make them responsible for his acts, that agency ceased at the period affixed for his sailing. The captain is appointed by the shipowner; and if he does any thing to his pre-[484]-judice, especially if what he does be contrary to his instructions, and not within the contract of affreightment, the owner cannot have recourse for indemnification against the freighters, but must stand to any loss which may accrue from the negligence, the wilfulness, or mistake of his captain.

II. But, if the shipmaster thought proper to remain after the expiration of the time limited in his letter of instructions, he could only claim demurrage, according to the custom of merchants in similar cases. And the appellants do humbly contend, that the witnesses adduced by them do clearly and irrefragably establish the law and the practice of merchants to be, that *demurrage ceases, either from the day that the ship is cleared and ready for sailing, or, at least, that when a ship has once sailed, all claim for demurrage is totally at an end*; and this without distinction, however the detention of the vessel may have been occasioned. In the case in question, the vessel did actually sail from Cronstadt on the homeward voyage; and the appellants contend, therefore, that the demurrage should cease either from the day on which the vessel had received the necessary passes, and was cleared out and ready to sail, or from the day on which she actually did sail.

*To the objections* contained in the third and fourth reasons of the respondent, viz. "That it was not owing to any fault in the master, but to contrary winds and to the frost setting in, that the ship did not make out her voyage, which disasters would not have happened if the ship had sailed early in September:" *It was answered*, That the evidence of usage is clear and decisive against this position, and is corroborated by the conduct of the English ship-owners, who, in the same winter, had ships detained by frost in the port of Cronstadt, but who, nevertheless, made no demand for demurrage or detention, while the appellant has been unable to prove a contrary usage. The ship's not sailing in September was the fault of the master, who disobeyed the positive instructions of the appellants.

III. The evidence of usage by the merchants, who were examined in the presence of the agents, and at the instance of both parties, is decidedly applicable to the present case. It is a question to which such evidence directly applies, and as such, is to be decided upon by the testimony of persons who are acquainted with that usage.

To the objection of the respondent, "That it was by the desire of Atkins, E. Rigail, and Co. that the ship was detained, and that that circumstance took it out of the common case, by making the shipmaster subservient to the orders of Atkins, E. Rigail,

and Co. who are to be considered as the agents of the appellants;" it was answered, 1st. That Atkins, E. Rigail, and Co. were not the agents of the appellants; they were merely the merchants and shippers of goods. 2dly. The positive instructions of the appellants to the captain took away any implied or supposed agency upon the part of Atkins, E. Rigail, and Co. if any such could be raised by [486] implication. 3dly. The agency of those merchants does not vary the case, nor take it out of a case of mercantile dealing, to which evidence of usage is applicable. Because the ship had actually cleared out and sailed in October, and the moment she did so, *whatever might have been the cause of her original detention*, the ship-owner became liable for every risk; and the freighters ceased to remain any longer liable for demurrage or detention.

IV. It was insisted that when there is such clear evidence of a practice in England, founded upon what results from the very nature of the contract, and supported by reason and justice, it would be of very bad consequence to establish a contrary rule in Scotland, especially in a case where the question is perfectly open, *having never been, in any shape, under the cognizance of a court in Scotland before this period*. So much has the court of session and the house of peers been inclined in other cases to preserve an uniformity in the decisions in mercantile questions between the two countries, that in several instances, and particularly in a late case, with regard to the hypothec on ships for furnishings at a home port, (*Wood and Co. v. Hamilton*, decided on appeal, 15th June 1789,) a variety of opinions, cited from foreign authorities, were not only disregarded, but even former decisions of the court of session, and the authority of the law writers of Scotland, were passed over, that the law and practice of England might be adopted, and the desirable object of assimilating the commercial law of the two countries obtained.

V. In fine, it was submitted that every consideration on the head of equity and general expediency was also on the side of the appellants; and so far as the considerations of favour, arising from the situations of parties, mutually striving *de damno evitando*, could operate, they were all on the side of the appellants. While the foreign merchants and the shipmaster mutually criminated each other for having occasioned the damage, it was admitted on all hands, that the appellants were free from every degree of blame. While the appellants, living in Britain, could neither know the situation of this business in Russia; or, had they known it, could they have done any thing to remedy it; the foreign merchants and the shipmaster, being both on the spot, might have prevented the loss; the former by shipping the goods at an earlier period, or giving notice that they could not ship them in time; and the latter, by sailing without them, as soon as from the lateness of the season there came to be any serious risk of the ship being deterred for the winter. And if demurrage shall be adjudged to be due to a shipmaster for detention, as in the present instance, this bad consequence would follow, that if a ship, at any future period, happen to be detained till near the time of the frost setting in, and the master should see that it would answer his purpose much better to remain over the winter than encounter a hazardous voyage, he would easily suggest, or might be prompted to invent, excuses for making a protest, and not sailing, because he would rely on this precedent for getting all his demands satisfied.

[486] IT was accordingly ORDERED and ADJUDGED, That the several interlocutors complained of, be reversed: And it was further ordered and adjudged, That the interlocutor of the lord ordinary of the 11th of December 1792, be affirmed: And it was further ordered, That the cause should be remitted back to the court of session in Scotland, to proceed according to the said interlocutor of 11th of December 1792. (MSS. Jour. *sub ann.* 1796.)

## STATUTES.

CASE 1.—WILLIAM PANTER and another,—*Appellants*; ATTORNEY-GENERAL,—*Respondent* [25th May 1772].

Every act of parliament, in which no particular time is specified for its commencement, is held to operate and take effect from the first day of that session of parliament wherein it is made.

DECREE of the Court of Exchequer AFFIRMED. See the succeeding case.

By stat. 33 Geo. III. c. 13. reciting that the above rule of law "is liable to produce great and manifest injustice," it is enacted, that the clerk of the parliaments shall indorse (in English), on every act of parliament to be passed after April 8, 1793, immediately after the title of such act, the day, month, and year when the same shall have passed, and received the royal assent: and such indorsement shall be taken to be a part of the act, and to be the date of its commencement, where no other commencement shall be therein provided.

[33 Geo. III. c. 13 is The Acts of Parliament (Commencement) Act 1793. See Short Titles Act 1896 (59 and 60 Vict. c. 14).]

By the act of tonnage and poundage of the 12th Charles II. and several subsequent statutes, certain duties were laid on rice imported, amounting to 6s. 4d. and twelve twentieth parts of a penny per hundred weight, with a drawback of 5s. 9d. allowed on exportation; so that there remained a net duty to the crown of 7d. and twelve twentieth parts of a penny per hundred weight.

In the year 1767, and for some time before, there was a great scarcity of corn in this kingdom; whereupon the legislature thought proper not only to prohibit the exportation of all sorts of corn out of the kingdom, but also to encourage the free importation of it from foreign parts; and among several acts passed to increase provisions in that year, there was one intituled, "An act for allowing the free importation of rice, sago powder, and vermicelli into this kingdom, from his majesty's colonies in North America, for a limited time." By which it was enacted, "that, from and after the 4th day of May 1767, it shall and may be lawful to any person or persons to import into Great Britain [487] from any of his majesty's colonies in North America, at any time or times before the 1st day of December 1767, any rice, without the payment of any subsidy, custom, duty, or imposition whatsoever, any thing in any former act or acts to the contrary notwithstanding."

On the 30th of May 1767, John Nutt imported, at the port of London, 3660 hundred weight of rice from South Carolina; and on the 1st of June following, he imported also at the port of London, 1785 hundred weight of rice from the same place.

On the 2d of June, William Thompson imported at the port of London, 883 cwt. 2 qr. 21 lb. of rice from Georgia. And on the 3d of June, Messrs Smith and Nash imported, at the port of London 1800 cwt. of rice from South Carolina.

As it was foreseen that merchants importing rice under the act above stated, might again export the same to foreign parts, duty free, whereby the proposed benefit to this kingdom would be turned to its disadvantage; therefore, the committee of supply of the house of commons, upon the 2d of June 1767, resolved, that a duty of sixpence in the pound, according to the value specified in the book of rates, referred to by the act of 12th Charles II. should be laid upon the exportation from this kingdom, of such rice as should have been imported duty free, by virtue of the act made in that present session; that such duty should be reserved in the exchequer for the disposition of parliament; and that a bill should be brought in upon this resolution: accordingly, an act passed in the same session, which, after reciting that part of the former act above stated, proceeds in manner following: "Now to the end the advantage intended to this kingdom by the said recited act may not be evaded by the exportation of such rice into foreign parts, be it enacted, That, for and upon all rice which hath been, or shall be imported into this kingdom duty free, by virtue of the said recited act, and which shall be again exported thereout, there shall be paid and answered to his majesty, his heirs and successors, a subsidy or poundage of sixpence

in the pound, according to the value or rate set upon rice imported in the book of rates, referred to by the act of the 12th of king Charles II. which said subsidy of sixpence in the pound upon such rice so exported, shall be raised, levied, collected, and recovered, by such ways and means, and under such rules, regulations, penalties, and forfeitures, as the subsidy of poundage for any goods or merchandize exported from Great Britain, may be raised, levied, collected, or recovered by any act of parliament now in force, as fully and effectually, to all intents and purposes, as if the several clauses, powers, directions, penalties, and forfeitures, relating thereto, were particularly repeated, and again enacted in the body of this present act."

This act received the royal assent on the 29th of June 1767.

On the 10th of June 1767, the appellants entered outwards, at the port of London, the following quantities of rice, viz. [488] 250 cwt. part of the 3660 cwt. imported by John Nutt, from South Carolina; 1300 cwt. other part thereof, and also part of the 1785 cwt. imported by John Nutt; 1535 cwt. part of the 1800 cwt. imported by Smith and Nash; and 365 cwt. part of the 883 cwt. 2 qr. 21 lb. imported by William Thompson, making in all 3450 cwt. The export duty on which, under the last stated act, amounted to £115, but the appellants refused to pay the same.

Whereupon his majesty's attorney general in Hilary term, 1768, filed an information in the court of exchequer against the appellants, and Thomas Robinson, their late partner, stating the above-mentioned facts, and praying, that the appellants might be compelled to pay, to the use of his majesty, the sum of £115, in respect of the duty upon 3450 cwt. of rice exported by them.

Thomas Robinson having soon afterwards died, the appellants, as his surviving partners, put in their answer, in which they admitted all the facts charged by the respondent; but alleged, that no more rice was really shipped, than 3067 cwt. and 23 lb. and insisted, that as the act last above stated did not receive the royal assent till the 29th of June, it could have no effect till that day.

On the 15th of December 1769, the cause came on to be heard; when the court ordered it to stand over to a future day, and allowed the appellants to examine witnesses, to prove their allegation, that the rice was sold, as if exempted from all duties. They accordingly examined several witnesses; and on the 11th of the same month, counsel were heard for both parties, when the cause was ordered to stand over for the opinion of the court; and on the 5th of July 1771, the lord chief baron and Mr. baron Adams were pleased to declare, contrary to the opinion of Mr. baron Perrot, that his majesty was entitled to the duty demanded by the information; and it was thereupon ordered, adjudged, and decreed, that it should be referred to the deputy remembrancer, to take an account of what was due to his majesty from the appellants, for the duty of sixpence in the pound for all the rice imported duty free, and which had been exported by them, between the 4th of May 1767, and the 29th of June following, according to the value or rate set on rice imported in the book of rates, referred to by the act of tonnage and poundage, made in the 12th year of the reign of king Charles II.

From this decree the appellants appealed (R. Perryn, J. Skynner), and on their behalf it was said, that the grounds alleged by the information in support of the demand were, that the legal commencement of the act imposing the subsidy, must be taken and understood to be the first day of that session of parliament in which the same was made, as no particular time for the commencement thereof was specified in the act itself; and that it was manifestly the intention of the legislature, that the act imposing this subsidy should operate upon the exportation of all rice, which should be imported duty free, by virtue of the first-mentioned act. But to [489] this it was answered, that it is not a universal rule, that an act of parliament, where no time for its commencement is therein specified, should commence upon, and have relation to the first day of the session; but the commencement thereof is to be governed by reason, justice, and the nature of the subject; and such commencement by relation has prevailed only in such cases as tend to protect rights, and not where it would introduce oppression and injustice, as in the present case. That it was evident, the legislature never meant that this act should relate, or have retrospect to the first day of the session, because it recited another act which had previously passed in the same session, for the importation of rice duty free, and then imposed the subsidy in the future tense, on such rice only as should be exported. That if the act

imposing the subsidy should have its commencement on the first day of that session of parliament, which was the 11th of November 1766, it would take place before the other act for allowing the importation of rice duty free, which did not commence till the 4th of May 1767; for until that time, all rice imported was charged with duties on importation, and entitled to a drawback of near the whole of such duties on being exported, which would be absurd. That by this act, the subsidy demanded was to be collected by the same ways and means, as the subsidy or poundage for any goods or merchandizes exported from Great Britain, might be collected by any act of parliament then in force, and which subsidies were always demanded and paid, before such goods were suffered to be shipped for exportation, or the clearances and documents for that purpose passed; but this could not be done in respect to the subsidy demanded, there not being, at or before the shipping of such rice for exportation, any law in being which could empower the officers to demand and collect such subsidy, by the ways and means payable by former acts on the exportation of goods. Besides, by this act it was provided, that the subsidy should be collected and recovered, under and subject to such penalties and forfeitures, as the subsidy or poundage, for any goods or merchandizes exported from Great Britain, might be collected and recovered by any act of parliament then in force; if therefore this act was to commence from the first day of the session, the exporters of rice would be liable to penalties and forfeitures by an *ex post facto* law, which was totally unprecedented, and manifestly unjust. And lastly, that by the construction of this act contended for by the respondents, not only particular hardships and injustice would be sustained by the appellants, but a mischief also would result to the exportation trade; and it would have a very injurious effect upon the general trade and commerce of the kingdom. It was therefore hoped, that the decree would be reversed, and the information dismissed.

On the other side it was said (E. Thurlow, J. Dunning) to have been always considered as a fixed point, that every act of parliament in which no particular time is specified for its commencement, shall be held to operate and take effect from the first day of that session of parliament [490] wherein it was made; and that the courts have in several cases so decided (Sir W. Jones, p. 22: Siderfin, 310). That if the time of giving the royal assent was to be considered as the date and commencement of any act of parliament, such time would be specified therein, and make part of the act. But this is by no means the custom or practice; for all the acts passed in one session, have relation to and bear one date, viz. *at the parliament begun and holden at the day of*, etc. and such acts whose time of commencement is specified, can only be construed to have their effect suspended, and are exceptions to the general rule. That both the acts relative to the importation and exportation of rice, must be held and considered as bearing date the first day of the session of parliament wherein they were passed, but were not to operate or take effect till the 4th day of May 1767. As to the objection, that the resolution of the committee of supply, upon which the last of these two acts was founded, was dated the 2d of June 1767, and the act itself did not receive the royal assent till the 29th of that month, between which periods the appellants exported the rice in question, under a belief that the same was to be free of duty, and charged their correspondents accordingly; it was answered, that supposing the allegation true, yet such exportation was made with a knowledge of the duty, because it was made after the resolution passed; and must therefore be held to have been done with full notice, and in fraud of the revenue. And as to the other objection, arising from the manner in which this duty is to be recovered and levied, it was said, that the directions referred to in the act, respect the mode of recovering such duties, and penalties consequent thereon. And if the collector had committed any mistake in demanding the duties now claimed, the publick revenue could not suffer thereby, nor would justice allow the appellants to benefit by such mistake.

After hearing counsel on this appeal, the following question was put to the judges, viz. "At what time shall the statute of the 7th year of his present majesty, intituled, *An act for discontinuing the duties on logwood exported; and for granting a duty upon the exportation of such rice, as shall have been imported duty free, in pursuance of an act made in this session of parliament*, etc. be deemed to commence, as to the duty laid thereby upon the exportation of such rice as was imported duty

free, in pursuance of an act made in the same session of parliament?" Whereupon the lord chief justice of the court of common pleas delivered the unanimous opinion of the judges present, "That the said statute did, by legal relation, commence from the first day of the session." It was therefore ORDERED and ADJUDGED, That the appeal should be dismissed; and the decree therein complained of, affirmed. (MS. Jour. *sub anno* 1772. p. 797.)

[491] CASE 2.—JEREMIAH VICKARS, and another,—*Appellants*; The Attorney-General of IRELAND—*Respondent* [12th February 1779].

J. and S. on the 28th of December 1771, imported certain quantities of tobacco in Ireland, which by the then subsisting statutes were liable to the payment of particular duties. Those duties being paid, the tobacco was accordingly delivered to them by the proper officer. On the 21st of that month heads of a bill were brought into the house of commons of that kingdom, for imposing an additional duty upon tobacco imported; but the bill did not receive the royal assent until the 1st of January 1772. On an information filed to recover the amount of this additional duty, the defendants pleaded the former acts and by their answer insisted, that they had paid all the duties thereby imposed. But it was held, that they were liable to the payment of the additional duty: for though the act imposing that duty had not in fact passed, yet the intention of the legislature to impose it was publicly and sufficiently known, by means of the printed votes of the house of commons, and therefore the importation was made, and the tobacco obtained, in fraud of the revenue.

ORDERS of the Irish Exchequer AFFIRMED.

See the note to the preceding case. It is now usual to make revenue laws in some degree retrospective; to avoid that evasion, which if not chargeable as a fraud on the revenue, is certainly injurious to it.

By an act of parliament, passed in Ireland, 14th and 15th of Charles the Second, intituled, "An act for settling the excise, or new impost, upon his majesty, his heirs and successors, according to the book of rates, therein inserted," it is (amongst other things) enacted, That, from and after the 25th day of December 1661, the several rates and charges therein mentioned, and no other, by the name of *The Excise, or new Impost*, shall be, and are thereby laid and imposed, to be levied, etc. in and throughout the realm of Ireland, upon all commodities, merchandizes, and manufactures, as well native as imported, or foreign, and particularly for all sorts of wine, tobacco, etc. specified and rated in the book of rates, thereby referred to, of the value of every twenty shillings, twelve pence, and so after that rate for a greater or lesser quantity.

By the said book of rates, all tobacco, of English plantation, is rated at 1s. 8d. per pound. And it is enacted, That every merchant, or importer, that is not a shopkeeper, retailer, or consumptioner, (that is to say, one employing the commodities of his importation for his own use and consumption), after entry, and before he and they be permitted to have any warrant to receive his or their goods out of the ship, or from the waterside, shall enter into obligation to the king, singly, if known and responsible, or otherwise with sufficient security, in double the value, with condition not to deliver, or suffer to be delivered, any of the said goods to any buyers thereof, or to any shopkeeper, or retailer, before the duty of excise paid; and, on failure of giving such bond, to pay down the excise of his goods; and if he shall not be able, or else refuse the doing [492] thereof, the goods, after due notice taken of the quantity and quality, shall be laid up in his majesty's or other fitting warehouse or warehouses, there to be kept until sufficient bond be given, or excise fully paid.

And by the act of tonnage and poundage, passed in the said kingdom of Ireland, in the 14th and 15th years of the same reign, it is (amongst other things) enacted. That the rates mentioned and expressed in one book of rates, thereunto annexed, intituled, "*The rates of merchandize*," (that is to say), the subsidy of poundage, and the subsidy of tonnage, as they are rated and agreed upon by the parliament of Ireland, set down and expressed in the said book, to be paid to the use of his majesty.



his heirs and successors, for ever, shall be the rates according to which all goods and merchandizes, to be brought into or carried out of the said realm, of every twenty shillings of the same goods and merchandizes, as they are particularly and respectively rated and valued in the forementioned book, shall pay twelve-pence English money.

By the last-mentioned book of rates, all tobacco, of English plantation, is rated and valued at 1s. 8d. per pound.

By another act, passed in the said kingdom of Ireland, in the 11th and 12th years of the reign of his present majesty, intituled, "An act for granting unto his majesty an additional duty on the several commodities, goods, and merchandizes, therein mentioned, and for prohibiting the importation of all gold and silver lace, and of all foreign cambrics and lawns (except of the manufacture of Great Britain)," it is (amongst other things) enacted, That, from and after the 25th day of December 1771, until the 25th day of December 1773 inclusive, there shall be, throughout his majesty's kingdom of Ireland, granted, levied, collected, and paid unto his majesty, his heirs and successors, the several rates, additional duties, and impositions, thereafter mentioned, (that is to say), for every pound weight of tobacco that shall be imported into this kingdom during the time aforesaid, the sum of 3½d. And by the said act it is further enacted, That all and singular the said duties and impositions thereby granted, shall be raised, levied, collected, and paid unto his majesty, his heirs and successors, during the time aforesaid, over and above all other duties payable for the same by virtue of the two before-mentioned acts. And that all and every the several and respective additional duties, rates, and impositions, thereby granted, shall be raised, collected, and paid into his majesty, his heirs and successors, during the term aforesaid, at the same time, in like manner, and by such ways, means, and methods, and by such rates and directions, and under such penalties and forfeitures, and with such powers as are appointed, directed, and expressed in and by the said first-mentioned act of excise, or new impost, according to the book of rates therein inserted, or by any other law now in force relating to the revenue of excoise in the said kingdom, as fully and effectually, to all intents and purposes, as if the same were particularly mentioned, expressed, and enacted again in the body of the said act.

[493] On the 30th day of December 1771, the appellant Jeremiah Vickars, and John Lord his late partner, did import into the port of Dublin, 80 hogsheads, containing 81,000 lb. of tobacco, of British plantation, upon which certain duties were payable to his majesty, according to the acts and rates before mentioned, and the additional duty of three-pence halfpenny per pound, which additional duty amounted to £1063 2s. 6d.

But the appellant Jeremiah Vickars, and his partner, having refused to pay the said additional duty, his majesty's then attorney general of Ireland, on the 30th of January 1773, exhibited an information in the court of exchequer in that kingdom, against the said Jeremiah Vickars, and John Lord his partner, for recovery of the said £1063 2s. 6d. being the amount, as charged by such information, of the additional duty of 3½d. for every pound weight of tobacco therein stated to have been imported into the port of Dublin, on the 30th day of December 1771, and therein alleged to have been 81,000 lb. weight; insisting, that the said Jeremiah Vickars and John Lord ought to have entered into such sufficient obligation, and with such condition, as by the said acts, or some of them, is required, or to have paid down the duties imposed on the said tobacco by them imported, in case they were not able or willing to give bond, in manner and form aforesaid, according to the directions of the said acts, and in all things to have conformed to the true intent and meaning of the said acts. And further setting forth, that the appellant Jeremiah Vickars, and his late partner, pretending they were not compellable to pay the said additional duty of three-pence halfpenny for every pound weight of tobacco by them imported into the said kingdom, from and after the 25th day of December 1771, had carried away and possessed themselves of the said tobacco, imported by them as aforesaid, and had not entered into bonds, or paid the several duties payable to his majesty for the said tobacco, pursuant to the said acts, and actually refused to account for and pay the same: Whereas his majesty's attorney general charged that the said duties were imposed for the security of the said kingdom, and the support of his majesty's government, and were justly due from and payable by the appellant Jeremiah Vickars, and the said John Lord,

and that they ought to have come to an account for the said additional duties, and that withholding the same is defrauding his majesty of his just and legal duties; and therefore the said information prayed, that the said Jeremiah Vickars and John Lord might be compelled to set forth, whether they did, at the time in the information mentioned, import any, and what quantity of tobacco, into some, and what port in the said kingdom; and whether they did enter into such sufficient obligation in the law, to pay or did pay the several duties by the said several acts imposed on every pound weight of tobacco, of British plantation, imported into the said kingdom, or did account for the same; and that they might be obliged to set forth what sum the said several duties amounted to, and might account for and pay the same.

[494] To this information the appellant Jeremiah Vickars, and the said John Lord, put in their plea in bar, to the account and relief thereby sought; and therein admitted, that they, on the 28th of December 1771, did import into the port of Dublin certain quantities of tobacco, of British plantation, upon which certain duties were payable to his majesty; and that afterwards, (to wit), on the 30th of December 1771, the appellant Jeremiah Vickars did, on behalf of himself and the other defendant John Lord, duly and regularly make an entry in the custom-house of the said port of Dublin, pursuant to the said statute; and on the said 30th of December 1771, did duly and punctually pay to the proper officer duly authorized to receive the same, all the duties due and payable to his majesty for all the said tobaccos; and, in consequence thereof, having got the said tobaccos duly discharged by the several officers authorized and empowered to discharge the same, according to the usual course of discharging such merchandize imported into the said port of Dublin, they insisted they ought not to be vexed with an information at the suit of his majesty's attorney general, upon a suggestion that they had not paid the duties thereof. And the defendants further insisted, that if the duties of the said tobaccos had not been paid, or such bond given for the same as in the information mentioned, the only remedy for recovery of such duties, if not so paid or secured, was, by seizure of the said tobaccos, and lodging them in his majesty's storehouses, pursuant to the statute in the information first-mentioned; and further insisted, that if his majesty's attorney general had any claim against the defendants, for the said duties, (which they insisted he had not), that his remedy was proper at law, and not in the equity side of that court.

And the defendants for their further plea said, that the heads of the bill, or act, mentioned in the information to have been enacted in the 11th and 12th years of the reign of his present majesty, were not brought in, or moved upon, in the parliament of that kingdom, until the 24th of December 1771, and did not pass into a law, or receive the royal assent, until the 1st of January 1772, as the defendants believed; which matters and things the defendants averred, and pleaded in bar of the information.

The plea having been argued, the court, by their order of the 2d of May 1774, ordered it to stand for an answer, with liberty to except thereto, and the benefit of it was reserved to the hearing of the cause.

The suit having been abated by the death of the said John Lord, his majesty's then attorney general of Ireland, on the 18th of January 1776, filed his bill of revivor against the appellant Jeremiah Vickars, and John Mathew, merchant, executors of the said John Lord deceased; and the cause being afterwards revived, the attorney general, on the 28th of March following, pursuant to the liberty reserved by the order on arguing the plea, took exceptions thereto.

On the 4th of November 1776, the appellant Jeremiah Vickars, in his own right, and he, together with the said John Mathew, as executors of the said John Lord deceased, put in their answers; [495] and thereby insisted, that all legal requisites were performed, and all duties paid, for the said tobaccos; and particularly insisted, that they were not compellable to pay the additional duty of 3½d. for every pound weight of tobacco, though imported after the 25th of December 1771, the act of parliament by which it was imposed not being in force at the time of importing or discharging the said tobacco, and the said duty not being made by any law a personal charge on the importers, but being (if payable at all for goods imported before the passing the last-mentioned act) either a charge on the first buyer, or a lien on the goods themselves, and not payable by them. That the duties paid by the appellant and the said

John Lord amounted to the sum of £784 13s. 9d. including poundage; and the tobacco was not liable to any other duty, unless the additional duty of 3½d. per pound on account of the last act, which was afterwards passed, but not in force at the time of importing or discharging the said tobacco; which additional duty amounted to a sum of £1063 2s. 6d. and had not been paid. And they farther insisted, that as there was not any colour to charge the defendants with any fraud on his majesty's revenue, that therefore the remedy of his majesty's attorney general for the additional duty, if any, was in a court of law, and not in a court of equity.

The cause having been heard upon a bill and answer, on the 16th of June 1777, the court of exchequer in Ireland adjudged and decreed, that the appellants should pay to the respondent the sum of £1063 2s. 6d. being the amount of the additional duties in the pleadings mentioned, as admitted by the appellants in their answer, without interest or costs.

The appellants conceiving themselves aggrieved by the order of the 2d of May 1774, made on arguing the plea, and also by the subsequent decree of the 16th of June 1777, appealed from both. And on their behalf it was insisted (J. Dunning, L. Kenyon), That the duties for which this information was brought, were recoverable pursuant to the directions of the stat. 14th and 15th Charles II. which specifies a particular mode for enforcing their payment, viz. by the first buyer, unless the merchant importer to be a shopkeeper or retailer. If he be not so, he is to enter into bond with sufficient security, conditioned not to deliver the goods to the buyer till the duty paid; and in default of such bond, the commissioners or officers of excise are to detain the goods till the security given, or the excise paid. That the defendants were the merchants importers only, and neither the buyers, shopkeepers, or retailers. Their inability to give the requisite security was not surmized, much less their refusal, as it was never asked, nor was there at that time any person authorized to take it; and that their goods were not detained was not imputable to them, who removed them openly, and by consent of the proper officer, and after a full receipt and discharge previously granted for all his majesty's duties then due, which extended to the duties due under the last act as well as the former ones, if then due. That it appeared upon the face of the information that all the duties accrued before the date of this [496] receipt. The receipt therefore operated as a sufficient bar, and it was pleaded accordingly as upon an account stated and settled, unless there were grounds to impeach it, as obtained by fraud, neglect, or falsity, which were circumstances to have been disclosed by the information, had there been any foundation for them. That if the receipt was not a bar, yet by the delivery and discharge of the goods the remedy prescribed by the statute of detaining the goods was gone, and the king could not resort to any other remedy. If the duties were recoverable in any other mode, it must be because they were become a debt, and might be recovered as such by general remedies; but they were not the debt of the merchant importer, being payable, under the statute, by the buyer, and can only become the importer's duty, on some default in him, which was not suggested. The provisions relative to the security to be given by the importer were cautionary only, to prevent the sale till security given for payment of the duties by the purchaser. The importers never made them their debt, for they gave no bond, as none was required of them; and had any been required of them, the goods would have been detained in the king's warehouses on refusal if any had been due; but none being then due, the officer, had he detained them, would have subjected himself to an action. And yet, for want of this detention, the buyers had got the goods discharged of the additional duty, and the importers were left without remedy, and there was no charge in the information that the defendants, the importers, ever sold any of the goods. That the defendants could have no previous notice of the act laying the additional duty: the tobacco was not only shipped in a foreign port long before the heads of the bill were framed, but was actually imported and entered on the 28th of December and finally cleared, discharged, and delivered up, after payment of all the duties payable to his majesty by every law then in being, openly and without fraud, by the consent and act of the proper officer on the 31st, before the bill had received the royal assent. There being no other law then subsisting there could be no breach. In the case of Panter (*vide ante* Ca. 1. of this title), he was obliged to pay the duty upon exportation; but, in the present case, the duty was expressly made not payable by the importer. In that case the goods never were in the hands of the

revenue officers, as the tobaccos in question were; nor were they discharged in the same manner by warrant certifying that the full duty was paid; and that case was on the law respecting the customs; and the present information was on the same laws, which pointed out a particular mode for recovering the duties, and from whom.

On the other side it was argued (A. Wedderburn, J. Wallace), That the additional duty, for which this information was brought, had been paid, by virtue of several acts of parliament in Ireland, from the year 1705, without any discontinuance; consequently, this duty could not be considered as a novelty in the mode of taxation in that kingdom. That the resolutions of the committee of ways and means, upon which the heads of a bill, imposing this additional duty, were founded, were [497] agreed to by the house of commons on the 29th of November 1771. Heads of a bill, framed upon these resolutions, were ordered to be laid before the lord lieutenant, to be transmitted into Great Britain, in due form; on the 4th of December, the bill was returned from Great Britain, and rejected; on the 21st of December, heads of a bill for the same purpose, but under a different title, were introduced into the house of commons, and sent to the lord lieutenant, to be transmitted into Great Britain, on the same day; the importation in question was on the 28th of December; the second bill received the royal assent on the 1st of January 1772. And that these several proceedings having been circulated in the printed votes of the house of commons, the intention of the legislature to continue this ancient additional duty must therefore have been publicly known; consequently, the imposition was made with full notice, and critically at that juncture, to evade, in fraud of the revenue, the payment of the additional duty. That it is an established rule, that every act of parliament, wherein no particular time for its commencement is expressed, shall, by legal relation, commence and operate from the first day of the session of parliament wherein it was made: and that this rule stands confirmed by several judicial decisions. That if acts of parliament were to commence from the time of the royal assent given, that time would be notified and expressed in the act; but all acts passed in one session bear one date; viz. at the parliament begun or holden at the day of

But it is objected, that this additional duty was not to be paid by the merchant importer, except such merchant be a consumptioner, which was not charged in the information; the retailer, therefore, was to pay the duty, and the merchant was only to give security not to part with the tobacco until the duty be paid; but the merchant, in case he is not able to give security, or refuses so to do, becomes liable to the payment of the duty only upon either of these two events, and then the goods are to lie in the stores until the duties shall be paid. But to this it was answered, that the appellants must be considered as his majesty's debtors for the additional duties in the information. It is expressly enacted, that if the merchant importer will not give a bond for the duty, he must pay the full duty down before the goods shall be taken away. By the case of the attorney general against Staniforth, reported in Bunbury, 97, the crown recovered £500 at the distance of seven years, where there was no suggestion of fraud, it being a mistake in the tot by a revenue officer; the decree in that case was founded upon a principle that cannot be disputed, which is, that every importer becomes a debtor to his majesty. It is further objected, that the remedy in this case (if any) is at law. But the respondent relied upon the last cited case in Bunbury, as a full answer to this objection. The crown has an undoubted right to come into a court of equity against its debtors in matters of account; which constitute one of the grounds upon which the jurisdiction of a court of equity is founded; and the [498] court of exchequer, from the nature and constitution of it, is to enforce the due execution of the revenue laws.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and that the order and decree therein complained of, should be affirmed. (MS. Jour. *sub anno* 1779, p. 227.)

CASE 3.—JAMES OGILVIE,—*Appellant*; THOMAS WINGATE,—*Respondent*  
[13th June 1792].

[See the Hypothec Abolition (Scotland) Act, 1880 (43 Vict. c. 12), and  
1 Scots R.R. 681.]

The right of hypothec given to the landlord, by the law of Scotland, over the crop and stocking of his tenant, may be defeated by the prerogative process of the Crown; in virtue of the stat. 33 H. 8. c. 39. (sec. 26.) as extended to Scotland by the articles of union, and the stat. 6 Anne, c. 26. for establishing the court of exchequer in Scotland.

INTERLOCUTORS of the Scotch Courts reversed.

[In the case of *John Smart*, (appellant), v. *honourable Walter Ogilvy*, (respondent), heard before the house of Lords on the 26th of October 1796, it was determined that in virtue of this right of hypothec enjoyed by the landlord, corn might be reclaimed at an interval of two years, by the owner of the land which produced it; the tenant having owed him an arrear of rent for the year in which the corn grew: although there was a colourable sale in publick market; and although it was offered to be proved, that, exclusive of the corn so sold, there remained sufficient fruits on the ground for payment of the landlord's rent.—The interlocutors of the Scotch court were affirmed with costs.]

By the law of Scotland the landlord has in security of his rent, not barely the tenant's personal obligation expressed in the lease, but a *right*, [a *real right*, it was termed in the Respondent's case], in the fruits of the ground, and in the cattle brought upon it by the tenant; and this right, under the name of hypothec, has always been considered as one of the most ancient rights known in that country.

In virtue of this right, the respondent, as landlord, applied to the sheriff of Fife, within which county the lands possessed by James Burgess, distiller at Minshalloch, his tenant, lay, for a warrant to sequestrate and sell the growing corn upon his farm, hypothecated to him for payment of the current rent for crop 1781. The corn having accordingly been sold, the respondent insisted, that out of the price thereof he was *first* entitled to be paid the then current rent for crop 1781, with the expences of the application to the sheriff; while the *appellant*, who was collector of excise for the county of Fife, on the other hand, contended that he, on the part of the crown, having obtained decret against the said Burgess, [499] the tenant, for payment of considerable arrears for malt and distilling duties, and having arrested his corn and other effects in his majesty's name before the time of the sale, must be preferred to the respondent the landlord.

The sheriff of Fife having given judgement in favour of the respondent, the cause was removed to the court of session by advocacy; and, as the question was of general importance, both parties joined issue, in order to obtain a full and ultimate decision of the abstract point of law, concerning the preference of the crown in a competition with the landlord's right of hypothec.

By the municipal law of Scotland, the debts of the crown had no preference whatever over those of an individual; the appellant, however, founded his right upon the articles of union, and the statute 6th of queen Anne, (c. 26.) as introducing the revenue law of England to be a part of the law of Scotland, and establishing the preference of the crown to be the same in Scotland as in England, according to the act 33 Henry VIII. c. 39. The appellant, therefore, maintained, that, as the prerogative of the crown had been found preferable to the landlord's right of distress in England, so it must also be preferable to the landlord's hypothec in Scotland.

To this the respondent, in his pleadings before the court of session, answered, That he admitted the act of Henry VIII. was made part of the law of Scotland by the above mentioned British statute 6th of queen Anne; but that he could not allow that the law of Scotland, with regard to the preference of the crown, was in any measure affected by the treaty of union.

For when the two kingdoms of England and Scotland were united, the laws of each were so distinct and different, that no human ingenuity could have interwoven or blended them together. Although the publick government of both, therefore, was united, the municipal laws, usages, and religion, were expressly reserved as separate and distinct from each other as they ever formerly had been. Any law, therefore, applicable to both, although entitled to the same force in both kingdoms, must (he contended) be applied according to the respective municipal institutions of each; and so far as any part of the law of the one has been imposed upon the other, it must operate agreeably to the constitution of the kingdom where it is to have effect, and must take the different objects of law as there established and defined, without changing their nature, and thus totally subverting the other system.

In this view it became proper to consider the different clauses in the treaty of union founded on by the appellant. The first of these, being the 6th article of that treaty, imports, "That all parts of the united kingdoms, for ever from and after the union, shall have the same allowances, encouragements, and drawbacks, and be under the same prohibitions, restrictions, and regulations of trade, and liable to the same customs and duties on import and export; and that the allowances, encouragements, and drawbacks, prohibitions, restrictions, and regulations of trade, and the customs and duties on import and export, settled in Eng-[500]-land when the union commences, shall, from and after that union, take place throughout the whole united kingdoms."

In the fair construction of this clause the Respondent admitted, that all the different customs and excises imposed at that time upon different goods in England, immediately affected those in Scotland; and likewise all the allowances, encouragements, and drawbacks, and different regulations of trade, which took place in England, were immediately extended to Scotland. This clause, however, (he insisted) went no farther. He would not allow that it could be extended so far as to alter the established law of Scotland with regard to the different preferences which the crown enjoyed in England, not only in revenue matters, but in every other claim against the subject. That preference (he asserted) does not flow from the nature of the duties or customs, or the regulations of trade thus extended to Scotland; for all these regulations, whether favourable or prohibitory, might have had their full operation, without also introducing the other distinct prerogative privileges which did not arise from the nature of these regulations and customs, and were altogether inconsistent with the common law of Scotland, expressly reserved by the articles of union. He therefore concluded, that there was not even room for a presumption, that the preference of the crown debts was by this clause introduced to Scotland; supposing that an innovation of such consequence could be introduced by implication; and that in fact, such an alteration is most anxiously guarded against by the 18th article of that treaty: "That the laws concerning the regulations of trade, customs, and such excises to which Scotland is, by virtue of this treaty, to be liable, be the same in Scotland, from and after the union, as in England; and that all other laws in use within the kingdom of Scotland do, after the union, and notwithstanding thereof, remain in the same force as before, (except such as are contrary to, or inconsistent with, this treaty), but alterable by the parliament of Great Britain."

Another clause in the Articles of Union, which bears relation to this subject, is the 19th, as follows: "That there be a court of exchequer in Scotland after the union, for deciding questions concerning the revenues of customs and excise there, having the same power and authority in such cases as the court of exchequer has in England."

Accordingly an act was passed in the 6th of Anne, [c. 26], intituled, "An act for settling and establishing a court of exchequer in that part of Great Britain called Scotland;" by which it was provided, "That the said barons of the court of exchequer in Scotland, or any one or more of them, either in court or out of court, shall have full power and authority to take all manner of recognizances and securities for debts; and that all obligations, recognizances, specialities, and other securities for any of the revenues, rents, debts, duties, accounts, profits, and other things accruing, or which shall or may become due or accrue to the queen's majesty, her heirs or successors, within Scotland, or [501] which shall in any ways concern or

relate thereto, or any of the officers, ministers, or accountants thereof, or for the same; or which shall be taken in, or by order of the said court of exchequer in Scotland, or upon any other account for the use or benefit of the crown, or for securing any of the revenues, debts, or duties of the crown, shall be taken in the name of the queen's majesty, her heirs and successors, and to be paid to the queen's majesty, her heirs and successors, with other proper words, and with and under such conditions as shall be suitable to the matter for which they shall be taken, and shall have the full force and effect of any obligations, recognizances, and specialities, which have been, or may be taken or acknowledged in the court of exchequer in England, according to the purport, true intent and meaning of the statute in that behalf made in England in the three-and-thirtieth year of the reign of king Henry VIII. or any other law or statute, or any practice, custom, or usage in the court of exchequer in England, or by virtue of the royal prerogative; and that all suits and prosecutions upon any the said obligations, recognizances, and specialities, or for any revenues, debts, or duties, any ways due or payable to the queen's majesty, her heirs and successors within Scotland, shall be in the said court of exchequer in Scotland; and her majesty, her heirs and successors, shall be preferred, and have preference in all suits and proceedings in the said court of exchequer in Scotland, according to the statute of the three-and-thirtieth year of king Henry VIII. and according to the usage, course, and practice of the court of exchequer in England; and shall have and enjoy such and the same prerogatives, as well in and about the pleadings, and in all other matters and things, as by any the laws in England, or courts of exchequer in England have been, are, or ought to be allowed; and as well the bodies as the lands and tenements, debts, credits, and specialities, goods, chattels, and personal estate, of all debtors or accountants to the crown, or other debtors in Scotland, shall be made subject and liable by extent, inquisition, and seizures, or by any other process, ways, or means, to the payment of such debts, duties, and revenues to the crown, and in such and the same manner and form, to all intents and purposes, as hath been, or is used in the court of exchequer in England in like cases:

" Provided nevertheless, That no debt or duty from any the debtors or accountants to the crown of Scotland, shall affect or subject any real estate in Scotland of any such debtors or accountants to the payment or satisfaction of any such debt or duty further or otherwise, or in any other manner or form than such real estate may or ought to be subject and liable by the laws of Scotland; and that the laws of Scotland shall in all such cases, and for all such purposes, hold place and be observed, any thing in this act contained to the contrary notwithstanding: And for all the purposes in this act mentioned, the said court of exchequer in Scotland, and the barons and other officers thereof and therein, [502] shall have, exercise, and put in execution within Scotland, all and every the authorities, powers, and jurisdictions, as to all matters and things whatever arising or happening, or which have or shall arise and happen within Scotland touching or concerning any the aforesaid revenues or duties of customs and excise, and other revenues, debts or duties, obligations, securities, judgements, or specialities, or the recovery of the same, or of any other the premises which the court of exchequer in England, or the barons or officers thereof, by virtue of the said statute made in England in the said three-and-thirtieth year of the reign of king Henry VIII. or of any other statute made and in force in England, or by the constitution, course, or practice used in the court of Exchequer in England have, or ought to have performed or put in execution in England, as fully and amply, to all intents and purposes, as if the same powers, authorities, and jurisdictions were in this act particularly expressed and thereby enacted; yet so nevertheless, that nothing be done to make the real estate in Scotland of any debtor or accountant to the crown there, subject or liable to the payment of any debts or duties to the crown, farther or otherwise than they may or ought to be by the laws of Scotland, according to the purport of the proviso last herein-before mentioned; and the barons of the said court of exchequer shall and may act and do in respect to any the parties in law or equity, to any action, information, suit or prosecution in the said court of exchequer in Scotland in such cases, sort, and manner, as by any the statutes or laws of England, or the use and practice of the court of exchequer there touching the award or costs, and issuing process and execution for the same, hath or used to be done."

By the 33d of Henry VIII. [c. 39. sec. 26.] here referred to, it is enacted, "That if any suit be commenced or taken, or any process be hereafter awarded for the king for the recovery of any the king's debts, that then the same suit and process shall be preferred before the suit of any person or persons; and that our said sovereign lord, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debts before any other person or persons, so always that the king's said suit be taken and commenced on process awarded for the said debt at the suit of our said sovereign lord the king, his heirs or successors, before judgement given for the said other person or persons."

It was contended by the Respondent, That the preference given to the Crown by this statute, 6 Anne, c. 26. was nothing more than a preference *inter chirographarios*, or mere personal claimants; and that in titles or suits similar and concurrent between the king and subjects, the subject must yield to the crown *tantum digniori*. And that as there is nothing at all said about landlords in this statute, if the landlord in England be merely a creditor *chirographarius*, so that his right solely depends upon the execution which he uses to enforce a personal claim, while the Scots landlord, on the other [503] hand, stands as creditor *hypothecarius*, or *proprietor* to a certain extent, holding a special interest or *real right* in his tenants subjects, then, although the king be preferable to the landlord in England, yet it would not in any measure follow, that he will, upon the same statute, be preferable to the Scots landlord, whose right appeared perfectly different from the landlord in England.

Not only because the landlords in Scotland hold a better and stronger security for their rents than the landlords in England, did the respondent maintain that the crown, as creditor of the tenant, could not defeat their right, but also because, from the very nature and essence of their right, they hold a *special and complete property* in the subject until their rent was paid: and in this view, the respondent insisted that the appellant could have no claim upon the corn sold by the respondent, in so far as he had sold no more than was his own, and sufficient to extinguish the rent due to him.

*The Respondent then continued to enforce his claim before the Court of Session, by the following arguments, which were stated, in his printed case, before the house of Lords.*

"This right of *property* in the landlord over the crop and stock upon his grounds until his rent be paid, has always existed in the law of Scotland. For as it is impossible any person by conveyance, or by his *jus crediti*, can acquire any right that was not vested in the person of him from whom he derives that right, it follows, that if there be evidence of the manner or extent in which the creditor or disponent can exercise his right, it will also precisely ascertain the measure and nature of the right in the creditor. By the ancient law of Scotland, the landlord was in use of conveying in security of debt, real or personal, the whole goods and chattels upon his estate, whether possessed by tenants or not. And every creditor of the landlord, whether real or personal, had full execution against the whole stock and crop upon his ground, whether possessed by himself or by a tenant, to the full amount of their debt. It even mattered not, whether the tenant had paid his rent to the landlord; for so much did the whole fruits of the ground as *pars soli* belong to the landlord, that his creditors did not think themselves bound to observe the personal claims which the tenant, or any other persons, might have to these effects. They were so much considered as the landlord's sole property, that any claim which the tenant could have against any part of them, could not even compete with the diligence of a personal creditor of the landlord. The hardship to which this principle of law subjected the tenants, the inexpediency of allowing the whole fruits of their industry to be swept off by any creditor of the landlord, notwithstanding their having paid their rent, called loudly for the interposition of the legislature. Accordingly, by the act of parliament 1469, c. 36. (5th James III. c. 36.), it was provided, "That the poor tenants shall pay no farther than their terms mail for their lords debt by the brief of distress." Thus it required the express enactment of the legislature to preserve the whole effects of the tenants from being carried off by the brief of distress, (which at that time seems to have [504] been the general term used throughout both kingdoms for legal execution or diligence), to the amount of the whole



personal debts of the landlord; and this statute being a correction of the common law, received so strict an interpretation, that it was never extended farther than to save the effects of the tenants from distress *for the personal debt of the landlord*; for, in decreets of poiding the ground, the creditor, as observed by sir George M'Kenzie, 'might have poided all he found upon the ground, and all *invecta et illata*, though the tenant owed not so much to the master, yea, though he owed him nothing, as was found, 11th July 1628; and though the tenant's term of payment were not come, if the term of payment of the annual rent were by-past, and they who were so poided had their relief off the heritor, for whose debt they were poided.'

"But since that period, the extension of commerce has, no doubt, introduced a more liberal interpretation of that statute, by securing the tenants, after the payment of their rents, from the real as well as the personal debts of the landlord.

"So entirely, indeed, was the possession of the tenant considered as the possession of the landlord, that purchasers were entitled instantly to remove the tenants or possessors of the ground, until another statute, 1449, c. 18. (6 James II. c. 18.) enacted, 'That all tenants having leases for a term of years, should hold their farms until the expiry of that term, for payment of the rents contained in their leases, into whose hands soever the lands should fall.'

"Moreover, no creditor of the tenant could, upon any pretence, distress these goods, however much they were subjected to every diligence on the part of the landlord's creditors. If the whole effects could be carried off, even by the personal creditor of the landlord, until the enactment of the statute 1469, it is demonstratively clear, that they could not be affected by the tenant's creditor; as he had no property himself in these effects, he could not have conveyed it to others. So much, indeed, was this the case, that several old statutes declare it to be *infang theft* for any person to distress or poid these goods without the landlord's consent. 'Item rex David Statuit quod nullus in terra alicujus capiat namium nisi prius habeat *licentiam domini illius terræ, vel ejus balivi*.'

"It is impossible to account for any of the above circumstances in any other view, than that of the landlord being held as the complete proprietor of the produce of his ground, whether possessed by a tenant, or in his own natural possession. Indeed every characteristic of property was at that time united in his right.

"Tenants, however, being thus secured by the two statutes already mentioned, from being turned out of their possessions by singular successors, until the expiration of their leases, and from being liable to be distressed for more than *their terms mail*, or rent, and money-rent having been likewise generally substituted over the kingdom for rent in kind, their possessions began to assume somewhat of a new appearance: but the principle of the law remained [505] the same. It still was understood to be the condition upon which the tenant held his farm, that the produce of every year's crop thereof was the landlord's, but might become his own, upon payment of the rent, by which the landlord's right was defeasible: in short, that he had only the property of the fruits and stock upon the ground, *minus* the landlord's rent. The landlord therefore continued to enjoy all the benefit of a real proprietor to that extent. Indeed the tenant's possession, by the best writers on the law of Scotland, is even limited to that part of the crop which remains after the payment of the landlord's rent. Lord Stair, speaking of the civil possession of tenants, describes them as persons who 'hold and possess for themselves, *in so far as concerns the excess of the profits above the rents, as to which they possess in name of their masters*': and therefore this possession is partly natural to the master of the ground, and partly civil by their tenants.' And in another paragraph in the same title, his lordship concludes: 'And they who possess partly for themselves, and partly for others, as tenants, have possession only in part.'

"As, however, the landlord's real right to the crop and stocking of his tenant, to the amount of his rent, has for a considerable time very much resembled the tacit hypothec which had first been introduced in the *Roman* law, in favour of the landlord, over the fruits of the praedial subject of his tenant, for the payment of his rent, it is generally distinguished by lawyers under the same name. From the earliest period, also, the stocking upon the ground, from analogy, as having been presumed to be secured thereon, had always been considered in the same view as the fruits, although from their own nature perfectly different.

"Lord Kaimes, to whom the law of Scotland is, above all others, indebted for many most accurate disquisitions into its origin, nature, and principles, gives the following clear and distinct view of this subject: 'Lands originally were occupied by bondsmen, who themselves were the property of the landlord, and consequently were not capable to hold any property of their own; but such persons, who had no interest to be industrious, and who were under no compulsion when not under the eye of their master, were generally lazy, and always careless. This made it eligible to have a freeman to manage the farm, who probably at first got some acres set apart to him for his maintenance and wages: but this not being a sufficient spur to industry, it was found a salutary measure, to assume this man as a partner, by communicating to him a proportion of the product, in place of wages; by which he came to manage for his own interest, as well as that of his master. The next step had a better effect, entitling the master to a yearly quantity certain, and the overplus to remain with the servant. By this conduct, the benefit of the servant's industry accrued wholly to himself, and his indolence or ignorance hurt himself alone. One farther step was necessary to bring this contract to its due perfection, which is, to give the servant a lease for years, without which he is not sure that his industry will turn [506] to his own profit. By a contract in these terms, he acquired the name of *tenant*, because he is entitled to hold the possession for years certain. According to this deduction, which is supported by the nature of the thing, the tenant had a claim for that part only of the product to which he was entitled by the contract. He had no real lien to found upon in opposition to his landlord's property. The whole fruits, as *pars soli*, belonged to the landlord, while growing upon the ground; and the act of separating them from the ground could not transfer the property from him to his tenant; neither could the payment of the rents transfer the property of the remaining fruits without actual delivery. It is true, the tenant, empowered by the contract, could lawfully apply the remainder to his own use, but still while upon the ground it was the landlord's property; and for that reason, as we shall see afterwards, it lay open to be attached for payment of the landlord's debts.'

"The same author too, in another work, gives the result of this deduction as follows: 'The tenant, it is true, has by paction, right to what remains of the crop, after making good the landlord's rent; but till that be done, he has no right to a single sheaf. This *rei vindicatio*, founded evidently on the landlord being proprietor of the corn, is erroneously considered as a hypothec upon the effects of his tenant.'

"All other lawyers agree, that the landlord's right, or hypothec, affords a *real right* over the effects of the tenant; and Mr. Erskine, who on this subject has only adopted the opinion of others, states, that 'all fruits, while growing, belong truly to the proprietor of the ground, in consequence of his right of property.' Much, therefore, as the landlord's right to the fruits of the ground has been modified and restrained, both by statute and expediency, the nature of it still remains the same, vesting in him a *real right* to the fruits and effects of his tenant, until his year's rent be paid.

"From the deduction already given, and from the property vested in the landlord to the fruits raised upon his ground, as *partes soli*, being defeasible by payment of the rent, it is evident that it must affect, at any distance of time, the crop of each year, until that particular year's rent be paid. For as the tenant, by convention, was to have right to the remaining fruits, after the payment of his rent, the landlord had only a special property in the particular fruits of every year, for the payment of that year's rent; which, therefore, must continue until the condition upon which they became the property of the tenant was purified. Thus the corn of each year's crop, of which it is the growth, standing for ever impignorated or hypothecated for that year's rent, distinctly manifests the foundation upon which the hypothec was introduced, by still connecting the crop with the ground; the necessary consequence of which is, that the landlord's real right to that extent is continued, and he can at this moment vindicate or recover from those who have intromitted with any part of the crop, for payment of that year's rent of which it was the produce, at any time within [507] the years of prescription; whereas had it been but a preference competent to the landlord, *tanquam chirographarius*, it

would naturally have extended to all corn, of whatever year it was the growth, for the whole arrears due to the landlord.

"The effects of this right, then, necessarily flowing from the deduction above given, are,

"1st, That the landlord can still, as originally, retain the tenant's crop upon the ground, against all persons who shall endeavour to carry it off, whether as creditors of the tenant, or as purchasers from him, until the year's rent, of which that crop was the growth, be paid.

"2d, The landlord has also a *rei vindicatio*, or right of recovery, as proprietor, from any creditor or purchaser from the tenant, or any other person who may have carried these effects off the ground, under the single exception which has been lately adopted, that if the goods were sold in the publick market, he loses his right of recovery, which has been introduced not only from expediency, but from a presumed consent on the part of the landlord, in allowing the tenant to carry effects, which properly belong to him, to be sold in the publick market. If the landlord uses this right of recovery *de recenti*, he may bring back the corn *via facti*, without the authority of a judge, unless where the tenant's creditor has carried them off by legal diligence, upon the decree of a court, when so strong is the presumption of *solennter et ite actum*, that it becomes necessary to apply for judicial interposition for their recovery.

"3d, Nor is this right of recovery limited to any period, for the landlord may reclaim, or recover the value of the crop from the intromitters therewith, at any time within the years of prescription. It is indeed true, that the hypothec over the cattle or stock upon the ground, has for the last sixty years, from motives of expediency, been limited to three months after the term of payment of the rent: but as this right proceeds altogether upon a different foundation, and had been chiefly introduced from analogy to the stronger right over the fruits, it cannot be considered as any exception from the general rule, especially as during that short period the hypothec over the cattle affords a *real lien*, founded upon a right of property, and not a mere personal right of preference to the landlord above the other creditors.

"4th, The right of hypothec is not in the smallest degree dependent upon the application to the judge for sequestration. The special property, *lien*, or hypothec, is as fully and amply vested in the landlord before as after the sequestration, which has been introduced merely for the purpose of settling accounts between the parties. It is not, therefore, from the goods being in *custodia legis*, that the landlord's right, in Scotland, arises. It is the same, and as strong, before he has applied for the interposition of a judge; and there can be no doubt, that the landlord might even, *brevis manu*, carry off and appropriate to his own use the corn-rent payable by [508] his tenant, without his being held as a vicious intromitter. The reason for the goods being sold by warrant of a judge, and of the price thereof coming into the hands of the court, is obvious, and impinges not in the smallest degree upon the landlord's property, or lien, not depending upon the operations of the court. For there is no instance, so far as the respondent knows, in the law of Scotland, where a separate interest, property, pledge, or reversionary right, in any subject, takes place, that it can be sold without the interposition of a judge. This proceeds solely from a most equitable consideration in the law of Scotland, that the interest of all parties should be regarded, and that the reversionary right may be as well attended to, as that of the person who holds the special immediate interest or lien upon the subject.

"So standing the landlord's right to the crop and stock of his tenant in Scotland, until his rent be paid, the respondent maintained, that there were not *termini habilis* for the application of the statute of Henry VIII. or the king's preference, to this case. For the crop is really the landlord's, and not the tenant's, until the condition be purified by which it may become the tenant's. The tenant's property, therefore, must be consequent upon his fulfilling the condition and purpose of his possession; that is, the payment of his rent to the landlord.

"But the landlord's remedy by distress in England, or, as it is defined, 'the taking of a personal chattel out of the possession of the wrong-doer, into the custody of the person injured, to procure a satisfaction for the wrong committed,'

is most essentially different, both in nature and substance, from the right of hypothec. For, as mentioned by lord chief baron Parker, in the case of *Cotton*. (Parker, 112, 2 Vez. 288), 'The distrainer neither gains a general nor a special property, nor even the possession, in the cattle or things distrained. He cannot maintain trover or trespass, for they are in the custody of the law by the act of the distrainer, and not by the act of the party distrained upon.' Whereas the hypothec in Scotland, according to the unanimous opinion of lawyers, invests the landlord with every one of the above requisites, which were wanting to render the distrainer preferable to the crown. Judging of this case, therefore, upon the same principles applied to that of *Cotton*, the respondent must clearly be preferred to the crown: for in that case it was admitted, that where any person previously had a special property or lien in any subject, he must be preferred to the king. The Scotch landlord, having a *real right* in the effects of his tenant, and being entitled to exercise every act of property in a much higher degree than is allowed to the holder of a pawn or a pledge, or in any of those cases preferred in England to the crown, must, upon every principle of justice and sound analogy, also be preferable. Whereas the English landlord, having no real right to the effects of his tenants, having only merely a personal claim against them, which might even be defeated by the prior execution of a creditor, there could be no pretence for alleging that the statute of Henry VIII. [509] did not affect his right; and as it originally affected his right, it must have continued ever afterwards to do so, unless the contrary was expressly provided by an act of parliament.

"In another view of this case, the respondent maintained, that even considering the hypothec in its weakest light, it must be preferred to the crown; for, by the law of Scotland, a tacit pledge confers the same *real* right that a pledge by positive stipulation can do. All lawyers are agreed, that the landlord's hypothec confers a *real* right of pledge or lien, and is an effectual impignoration of the crop and stock upon the ground for the year's rent thereof; that it confers a *jus in re*, and is equally effectual, as if the goods themselves were pledged to the landlord. Thus a pledge is as completely constituted in the law of Scotland by the hypothec betwixt the landlord and the tenant, as if it had been constituted by actual impignoration. Indeed, even by the Roman law, the chief source of the law of Scotland, especially in judging of the effects of pledge and hypothec, it is said, *inter pignus et hypothecam tantum nominis sonus differt*. There is not a lawyer who pretends to doubt, that the effect of the hypothec is not as strong as if the goods had actually been pledged. As therefore this right in the law of Scotland is universally acknowledged to be as strong, or even stronger, than those rights which defeat the crown's preference in England; so, in fair reasoning from analogy, and from the decision of the house of lords in the case of *Gordon of Park*, founded on by the appellant, it must also be preferred to the crown in Scotland.

"Other tacit hypothecs are mentioned by the writers on the law of Scotland, such as that of a manufacturer over the goods in his possession, for the price of his labour; a carrier or shipmaster, for the freight and carriage of goods, and a variety of others; but in the front of all in this view, must be considered the landlord's hypothec. It would then be not a little singular, if, in all the above cases, the hypothec must be preferred to the crown, except that one which has always been considered as paramount and superior to every other. The appellant, indeed, maintained, that tacit hypothecs were unknown in England, notwithstanding the hypothec upon a ship for repairs in a foreign port, which, it is admitted, excluded the crown's preference. But even supposing that this were the case, would it deprive that right universally known and admitted in Scotland, of its usual and legal effects? Because a pledge is constituted differently in Scotland to what it is in England, is not a pledge to have the same effect in the one kingdom as in the other?

"This question was also considered by the respondent in another view. By the act 6th of queen Anne already recited, it is expressly provided, That none of the crown debts or duties shall affect or subject any real estate in Scotland in any other manner or form than it may be subject to by the law of Scotland, which shall in such cases, and for all such purposes, hold place and be observed.

"Any creditor whose infetment has been duly recorded, has always been con-

sidered as holding a *real estate* in Scotland, in every [510] sense of the word. If, when a creditor has thus however acquired a real estate by being infest in lands in security for a sum of money and the interest thereof, the crown be entitled to carry off the stock and crop of the tenants, upon which, by the law of Scotland, he was entitled to depend for payment, his real estate is thereby, notwithstanding the exception in the act of parliament, most materially affected. He has no power to sell the lands, and could therefore only depend upon the fruits and produce thereof for his payment. This occurs in every heritable right, but is more particularly evinced in the case of an infestment of annual rent, in which manner the most of the heritable securities, or real estates in Scotland, were at one time constituted. Is it possible to deny, then, that the real estate is most materially injured, and affected, contrary to the exception of the statute, if the preference of the crown could carry away those effects, upon which that real estate solely depended, and which, in that view, may properly be considered as part of that estate? As the exception in the statute was introduced for the purpose of preserving the real right, and heritable securities of creditors, on the same footing on which they formerly stood in the law of Scotland, it must certainly be explained consistently with that purpose; and unless the above fair and just construction, contended for by the respondent, be adopted, that exception, so far from having the effect which it was meant to have, could have no effect at all."

To the argument of the appellant, "That unless the crown be preferable in every case in Scotland where it is in England, the equality between the two kingdoms, the chief object of extending the revenue laws, would be defeated;" The respondent answered, "That the genius of the two laws differing essentially in many respects, will not admit of the application of the statute of Henry VIII. exactly in the same manner in both countries. There are many advantages enjoyed in England in consequence of this law, in which the subjects of Scotland, from the nature of their system of jurisprudence, cannot participate. By the common law of Scotland, also, the king's debtors must be entitled to several privileges which they cannot enjoy in England; and a very late instance places this in a striking point of view. In the case of Smith, the farmer general of the post-horse tax, the court of session were perfectly clear, that he was entitled to obtain a *cessio bonorum* against the crown, a remedy only competent by the law of Scotland, and totally unknown in the law of England, which, with regard to revenue matters and the crown debts, had been incorporated with the law of Scotland. In like manner the respondent presumes, that in many instances, from the peculiarities in the law of England, the crown debtors may have advantages not enjoyed by persons in similar situations in Scotland. The two laws must therefore be assimilated in a manner consistent with the existence of both, so that, notwithstanding any slight discrepancy in their operation upon the two countries, the one may not be subverted to give way to the other. In this view, therefore, as the English law has not declared the [511] crown's right to be preferable to the landlord's, and that preference does not operate against any person who has antecedently obtained a special property, a lien, pledge, or real right to the subject; the question is not, whether a landlord, *quo* landlord, is preferable? but, whether he be a *real* creditor holding a special property or lien on the subject? The Scots landlord, therefore, holding a special property in the subject, must be regulated in the same manner with those in England also holding a special property or real right to the subject. Besides, the exception of real rights in the act of queen Anne, of itself sufficiently overturns the whole argument upon the perfect equality being established between the two kingdoms; and upon the fair construction of that exception, the respondent's right might even be wholly rested.

On the part of the Appellant it was argued in the court of Session, "That by the union this statute of Henry VIII. and every other revenue law then in force in England, were incorporated into, and made part of, the law of Scotland. This necessarily operated as a virtual repeal of every one branch of the law of Scotland inconsistent with the revenue laws of England; and from the day that the union took place, not only the revenue laws of Scotland ceased to have any force or effect, but likewise every other law contrary to, or inconsistent with, the revenue laws of England, which, by the treaty of union, became part of the established law of Scotland.

"That by the articles of union, and by the 6th of Anne, the crown, in competition with other creditors, has precisely the same preference in Scotland that it has in England, with this single exception, that no debt or duty to the crown in Scotland shall affect or subject any real estate in Scotland, 'in any other manner or form than such real estate may or ought to be subject and liable by the laws of Scotland.' This exception must be allowed to be highly favourable to the subject in Scotland, but it cannot be extended beyond *real estates* properly so called.

"In England, it was settled in the case of *Cotton* (*R. v. Cotton*, Parker's Rep. 112: 2 Vez. 283.), that an extent for the crown's debts coming in after a distress for rent made, and before a sale under that distress, shall be preferred before the distress. In that case, the general question stated by lord chief baron Parker was, 'Whether goods are not liable to be seized on an immediate extent for the king's own debt, after a distress taken of the same goods by a landlord for rent justly due to him, and before an actual sale of the goods?'

"It being thus settled, that the crown is preferable to the landlord in England, the appellant maintained, that the crown ought to have the same preference in Scotland; and that, upon a fair comparison of the remedy afforded to landlords in Scotland in levying their rents, with the remedy afforded to landlords in England, it appeared, that the nature, the origin, and the substance of both, were the same; and that though there might be some difference, or shades of difference, between them, yet there was no such difference as could warrant the court, upon a sound construction of [512] the articles of the union, to put landlords in this country in a situation so very different from that of landlords in England.

"As to the origin of the right, it was well known that the hypothec in Scotland was derived from the civil law; and it is remarked by lord Stair, that it is the only one of the tacit or legal hypothecs of the Romans which we have retained. 'Our law,' says he, 'doth allow no hypothecation of moveables by consent of parties, without delivery and real possession, though it was competent by the Roman law, because thereby the current commerce of moveables would be hindered. Neither doth it allow of many hypothecations competent by the Roman law, but only of the hypothecation of the fruits and goods on the ground belonging to tenants or possessors for the rent; and the *invecta et illata* in houses, for the mails of the houses.'

"As the Scots hypothec was derived from the civil law, so was the English distress. 'The remedy for recovery of rent,' says Bacon, 'by way of distress, seems to have come from the civil law; for anciently in the feudal law, the not paying attendance on the lord courts, or not doing the feudal service, was a forfeiture of the estate. But these feudal forfeitures were afterwards turned into distresses, according to the *pignorary method* of the civil law; that is, the land that is let out to the tenant is hypothecated, or as a *pledge in his hands* to answer the rent agreed to be paid to the landlord, and the whole profits arising from the lands are liable to the lord's seizure for the payment and satisfaction of it.'

"The origin of the two rights being the same, so it was maintained, that substantially, and in effect, the one remedy is in its nature the same with the other, there being no essential difference between them. The *hypothec*, like the *distress*, is a mere security or pledge for the rent of lands, of houses, or of any other subject. In virtue of the hypothec upon the corns and other fruits of the ground, a landlord is entitled, *1mo*, To retain them upon the ground *currente termino*, and to prevent any creditor of the tenant from pouncing them in satisfaction of his debt, even though he should offer to leave a sufficient quantity of corns to answer a year's rent. *2do*, After the term of payment, a common creditor may pounce the corns of the tenant, provided he leave enough to answer the year's rent; because, after the term of payment, the landlord is entitled to make his rent effectual, like any other creditor, by legal diligence or process; whereas, before the term of payment, the landlord is not entitled to seize any part of the crop, or apply it in payment of his rent; the whole, till then, remaining in the custody and possession of the tenant. *3tio*, The landlord has not only a right of retention, but a right to recover the corns from a creditor or purchaser, to whom they may have been delivered or sold by the tenant, to the prejudice of his right of hypothec; and if he use this right of recovery *de recenti*, he may bring back the corns *via facti*, without the authority of a judge.

4to, The [513] hypothec upon the fruits is limited to the rent for one year; and, therefore, though the tenant should be two or three years rent in arrear, and should actually have in his possession a quantity of corns fully sufficient to answer that arrear, the landlord, in virtue of the hypothec, can only recover the rent of one year, and must make effectual the arrear of prior crops in the same manner as any other common creditor.

"Such are the chief effects of the hypothec on the fruits. The hypothec on the *cattle* or *stock* differs from the hypothec on the fruits chiefly in this, that it is not special, so as to affect every cow, or sheep, or lamb, but is general upon the whole flock or herd, which is subject to the administration of the tenant, who, upon the one hand, may enlarge the subject of the hypothec by purchasing a new parcel of cattle or sheep; and, on the other hand, has a discretionary power of diminishing it, by selling part of his stock. There is this farther difference, that the cattle not being the produce of any one year, are not considered as hypothecated for the crop of any particular year. They are therefore subject to the hypothec only for one year's rent at one and the same time, which is the rent of the current year, and when that is past, for the rent of the next year, and so successively one year after another. This right cannot be exercised before the term of payment of the year's rent; and if not exercised within three months after the term of payment, the hypothec ceases for the rent of that year.

"The landlord of a *praedium urbanum* has likewise a hypothec for the goods brought into it for a year's rent. But neither is this a special hypothec, as the tenant has it in his power to dispose of any part of the furniture, or other effects brought into the house, which he may find no occasion for; but with this limitation, that if the tenant is disposing of his furniture, or other effects, to the evident prejudice of the landlord's right of hypothec, an application may be made even *currente termino*, upon the part of the landlord, to the judge ordinary for a sequestration, which ties up the hands of the tenant from any further power of disposal.

"Such being the nature of the right, the landlord, to make it effectual, must apply to the sheriff by petition, setting forth the arrears of rent incurred by his tenant, and requesting that the tenant's effects of every kind may be laid under sequestration, and afterwards sold for payment of these arrears and expences. The sheriff of course sequesters the tenant's effects, and grants warrant to the clerk of court to make an inventory of his whole corns, stock, and every thing else upon the farm belonging to the tenant; to whom, it is also ordered by the sheriff, that a copy of the petition shall be given, with notification to lodge answers thereto, if he thinks proper so to do, within a certain short space.

"In case no answers are given in by the tenant objecting to the proceedings on the sequestration, another application is made to the sheriff by the landlord, praying that warrant may be granted for selling by public auction the effects of the tenant sequestered and inventoried in manner above mentioned. Accordingly war-[514]-rant and authority is granted to the clerk of court for that purpose, and a sale is thereupon advertised and made by the clerk who takes bills, or other security, for whatever money is not instantly paid at the sale by the different purchasers. When the whole produce of the sale is recovered by the clerk of court, a third application is presented by the landlord, stating the proceedings which have taken place, and praying the judge to direct the clerk of court to make payment to him of such sums of money as will extinguish the arrears of rent falling under the hypothec, together with the expences incurred in carrying the process of sequestration into effect: and the desire of this petition being granted by the sheriff, the landlord in this manner comes to receive payment of the rents.

"Having thus explained the nature and effects of the right of hypothec, the appellant observed, that the right of distress, as defined by English lawyers, was 'the taking of a personal chattel of the debtor, or which is on the landlord's premises, out of his custody into that of the party injured, in order to procure satisfaction or payment of the rent in arrear.' Accordingly sir William Blackstone (3 Comm. 14.) observes, That at common law a distress is only in the nature of a pledge or security for the rent, to compel payment. 'This kind of distress,' adds he, 'though it puts the owner to inconvenience, and is therefore a punishment to him, yet if he continues obstinate, and will make no satisfaction or payment, is no remedy at all to the distrainer.'

"To remedy this defect an act was passed in the second of William and Mary. c. 5. the preamble of which is in these words: 'Whereas the most ordinary and ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as *pledges* for enforcing the payment of such rent, the persons distraining had little benefit thereby:' for remedying whereof it was enacted, 'That, from and after the 1st day of June, in the year of our Lord 1690, that where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law; that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place where such 'distress shall be taken, (who are hereby required to be aiding and assisting therein), cause the goods and chattels so distrained to be appraised by two sworn appraisers, (whom such sheriff, under-sheriff, or constable, are hereby empowered to swear, to appraise the same truly, according to the best of their understandings); and after such appraisement shall and may lawfully sell the goods and chattels so dis[515]-trained, for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and for the charges of such distress, appraisement, and sale, leaving the overplus, if any, in the hands of the said sheriff, under-sheriff, or constable, for the owner's use.'

"Mr. Justice Blackstone, after mentioning the substance of this statute, observes, that 'by this means a *full and entire satisfaction* may now be had for *rent in arrear*, by the *mere act of the party himself*, viz. by distress, the remedy given at common law, and sale consequent thereon, which is added by act of parliament.'

"By a subsequent statute, 8th of Anne, c. 14. it was enacted, that no creditor should take the goods of a tenant in execution, without paying 'to the landlord of the said premises, at the time of taking of such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent, and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgement, as he might have done before the making of this act; and the sheriff, or other officer, is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent, as the execution-money. (By section 8 of this act it is provided that it shall not extend to the prejudice of the crown in recovering debts, etc.)

"It was further enacted, 'That in case any lessee for life or lives, term of years, at will, or otherwise, of any messuages, lands, or tenements, upon the demise whereof any rents are or shall be reserved or made payable, shall, from and after the said 1st day of May, fraudulently or clandestinely convey or carry off or from such demised premises, his goods or chattels, with intent to prevent the landlord or lessor from distraining the same for arrears of such rent so reserved as aforesaid, it shall and may be lawful to and for such lessor or landlord, or any person or persons by him for that purpose lawfully empowered, within the space of five days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same shall be found, as a distress for the said arrears of such rent, and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord. in and upon such demised premises, for such arrears of rent, any law, custom, or usage to the contrary in anywise notwithstanding.'

"This last regulation is extended by the 11 Geo. II. c. 19. by which the landlord is entitled to distrain any goods of his tenant carried off the premises clandestinely, wherever he finds them, within thirty days after they are removed; and is authorized to break open any place, even a dwelling-house, upon reasonable ground to suspect that goods are concealed therein.

"Such being the nature and effects of the right of distress, the appellant maintained, that it resembled so nearly the right of *hy-[516]-pothec*, that the crown ought to have the same preference in the one case that it has in the other."



Such being the general import of the pleadings before the court of session, that court, of this date, pronounced the following interlocutor: "Upon report of lord Henderland, and having advised the informations for the parties, cases, and opinions thereon, now produced, and whole procedure, and having heard parties procurators in this cause, the lords find, *That the landlord's right of hypothec over the crop and stocking of his tenant, cannot be defeated by the prerogative process of the crown, in virtue of the statute of the 33d year of the reign of Henry VIII. as extended to Scotland by the articles of union, and the act of parliament the 6th of Queen Anne*: therefore advocate the cause, sustain the defences pled for Thomas Wingate, assoilzie him from the conclusions of the libel, and decern." And upon advising a petition on the part of the appellant, reclaiming against that judgement, and answers for the respondent, the court were pleased to adhere to the above interlocutor. Against these interlocutors the appellant conceiving himself and the revenue aggrieved by them, and that they were contrary to law, appealed to the house, and assigned (A. Macdonald, R. Dundas, J. Scott, W. Dundas) the following reasons for their reversal:

I. By the treaty of union, a perfect equality in matters of revenue was established between the subjects of that part of Great Britain called England, and the subjects of that part of Great Britain called Scotland. In every case then, where the crown is preferable to the subject in England, it ought to be preferable to the subject in Scotland; for otherwise that equality, which it was the object of the union to establish between the subjects of the two countries, would be defeated.

II. Upon a fair comparison of the right of distress enjoyed by the landlords in England, with the right of hypothec enjoyed by the landlords in Scotland, it does not appear that there is any such difference as should warrant a court of justice to give a preference to the subject in the one case which is denied in the other. The chief difference between the hypothec and the right of distress seems to be, that in virtue of the hypothec a landlord in Scotland is entitled to recover the effects of his tenant after they have been carried off the premises by creditors or purchasers; whereas, in England, it is only in virtue of statutes subsequent to the union that the landlord is entitled, in any case, to follow the effects of his tenant, after they have been carried off the premises. So far it must be admitted, that the hypothec affords a more complete remedy than the distress: but that difference is more than compensated by the superior advantages of the distress in other respects. In the first place, a landlord in England may, of his own authority, by "the mere act of the party himself," seize the whole goods and effects of every kind, in security not of *one year's* rent, but of the *whole* arrears due to him by the tenant. *2do*, If within five days the effects are not replevied with security for the *whole arrears*, the landlord may, by his own [517] authority, sell the effects, and apply the price in payment of these arrears.

III. Although the difference between the law of the two countries had been greater than in truth it is, the appellant is advised, that that would not have been sufficient to authorize the court of session to give the subjects of Scotland so marked and decided an advantage over the subjects in England. In the case of *forfeiture*, your lordships introduced a remainder into the law of Scotland, in order to put the subjects of the two countries as nearly as possible upon an equal footing. In the present case, that equality, which it was the object of the union to establish, may be obtained without going so far as your lordships did in the case of Gordon of Park.

IV. The right of hypothec being a mere pledge constituted by the act of the law, it seems evident, from the principles on which the judgement in the case of Cotton proceeded, that in England the crown would be preferable to it. Goods distrained by the landlord in England are, to the full, as much a pledge, as goods hypothecated in the possession of the tenant; and as the crown is preferable to the one, so must it to the other. Another ground of the judgement in the case of Cotton was, that goods distrained, though actually in possession of the landlord, are held to be in *custodia legis* till actually sold: but in Scotland, the goods of a tenant remain to the last in *custodia legis*. They are sequestered by the sheriff; they are sold by the clerk of court, the price is paid to him, and it is from him that the landlord receives his rent. Notwithstanding the sequestration, therefore, the effects still remain in *custodia legis*, and even after the sale the price itself remains in *manibus curiae*.

V. Certain debts, termed *privileged debts* in the law of Scotland, such as physicians' fees, servants' wages, etc. are all preferable to the hypothec of the land-

lord: but in a question with the crown, these privileged debts have no preference. To sustain the plea of the respondent, would therefore lead to this very strange consequence, that the crown would be preferable to privileged creditors, but not to the landlord, although privileged debts were preferable to him. This, by the way, proves to demonstration, that it is altogether a mistake to suppose that the landlord has any right of *property* in the effects of his tenant; for if he had, no creditor, in virtue of any privilege, could possibly be preferable to him.

On the part of the respondent the following arguments were urged (T. Erskine, H. Erskine, A. Wright, D. Cathcart) for affirming the interlocutor:

I. By the law of Scotland, the landlord has an absolute real right or special property in the crop upon his ground until the year's rent for which it was the crop be paid; which, as it could not be defeated by any act of the tenant even *bona fide* selling that crop upon the farm, nor by the diligence of his creditors attaching it, cannot be affected by the appellant, since the tenant, through whom he claims, had himself no right thereto until the respondent's rent was paid.

II. By the law of England a pledge, or even the hypothec on a ship for foreign repairs, defeats the crown's right of preference; [518] but the landlord's right is equal, if not paramount, to a pledge, or to any other right which by the law of England is preferable to the crown; and therefore the landlord's hypothec cannot be defeated by the right of preference secured to the crown by the act of Henry VIII and extended to Scotland by the act of queen Anne.

III. By the law of England, distress is only a remedy to the creditor of the tenant, and proceeds upon the footing of the effects being the tenant's property *ab initio*, whereas the hypothec can have no existence at all, except on the footing that the *property* of these effects belonged to the landlord, and not to the tenant. There is, therefore, no relation whatever betwixt the Scots hypothec and English distress. Accordingly, the hypothec is in the opinion of every writer upon the law of Scotland, possessed of all those requisites, the want of which was in the case of Cotton declared to be the reason why the distress at the suit of the landlord was not preferable to the crown.

IV. By the statute of queen Anne, it is most anxiously provided, that *real estates* shall not be affected by that statute; "but that the laws of Scotland shall, in all such cases, and for all such purposes, hold place and be observed:" but every real estate must depend upon the produce of the ground, and therefore should the prerogative process of the crown be found to affect the right of hypothec, the rights of every real creditor in Scotland, which were especially protected by the above exception, would be liable to be cut down wherever a preference was claimed for the crown, as the only security of real creditors arises from the produce of the ground; and thus the many and valuable advantages proceeding from the public records of that country, would wholly cease, since hidden and unknown preferences on the part of the crown, affecting even the debtors of the king's debtor, might render altogether useless and unavailing those real estates, which they might thus have obtained in security of their debts.

V. The present question brought forward by the appellant, is the very first attempt (and was considered as such by the court of session) ever made in Scotland to deprive the landlord of his hypothec, by the prerogative process of the crown. No maxim is more just, than *optima legum interpret est consuetudo*; and this established usage for so long a period, without the contrary being ever publicly called in question, would of itself be sufficient to remove any doubt upon the construction of the law, could any such doubts in reality exist.

In answer to the suggestion that "upon a fair comparison of the right of distress and hypothec, there was no such difference as to warrant any distinction between the two rights:" it was insisted on the part of the respondent, that while the real effects of the one flow spontaneously at common law, as necessary consequences of the nature of this right, amply possessed of every power which a special property can bestow; the other, depending solely for its existence upon the execution of distress, never conferred any thing resembling a real right upon its possessor, but, weak and inefficacious of itself, obtained from late statutes some important privileges, which indi-[519]-cate, by their very mode of existence, that they are exclusive of its original nature and character.

To the argument "that the right of hypothec being merely a pledge consti-

tuted by the act of the law, and the right of distress being a pledge of the same nature, the principles upon which the case of Cotton was decided, must apply to it," it was considered as a mere mistake in words to say, that *hypothec* is in the above sense a pledge by the act of the law; for the right of hypothec was just as strong before any application had been made to the judge; nor do the effects being placed in *custodia legis*, in the smallest degree better the landlord's right, which was equally strong before any such step was taken.

To the argument contained in the 5th reason above assigned by the appellant for the reversal of the interlocutors, the respondent answered, that he knew of no instance in the law of Scotland, where a privileged creditor was ever preferred to the landlord, except a creditor *funerarius*, mentioned by lord Kilkerran; and which decision, whether it proceeded upon the Roman edict, *si colonus vel inquilinus sit isque mortuus est, nec sit unde funeretur ex invecitis et illatis eum funerandum*, or upon the general police of the country, could not affect this question, as there can be little doubt that the crown, in the same situation with the landlord, would have been obliged to bury its debtor.

But it was ORDERED, that the interlocutors complained of, in so far as they declare generally, that the landlord's right of hypothec over the crop and stocking cannot be defeated by the prerogative process of the crown in virtue of the statute 33d Hen. VIII. as extended to Scotland by the articles of union, and the act of parliament 6th of queen Anne, be REVERSED. But in respect that the king's title does not sufficiently appear in the process, it is further ORDERED, that the cause be remitted back to the court of session to enquire more particularly into the process and the conduct thereof, whereby the effects in question are supposed to have been subjected to the king's title. (MSS. Jour. sub ann. 1792.)

[520] CASE 4.—JAMES CHRISTIE,—*Appellant*; The Attorney General,—*Respondent* [24th March 1796].

[See now 8 and 9 Vict. c. 15, s. 2; Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), s. 58.]

An auctioneer is liable to the Crown for the duties imposed on the sale of estates by auction (by statutes 19 Geo. 3. c. 56. 27 Geo. 3. c. 13.) for estates put up to sale, and bought in on behalf of the owner: though he does not receive the duties of the owner; and though he charges no commission on such sale; if he has not strictly complied with the terms of the statutes; and particularly of the stat. 28 Geo. 3 c. 37. s. 20. which requires notice of the person appointed to bid on behalf of the owner to be given in writing to the auctioneer previous to the bidding. These duties are not considered as a penalty, but as an actual charge on the auctioneer.

DECREE of the Court of Exchequer AFFIRMED.

See the cases of *Howard v. Castle*, 6 Term Rep. K. B. 642. and the case of *Bezwell v. Christie* there cited, from Cowp. 395. See also the case of *Bramley v. Alt*, 3 Ves. jun. 620, and *Conolly v. Parsons*, there cited. And further, *Walker v. Nightingale*, vol. iv. p. 193. of this work. The result from all of them seems to be, that where all the bidders at an auction, except a purchaser, are merely puffers, the sale is fraudulent against such purchaser: but where there are any real bidders who bid against each other, the biddings of the puffers will by no means render the sale invalid.

In Michaelmas term, 30th George III. an information was filed in his majesty's court of exchequer by the said Sir Archibald Macdonald, his majesty's attorney general, on behalf of his majesty, stating, That by an act made 17th Geo. III. intituled, "An act for granting to his majesty certain duties on licences to be taken out by all persons acting as auctioneers, and certain rates and duties on all lands, houses, goods, and other things sold by auction, and upon indentures, leases, bonds, deeds, and other instruments," it was enacted, That, from and after the 29th day of September 1777, there should be raised, levied, collected, and paid in such manner as therein-after was mentioned, to and for the use of his majesty, his heirs and successors, for and upon all manner of sales by way of auction as aforesaid in Great Britain,

the respective rates and duties therein-after expressed, viz. the sum of 3d. for every 20s. of the purchase-money arising by sale at auction, of any interest in possession, or reversion, in any freehold, copyhold, or leasehold lands, tenements, houses, and hereditaments, and of any annuities or sums of money charged thereon, and of any utensils in husbandry and farming stock, ships, and vessels, and of any reversionary interest in the public funds; and the sum of 6d. in every 20s. out of the purchase-money arising by sale at auction of all furniture, fixtures, plate, jewels, pictures, books, horses, and carriages, and all other goods and chattels whatsoever; the said respective rates and duties to be paid by every such auctioneer, agent, factor, or seller by commission, out of the monies arising at each and every such sale or auction as aforesaid; and further stating, that by an act passed 19th Geo. III. intituled, "An act for amending and enforcing so much of an act, made in the 17th year of the reign of his present majesty, intituled, *"An act for granting [521] to his majesty certain duties on licences to be taken out by all persons acting as auctioneers, and certain rates and duties on all lands, houses, goods, and other things sold by auction; and upon indentures, leases, bonds, and other instruments,* as relates to the method of granting licences to auctioneers, and to collecting the duties on estates and goods sold by auction," reciting, that by the aforesaid act, passed in the 17th year of the reign of his present majesty, certain duties were imposed on all licences to be taken out by persons selling estates, goods, and chattels by auction, and on the purchase-money of the thing sold; and reciting, that the powers, rules, and regulations therein prescribed, had been ineffectual to secure the payment thereof; and the said duties had, by reason of various frauds and evasions, been greatly decreased or withheld: for remedy thereof, and for the better securing the payment of the said duties, it was enacted, that, from and after the 5th day of July 1779, the several powers, rules, regulations, and provisions by the said act of the 17th year of his present majesty's reign, and directed for granting licences to auctioneers, and for collecting and managing the duties by said act imposed on licences, to be granted to persons selling by auction, and on the purchase-money of the estates, goods, and effects, so sold, should cease and determine, and be no longer used, except in all cases relating to the recovery of any arrears which might at any time remain unpaid of the said duties, or to any penalty or forfeiture which should have been incurred upon or at any time before the said 5th day of July 1779, any thing therein contained to the contrary notwithstanding; and reciting, that by the said first mentioned act, it was among other things enacted, that, from and after the 29th day of September 1779, there should be raised, levied, collected, and paid in such manner as in said act mentioned, to and for the use of his majesty, his heirs and successors, the sum of 6d. for every 20s. out of the purchase-money arising by sale at auction of all plate and jewels: and reciting, that the said duty of 6d. in every 20s. out of the purchase-money of the said goods, had been found to prevent, in a great measure, the sale of the said goods by auction, to the prejudice of the revenue intended to be raised by the said first mentioned act; it was therefore enacted, that, from and after the said fifth day of July 1779, the said duty of 6d. in every 20s. out of the purchase-money of the same goods should be, and the same was thereby repealed; and that the sum of 3d. for every 20s. out of the purchase-money arising by sale at auction of all plate and jewels, should be raised, levied, and collected to and for the use of his majesty, in such and the like manner as the other rates and duties granted by the said therein recited act upon sales by auction were directed to be paid, accounted for, recovered, and applied: and for the better preventing the like frauds, and for the better securing the aforesaid duties by the said first mentioned act imposed, it was further enacted, that, from and after the said 5th day of July 1779, no person whatever, not then licensed according to the said first mentioned act, who then, or at any time or times thereafter, did or should exercise the trade or business of an auctioneer or seller by commission at [522] any sale of any estates, goods, or effects whatever by outcry, knocking down of hammer, by lot, or by any other mode of sale at auction, or whereby the highest bidder was deemed to be the purchaser, or who should act in such capacity, should presume to deal in, vend or sell any estates, goods, or effects whatsoever by public sale or otherwise by way of auction as aforesaid, in any manner whatsoever, without taking out a licence in manner therein-after mentioned, before he, she, or they should so put up to sale or sell any such estates, goods or effects, by public sale by way of

auction as aforesaid; and the commissioners of excise, and the persons to be appointed by them as therein mentioned, and also the collectors of excise, were thereby respectively authorized and required to grant and deliver such licences to the persons who should apply for the same, upon their paying the duty by the said act directed to be paid for each and every such licence; and it was thereby further enacted, that such licence and licences should be renewed from year to year, as therein mentioned; and after reciting the said first mentioned act to the purport and effect herein-before mentioned, and reciting, that it might be doubted whether the said respective rates and duties so imposed as aforesaid were payable for any part of the purchase-money not amounting to the sum of twenty shillings; to obviate all doubts, it was thereby enacted and declared, that the said respective rates and duties of threepence and sixpence so imposed as aforesaid, was intended to be charged, and it was thereby declared to be charged and chargeable for every twenty shillings of said purchase money, and in proportion for any greater or less sum of the purchase money arising and to arise by sales at auction: and it was by both the said acts provided and thereby enacted, that in case the real owner of any estate, goods, or effects put up to sale by way of auction should become the purchaser, by means of his own bidding, or bidding of any other person on his behalf or for his use, at such sale, without fraud or collusion, then and in such case the respective commissioners of excise in Great Britain, and such collectors, supervisors, and other officers of excise as were thereby respectively authorized within their respective collections and districts to receive the said duties, were thereby authorized and required to make an allowance to such owner, of the duties arising by the said act upon such bidding, provided notice should be given to the auctioneer before such bidding, both by the owner and the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale for the use and behoof of the seller, and provided such notice should be verified by the oath of the auctioneer, and also the fairness and reality of the said transaction, to the best of his knowledge and belief; and in case any dispute should arise whether such purchase by the owner was not made by collusion, or in order to lessen the full sum appointed by said act to be paid, or concerning the fairness of said transaction, then and in such cases the proof thereof should lie in the person acting as auctioneer; and on failure therein, or in case of any unfair practice, then no allowance should be made as aforesaid, any thing therein contained to the contrary notwithstanding: and it was thereby provided, that the respective rates and duties therein mentioned, should be a charge upon every auctioneer or seller by commission, immediately from and after the knocking down of the hammer, or other closing of the bidding, at every sale by way of auction.

And the said information further stated, that by an act of parliament, made and passed in the 27th year of the reign of his present majesty, intituled, "An act for repealing the several duties of customs and excise, and granting other duties in lieu thereof, and for applying the said duties, together with the other duties composing the public revenue; for permitting the importation of certain goods, wares, and merchandize, the produce or manufacture of the European dominions of the French king, into this kingdom; and for applying certain unclaimed monies remaining in the exchequer, for the payment of the annuities of lives, to the reduction of the national debt;" it was thereby, amongst other things, enacted, that, from and after the 10th of May 1787, all and singular the duties, allowances, bounties, and draw-backs of excise, and other duties under the management of the commissioners of excise in England and Scotland respectively, granted by act or acts of parliament then in force, and also the additional imposts on duties charged upon the product or amount of said several duties, should cease and determine, save and except in all cases relating to the recovering, allowing, or paying any arrears thereof respectively, which might at that time remain unpaid, or to any fine, penalty, or forfeiture, fines, penalties, or forfeitures relating thereto respectively, which should have been incurred at any time before or on the said 10th day of May 1787; and further, save and except the duties upon mum, cyder, and perry therein mentioned; and save and except the rates or duties payable for any licence or licences which said commissioners of excise, or any or either of them, or the collectors, supervisors, or officers of excise, or any or either of them, were or had been by any act or acts of parliament in force on and immediately after the 10th day of May 1787, authorized

and empowered to grant; and that it was by the said act enacted, that, from and after the said 10th day of May 1787, in lieu and stead of the said duties of excise, and other duties under the management of the said commissioners of excise respectively by said last-mentioned act repealed, there should be raised, levied, collected, and paid unto his majesty, his heirs and successors, upon the several goods, wares, merchandizes, and commodities mentioned and described in schedule F, thereto annexed, the several sums of money, and duties of excise, as they were respectively inserted, described, and set forth in said schedule; and that there should be made, allowed, and paid, for or in respect of goods, wares, merchandizes, and commodities, for or in respect whereof any duty of excise was by said last mentioned act imposed to the several persons entitled to the same, the several allowances, bounties, and draw-backs of excise, as same were also respectively inserted, described, and set forth in said schedule, and also all other such special allowances as were particularly directed by any act or acts of par-[524]-liament in force on and immediately before the 10th of May 1787; and that it was thereby further enacted, that the said several sums of money respectively inserted, described, and set forth in the schedule thereto annexed, marked F, as the duties of excise upon the several goods, wares, merchandize, or commodities, also inserted therein, should and might be respectively raised, levied, collected, answered, paid, recovered, adjudged, mitigated, and allowed, (except where any alteration was expressly made by the said act), in such and the like manner, and in or by any or either of the means, ways, or methods by which the former duties of excise, and other duties under the management of the said commissioners of excise respectively, and allowances, bounties, and drawbacks of duties of excise, and other duties under the management of said commissioners of excise respectively in general; and also by any or either of the special means, ways, or methods respectively, by which the former duties of excise, and other duties under the management of the said commissioners of excise respectively, and allowances, bounties, and drawbacks of duties of excise, and other duties under the management of the said commissioners of excise respectively, upon goods, wares, merchandize, or commodities of the same sort or kinds respectively, were or might be raised, levied, collected, answered, paid, recovered and adjudged, mitigated and allowed, and the goods, wares, merchandize, or commodities, so by the said act now in recital made liable to the payment of, or chargeable with, the duties of excise, or so entitled to allowances, bounties, or drawbacks of duties of excise as respectively inserted, described, and set forth in said schedule thereto annexed, marked F, should be, and the same was made subject and liable to all and every the conditions and regulations, rules, restrictions, and forfeitures to which goods, wares, merchandize, or commodities in general; and also all and every the special conditions, rules, regulations, restrictions, and forfeitures respectively, to which the like goods, wares, or merchandize respectively were subject and liable by any act or acts of parliament in force on and immediately before the 10th of May 1787, respecting the duties of excise, or other duties under the management of the commissioners of excise respectively, except where any alteration was expressly made by the said act, or by any other act or acts of that session of parliament: and the said information further stated, that it was in the said schedule, marked F, annexed to the said last-mentioned act of parliament, set forth under the title *auction*, for every 20s. of the said purchase money arising or payable by virtue of any sale at auction in Great Britain, of any interest in possession or reversion in any freehold, copyhold, or leasehold lands, tenements, houses, or hereditaments, and of any annuities or sums of money charged thereon, and of utensils in husbandry, and farming stock, ships, and vessels, and of any reversionary interest in the public funds, and of any plate or jewels, and so in proportion for any greater or lesser sum of such purchase-money, to be paid by the auctioneer, agent, factor or seller by commission, three-pence half penny; for every 20s. of the [525] purchase money arising or payable by virtue of any sale at auction in Great Britain, of furniture, fixtures, pictures, books, horses and carriages, and all other goods and chattels whatsoever, and so in proportion for any greater or lesser sum of such purchase-money, to be paid by the auctioneer, agent, factor, or seller by commission, *seven-pence*.

And the said information further stated, That by statute of the 28th year of his present majesty, cap. 37. it is provided, that the notice to be given by the owner of the estate as aforesaid, should be in writing, and signed by the owner, and by the

person intended to be the bidder of the latter, being appointed by the former, and having agreed accordingly to bid at the sale for the use and behoof of the seller; and further stating, that there was no alteration made by the said last-mentioned act of parliament, nor has there either before or since the passing of the same been any alteration made respecting the several matters relating to the duties to be paid on the money arising or payable by virtue of any sale or sales at auction, or any of them, save as is herein-before-mentioned.

And further stating, That the appellant did, in or about the month of October, in the said year 1787, take out a licence as an auctioneer, agent, factor, or seller by commission, in pursuance of the several acts herein-before-mentioned, and had renewed, or caused the same to be renewed from time to time to the present time; and that the appellant had, ever since the said month of June 1788, to the present time, exercised the trade or business of an auctioneer, or seller by commission of estates, goods, and effects by outcry, knocking down of the hammer by lot or parcel, or by some other mode of sale by auction, whereby the highest bidder was deemed to be the purchaser, and had, during the time last aforesaid, sold and disposed of by the several or some of the means therein before last-mentioned, to divers persons, owners, or others, divers interests in possession, reversion, or remainder in divers freehold, copyhold, or leasehold lands, tenements, houses, or hereditaments, and divers annuities and sums of money charged thereon, and also divers utensils in husbandry, farming stock, ships and vessels, ship or vessel, and divers reversionary interests in the public funds, or some of them; and divers quantities of plate or jewels, and divers quantities of furniture, fixtures, pictures, books, horses, carriages, and divers other goods and chattels, for divers considerable sums of money, and for and in respect of which there were divers considerable sums of money due and owing, which ought to have been paid to or for the use of his majesty.

And the said information charged, that the appellant had refused to account for such duties, or to discover the several matters aforesaid by him sold at auction.

And the said information prayed, that the appellant might account, before the said court of exchequer, for all the sums of money which he ought to pay and answer to his majesty, for the matters aforesaid; and might pay to his majesty what should appear to be due to his majesty on the taking of the said account, his majesty's [526] attorney general, by the said information, offering to waive all penalties.

The appellant, by his answer to the information, admitted he had carried on the business of an auctioneer; and that, in the course of such business, he had put up to sale, and had actually sold, divers estates, goods, and effects; a particular account of which he set forth in the first schedule to his answer annexed. And, in the second schedule to his answer, he set forth an account of the several estates by him put up to sale, and bid for and purchased by some person or persons appointed by the owners thereof, in the form and manner required by the aforesaid act of parliament; and of which the appellant was informed, and received notice in writing, previous to the putting up such estates, as required by the said act. And the appellant, in his said answer, stated, that he had put up to sale divers estates, goods, and effects, which were bid for, and bought in, by the owners thereof, or by some person or persons by them appointed to bid for and buy in the same on their behalf, and to and for their use, without any notice in writing being given to the appellant, previous to the sale, an account of which estates, goods, and effects, so bought in, the appellant set forth, in the third schedule to his answer, and submitted that he was, notwithstanding notice in writing was not given to him previous to such sale, entitled to the allowance provided by the aforesaid acts of parliament, the same not requiring any notice in those instances in which the owner himself bought in his property, nor in those instances in which the auctioneer be ready to verify, by oath, the fairness and reality of the transaction; it being provided, by the aforesaid act of the 19th year of his present majesty's reign, that in case any dispute should arise whether such purchase was made by collusion, or in order to lessen the full sum by the said act required to be paid, or concerning the fairness of the transaction, then and in such case the proof should lie upon the person acting as auctioneer; and in failure thereof, or in case of any unfair practice, then no such allowance should be made: and the answer submitted, that this clause was not repealed by the act of the 28th year of his present majesty, nor by any other act. And the answer stated, that the appellant had not, in any accounts of the expences incurred by him in proceeding to the sale

of any real estates, or other property bought in as aforesaid, charged the owner or owners thereof with any sum or sums, on account of commission, the same by the practice of the trade not arising unless the property put up be actually sold; and submitted that the aforesaid several acts charging the auctioneer as aforesaid, charged him in respect of property put up to sale, and upon which a commission accrued due, and do not apply to cases on which no commission accrues: and that if he is liable to make good the several rates and duties imposed by the said acts of parliament on sales by auction, though the property was not actually sold, and though he had never received, nor as he conceives is at law entitled to recover the commission which would have accrued to him if the same had been [527] actually sold, nor to recover back from the owner or owners of the several estates and property so bought in, the said several rates and duties, if paid by the appellant, as insisted on by the said commissioners of excise, that the same must be considered as penalties incurred by the appellant for not having required such previous notice in writing, and that therefore the same were waved by the said information.

The respondent having replied to the answer, the information came on for hearing before the barons of the exchequer the 5th of July 1791, when they were pleased to declare and decree, That as to the estates and goods sold by auction by the appellant, whereof the real owners had been the purchasers, by means of the bidding thereon of any other person on their behalf, without such notice as is required by the statute in that behalf made and provided, no allowance of the duty by the said act granted is or ought to be made to the appellant. And it was further ordered, adjudged, and decreed, by the said court, that it should be referred to the deputy remembrancer of the said court, to take an account of all such estates and goods which had been so purchased at sales made by the appellant at auction, and of the prices at which the same had been respectively knocked down, and to compute the duties thereon by the said act granted and chargeable upon the appellant as auctioneer, in respect thereof, and that what should be found coming due to his majesty on that account, should be paid by the appellant, to the commissioners of his majesty's revenue of excise, for the use of his majesty.

The appellant appealed from the said decree, so far as it declared and decreed. That, as to estates and goods sold by auction by the appellant, whereof the real owners had been the purchasers, by means of the bidding thereon of any other person in their behalf, without such notice as aforesaid, no allowance ought to be made to the appellant; and so far as the said decree directed an account to be taken, subject to such declaration, and as directed payment to be made by the appellant, of what shall be found due upon an account so taken. The appellant submitted that the said decree ought to be varied, by omitting the aforesaid declaration, and directing that the appellant should not be charged, in the account to be taken by the said deputy remembrancer, with any sum of money in respect of the prices bid for estates and goods put up to sale by auction by the appellant, *which were not actually sold*; and particularly, for such whereof the highest bidder bid for the same, on behalf or for the use of the owners thereof respectively, *without fraud or collusion*: and the following reasons were assigned (T. Erskine, J. Mitford, J. Fonblanque) in support of the appellant's case.

I. For that all acts imposing duties on the subject ought to be construed strictly, and the legislature ought not to be deemed to have imposed a duty, by any act, unless the same is clearly and unequivocally expressed in such act, as otherwise a tax may be imposed by the construction given to acts of parliament, in courts of justice, contrary to the intention of the legislature: but the acts [528] by which the duties on sales by auction are imposed, have expressly given such duty out of the purchase-money arising by such sales, and therefore ought not to be deemed to have imposed a duty where no actual sale has been made, and where, consequently, no money has arisen by a sale by auction out of which the duty can be paid.

II. Because, although the acts refer to the case of real owners, or persons on their behalf and for their use, bidding for their property at sales by auction, and contain provisions respecting such biddings, yet such provisions, it is conceived, must have been intended by the legislature merely for the purpose of preventing frauds and evasions of payment of duties upon actual sales, under pretence of the purchase of the property by or on behalf of the real owners thereof, when the property was, in



fact, sold to others; and ought not to be deemed to have been intended to charge the auctioneer, where there was no actual sale, especially as such construction would charge the auctioneer with a sum of money in the nature of a penalty, for a mere neglect of form, without express words declaring the same to be a penalty for such neglect: and it is conceived to be the true construction of the several acts taken together, that although a previous notice in writing, in the terms specified in the act of the 28th Geo. III. may be deemed evidence that the person bidding at any sale, according to the terms of any such notice, did bid on behalf of the owner of the property, yet the provision for that purpose does not make such notice in writing the only evidence of the fact, but leaves the burden upon the auctioneer, according to the act of the 19th Geo. III. to prove the fairness and reality of the transaction.

III. Because, supposing the acts admitted of the construction contended for on behalf of the crown, yet, in ordinary cases, he who seeks the assistance of a court of equity, must submit to such conditions as equity and good conscience require; and, therefore, when the attorney general on behalf of his majesty, seeks the assistance of a court of equity, to enforce the payment of duties, the claim must be subject to every consideration of equity which would apply to any other demand; and, independent of this principle, the act of the 33d Henry VIII. cap. 29 (Q. c. 39. s. 797) has expressly given to the subject a right to the benefit of every equity which can be raised in his favour; and it is against good conscience, and all the principles on which courts of equity usually proceed, to charge a man as debtor to another for any sum of money, except such as he has actually received, or might have received without his wilful default; whereas the appellant has not actually received the sums of money with which it is attempted to charge him, in respect of prices bid for property on behalf of real owners, where there was no real sale of the property, nor could he have received such sums of money by any means whatsoever.

IV. Because the demand against the appellant of which he complains, not being a demand of money actually received by him, or of money which he might have received without his wilful default, [529] can only be a demand of a penalty for a neglect, in not requiring such notice in writing as specified in the 28th Geo. III. Whereas all penalties are waved by the information, and according to the constant course of the exchequer are waved in all such cases: and it is conceived, the appellant might have demurred to the information, if such penalties had not been waved.

On behalf of the respondent the following reasons were shortly adduced (A. Macdonald, J. Scott):

I. That the auction-duties imposed by the said statute 27 Geo. III. c. 13. are by virtue of that act, and of the statute 19 Geo. III. c. 56. declared to be a charge upon every auctioneer or seller by commission, immediately from and after the knocking down of the hammer, or other closing of the bidding at every sale by way of auction. And that the said duties so charged shall be paid by every such auctioneer, or seller by commission.

II. That it is by the said act 19 Geo. III. c. 56. (sec. 11.) enacted, that in case the real owner of any estate, goods, or effects, put up to sale by way of auction, shall become the purchaser, by means of his own bidding, or the bidding of any other person on his behalf, or for his use at such sale, without fraud or collusion, then the commissioners of excise, and the collectors, supervisors and officers of excise, are thereby authorized and required to make an allowance to such owner of the duties arising upon such bidding, provided notice be given to the auctioneer before such bidding, both by the owner and person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale, for the use and behoof of the seller, and provided such notice be verified by the oath of the auctioneer, and also the fairness and reality of the transaction, to the best of his knowledge and belief.

And that it is by the said act 28 Geo. III. c. 37. (sec. 20.) enacted, that no such allowance shall be made, unless notice in writing, signed by the owner and person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale, for the use and behoof of the seller, shall have been given to the auctioneer before such bidding, nor unless such delivery of such notice shall be verified upon the oath of the auctioneer, as also the fairness of the transaction, to the best of his knowledge.

It was accordingly ORDERED and ADJUDGED, that the appeal be dismissed, and that the decree therein complained of, be affirmed. (MS. Jour. *sub anno* 1796.)

[530] CASE 5.—JAMES EDGAR, & al.—*Plaintiffs* (in Error); DONALD and BENJAMIN MILLER,—*Defendants* (in Error) [9th June 1797].

[26 Geo. iii. c. 81 was repealed by S.L.R. 1872.]

The bounty of 20s. per ton given by stat. 26 Geo III. c. 81. on the buss-fishery for herrings is not payable where the buss lies in port and sends out her boats to fish.

The lord chancellor (Loughborough) observed in the house of lords that this case came before that house in an unusual shape; it was an action on the plea side of the court of exchequer in Scotland; a jurisdiction which the house had probably never before had occasion to consider. The form of the proceeding was also singular; the facts and evidence being put in the shape of a bill of exceptions to the directions of the judge; which would more properly have been the subject of a demurrer to evidence. But as the parties below had not taken any objection either to the jurisdiction, or to the form of proceeding; and as the question was of considerable public importance, his lordship proposed to refer it to the opinion of the judges.

DECREE of the Court of Exchequer in Scotland REVERSED.

Anstr. Rep. Scacc. iii. 926.

The Defendants in error were merchants in Staxigo in the county of Caithness in Scotland, and in the year 1793 were owners of a decked buss or vessel called the *Jean* of Staxigo, built in Great Britain, and of the burthen of 76½ tons, by admeasurement.

The plaintiffs in error, together with Alexander Maconochie, since deceased, were in that year commissioners of his majesty's customs for Scotland, and the present cause was a special action on the case brought against them by the defendants in error. in the court of exchequer in Scotland, to recover a satisfaction in damages for their refusing to cause payment to be made to the defendants in error of a bounty of twenty shillings per ton on a full cargo of herrings, caught and taken by the said buss or vessel as hereafter mentioned.

The cause of action was founded on the statute 26 Geo. III. chap. 81. intituled "An act for the more effectual encouragement of the British fisheries;" whereby, after reciting, that it is of the utmost importance to the preservation and increase of the wealth, commerce, and naval strength of his majesty's kingdom of Great Britain that the fisheries of his said kingdom should receive every reasonable encouragement which they may from time to time be found to require, and which it is in the power of parliament to bestow, it is (amongst other things) enacted, that a bounty of 20s. per ton shall be paid annually, in the manner therein-after prescribed, to the owner or owners of every decked vessel of not less than 15 tons burthen, manned and navigated according to law, which shall be fitted out for and employed in the British white herring fishery, in the manner and under the regulations therein-after directed and provided. The regulations here alluded to are contained in the 2d, 3d, 4th, 5th, and 6th sections of the above act of parliament: and (among others) it is provided, that every buss or [531] vessel, in order to be entitled to the said bounty of 20s. per ton, shall clear out of some port in Great Britain at some time between the 1st day of June and the 1st day of October in one and the same year, and shall proceed immediately upon the said fishery, and shall there begin and continue to fish in an orderly regular manner, without impeding or obstructing any other vessel which shall be employed in the said fishery, for the space of three months at the least, to be computed from the day upon which the master and crew of such buss or vessel shall first shoot or wet their nets, unless such buss or vessel shall within that space of time return into port with a full cargo of fish, taken wholly by the master and crew of such buss or vessel.

The bounty granted by the before-mentioned act is extended by the statute 27 Geo. III. chap. 10, § 2 and directed to be paid to the owner or owners of all busses and vessels whatsoever built in Great Britain, and employed in the said fishery: and this statute also declares what shall be deemed a full cargo of fish.

The Plaintiffs in error, with a view as it seemed of fixing on the defendants a systematic plan of fraudulently obtaining the bounty: an imputation which it appeared the defendants were neither wholly liable to nor entirely exempted from: thought it necessary to make the following observations upon the nature of that fishery in general, and upon the different modes in which it had been carried on.

Although the herring fishery is to a certain degree precarious, yet it is well known that in many parts of the coasts of Great Britain the annual resort of herrings has been so uniform for a long course of years, that their periodical return to such places is looked for with almost as much confidence as the products of the earth are in other parts of the country in the season of harvest. In such places, if the population of the neighbourhood affords a sufficient number of hands for the purpose, the trade of curing herrings easily establishes itself. Fish curers there provide stores of salt and casks *on shore*, for curing and packing the herrings: and, upon the appearance of the fish upon the coast, employ men with *boats* and nets to take them. The herrings are brought *on shore* daily, as they are taken, and are there salted, cured, and packed into barrels. In this way, one mode of carrying on the herring fishery takes place, which is called the *boat* fishery.

These fish, however, frequent also many remote and solitary parts of the coast, where there are neither men nor boats to take them: and where, therefore, no one will be at the expence of providing a store of salt and casks, which would be of no use if they were provided. The shoals sometimes make their appearance at unusual places, and where, although there may happen to be hands enough to take them, yet their appearance not being expected, salt and casks have not been provided for curing and packing them. Under these circumstances it became necessary, in order to extend the fishery, that decked vessels should be fitted out, which, being provided with a proper quantity of netting, salt, and barrels, and manned with a sufficient number of hands, should be capable of [532] proceeding to *distant* fishing grounds: of following the shoals from one part of the coast to another: and finally, of taking and preserving the herrings wherever they should happen to fall in with them. In this manner arose another mode of carrying on the herring fishery, called the *buss* fishery: but which does not exclude the use of boats by the crews of the busses in taking the herrings for those busses.

At the same time as, on the one hand, the carrying on of the fishery by a buss was attended with a considerable expence, from the wages and maintenance of a numerous crew, the hire of the vessel, and the cost of the fishing materials: and on the other hand, the success in fishing was, from the nature of the fishery itself, precarious and uncertain, some public encouragement was required, and for this purpose a bounty on the *tonnage* of the vessels, without regard to their good or ill success, being thought the proper mode, was granted accordingly by different acts of parliament.

From the preceding account, it appears that there is an essential and permanent distinction between the boat and buss fishery, founded upon the different nature of these two modes of fishing considered in themselves. But there is also a marked and highly important distinction to be observed between them, when considered respectively as objects of general and national concern. The principal advantage of the boat fishery seems to be that of providing employment and subsistence for the industrious poor; while the buss fishery, possessing the same advantages, contributes also in a high degree to the improvement and extension of *shipping* and *navigation*, and trains up a numerous body of *able seamen* for the protection and defence of the country. Accordingly the legislature appears to have had this distinction particularly in view in most of the acts of parliament which have granted bounties upon the *buss* fishery.

The acts of parliament which have been passed from time to time for the encouragement of the herring fishery, together with the rates of bounty thereby granted on the *tonnage* of the busses, are as follows:

| Acts.  | Rates.        |
|--|---------------|
| 25 Geo. II. cap. 24. . . . .                   | 30s. per ton. |
| Amended by 26 Geo. II. cap. 9.                 |               |
| Amended and continued by 28 Geo. II. cap. 14.  |               |
| 30 Geo. II. cap. 30. . . . .                   | 50s. per ton. |
| Continued by 5 Geo. III. cap. 22.              |               |
| 11 Geo. III. cap. 31. . . . .                  | 30s. per ton. |
| Amended by 12 Geo. III. cap. 58.               |               |
| Amended and continued by 19 Geo. III. cap. 26. |               |
| Amended by 25 Geo. III. cap. 65.               |               |
| 26 Geo. III. cap. 81. . . . .                  | 20s. per ton. |
| Amended by 27 Geo. III. cap. 10.               |               |
| Amended and continued by 35 Geo. III. cap. 56. |               |

"Of these acts, the 26 Geo. III. cap. 81. is that upon which the present question depends; all the preceding acts having either ex-[533]-pired or been repealed, partially or totally; and the 35 Geo. III. cap. 56. having been passed since this question arose.

"In the existing state of the fishery, and of the laws in force concerning it, some time before the year 1793, certain fish curers in the north of Scotland contrived a device for obtaining the bounties granted to the buss fishery by the 26 Geo. III. cap. 81. in a manner which the plaintiffs in error conceived to be against the intention and spirit of the regulations of that act. Some of those fish-curers being, in the course of their trade in the boat fishery, provided with men, provisions, boats, nets, salt, and barrels, imagined that nothing was wanting that was required by law for the buss fishery, excepting only the pageant of a decked vessel or buss. A decked vessel was accordingly procured; barrels, salt, nets, and provisions were put on board. A number of men appeared, calling themselves her crew. The forms prescribed upon the clearing out of *busses* for the herring fishery were gone through; and a licence from the principal officers of the customs was granted for the vessel to *proceed* upon her *voyage*. Immediately, the barrels, salt, nets, and provisions were all taken out of the buss; the men employed themselves in fishing with the nets in boats. The herrings were landed, salted, and packed *on shore*; and the fishing went on in the same manner in all respects as in the boat fishery; while during all that time the empty buss lay neglected in the very spot where she was cleared out. At last the herrings, taken and packed, were put on board of the buss. The officers of the customs were again called, to survey the vessel and cargo. The certificate and all the other requisite documents were made out, according to a set of printed forms; and thus the vessels *appearing* to the commissioners to have made a fishing *voyage*, the bounties were, in many such instances, ordered to be paid.

"A discovery having been made, that in the years 1792 and 1793, and for some years before, these practices had been carried on, and particularly that in the port of Thurso in the county of Caithness, many vessels certified by the officers of the customs there to have been cleared outwards for, and inwards from, the white herring fishery, and to have complied with the regulations of the 26 Geo. III. cap. 81. had actually never gone from the harbours of Wick and Staxigo, where they had been cleared out, (except a few, which had gone from the one to the other of these two harbours, being little more than a mile distant from each other,) the commissioners withheld their orders for payment of the bounties on a number of the vessels licensed at Thurso in the course of those two years; and amongst the rest, upon one belonging to the present defendants in error, who thereupon brought this action upon that case."

The declaration (of Whitsuntide term 1794) stated, *inter alia*, that the defendants in error were, on the 12th day of July 1793, owners of a certain decked buss or vessel, built in Great Britain, called the *Jean* of Staxigo, burden 76½ tons, whereof Donald Miller was master, then lying in the harbour of Wick, and properly fitted out for and intended to be employed in the British white herring fish-[534]-ery, in manner and under the regulations directed by the 26th of Geo. III. cap. 81.: that having complied with the requisites of the said act, the said buss or vessel did, between the 1st of June and the 1st of October in the said year, clear out of the port of Thurso, and *proceed* upon the said fishing, and did *there* begin and continue to fish in an orderly regular manner, without impeding or obstructing any other vessel employed in the said fishery, and did *there* catch and take a full cargo

of fish, according to the proportion required by the said act, (the whole of which were taken by the master and crew of the said vessel,) and did *return* therewith into the port of Thurso: that after the return of the said vessel, the collector and comptroller of the customs at Thurso did repair on board her, and reviewed her condition and lading, and did certify the same, together with their observations thereon: and also her neat tonnage, and the names of the master and persons on board; and the said master did also make the oath required by the said act of parliament; which said certificate, licence, and oath, together with an account of the fish taken, were transmitted by the said collector and comptroller to the plaintiffs in error: that thereby, and by virtue of the said act of parliament, the defendants in error became entitled to the bounty of £76 5s.: that the plaintiffs in error having notice of the premises, and having good and sufficient reason to be *fully satisfied* of the *faithful dealing* of the master, and other persons employed and concerned in the said vessel, *with respect to the said fishing*, nevertheless refused to cause payment to be made of the said bounty required of them by the defendants in error, to the damage, etc. £130.

To this declaration, the plaintiffs in error pleaded the general issue; and the cause coming on to be tried, a verdict, pursuant to the opinion and direction of the court, was found for the defendants in error, for £84 9s. 3d. costs 40s.

In the course of the cause, a bill of exceptions to the opinion of the court was tendered by the counsel for the plaintiffs in error, and was sealed by the chief baron, and the other barons of the said court; and which said bill of exceptions is as follows:

“Edinburgh.—Be it remembered, that on the 26th day of January, in Candlemas term, in the 36th year of the reign, etc. on a trial of an issue in a plea of not guilty, in an action of trespass on the case, now depending in the court of, etc. wherein Donald Miller and Benjamin Miller are the plaintiffs, and James Edgar, etc. are the defendants; and which said issue came on to be tried on the day and year, etc. by and in the presence of the right hon. James Montgomery, etc. barons of the said court, and a jury of the country, duly, etc. Upon the trial of that issue, the counsel, learned in the law, for the said Donald Miller and Benjamin Miller, to maintain and prove the said issue on their part, gave in evidence, by the admission of the aforesaid James Edgar, etc. that they, the said Donald Miller and Benjamin Miller, before and on the 12th day of July in the year of our Lord 1793, were, and from thence to the 12th day of May next following continued to be, owners of the decked buss or vessel called the *Jean* of Staxigo, in the said declaration mentioned, and to be resident at Staxigo aforesaid in the [535] county of Caithness, a creek of the port of Thurso, in this part of Great Britain called Scotland: that the said buss or vessel was built in Great Britain, and was, during all the time aforesaid, of the burden of 76½ tons; and that Donald Miller, during all the time aforesaid, was master thereof: that, on the said 12th day of July 1793, the said buss or vessel, lying and being in the harbour of Wick, a creek of the said port of Thurso, was fitted out for the British white herring fishery, and was stored, victualled, accoutered, furnished, and manned in the manner directed by an act made in the 26th year of the reign of his present majesty, in the said declaration mentioned; and did clear out of the said port of Thurso, for the said fishery, by taking and receiving the necessary papers and documents for that purpose from the custom-house there; and that all the conditions, requisites, matters, and things which by the said act are directed to be done and performed with respect to such buss or vessel as aforesaid, *before* proceeding on the said fishery, were, on the said 12th day of, etc. done and performed, with respect to the buss or vessel aforesaid. And the said Donald Miller and Benjamin Miller gave in evidence, by witnesses, that it was the intention of the said Donald Miller and Benjamin Miller, at the time the said buss or vessel was cleared out as aforesaid, that the said buss or vessel should proceed from the said harbour of Wick, to the herring fishery in the north-west highland lochs; and that the said Benjamin Miller gave injunctions to the master that the vessel should so proceed, in case that herrings did not start in plenty upon the coast of Caithness: that on the same 12th day of July 1793, after the conditions, requisites, matters, and things aforesaid were so done and performed as aforesaid, and *while* the said

buss or vessel *continued to lie in the harbour of Wick* aforesaid, the crew of the said buss or vessel proceeded *with the nets* of the said buss or vessel in *boats* to sea, and shot or wetted the same, and continued at sea, endeavouring to take herrings, from six of the evening of Friday the said 12th day of July, until seven o'clock on Saturday morning the 13th of July, when the boats, having caught no herrings, returned to the said buss or vessel, then lying in the harbour of Wick as aforesaid: that the crew of the said buss or vessel again proceeded *with the nets* of the said buss or vessel, in boats, to sea, at eight o'clock in the evening of Monday the 15th day of the said month of July, and returned to the said buss in the said harbour of Wick, at seven of the clock afternoon of Tuesday the 16th day of the said month of July, having caught one upset of herrings (an upset being a barrel full); and that from the said 12th day of July, till the 25th day of the same month, the said buss or vessel *continued to lie in the said harbour of Wick*, and the crew of the said buss or vessel continued to go out from the harbour daily to fish for herrings at sea in manner aforesaid, excepting only the nights of Saturday and Sunday, and caught herrings at every time they so went out, excepting on the first night as aforesaid; and during this period they caught forty-one upsets of herrings, which were salted and packed; using for that purpose, salt and barrels, being [536] part of the stores of the said buss or vessel; and that on the said 25th day of July, the fishing having slackened a little at Wick, the said Donald Miller, master, resolved, according to his instructions, to proceed with the said buss or vessel to the north-west highland lochs, and for that purpose *the said buss or vessel*, having on board the said master and crew thereof, and the stores with which she was cleared out, *did, at eleven of the clock of the forenoon of that day, proceed from the said harbour of Wick northward*, but the wind and weather being such as rendered it unsafe to enter the Pentland Frith, through which his voyage lay to the north-west highland lochs, the said buss or vessel, *at three of the clock of the afternoon of the same day*, put into the harbour of *Staxigo aforesaid, which is distant two miles from the said harbour of Wick, in which harbour of Staxigo* the said vessel was kept constantly afloat, for the purpose of her getting more readily to sea, in order to proceed to the north-west highlands as soon as the wind and weather permitted: that afterwards, to wit, on the said 25th day of July, the crew of the said buss proceeded in *boats* from the said harbour of Staxigo to sea, and *fished herrings in manner aforesaid*; and before the wind became fair for proceeding to the north-west highland lochs, the herrings having appeared in plenty upon that coast, the said buss or vessel *continued to lie in that harbour*, and the crew of the said buss or vessel continued to go out to sea from thence daily in *boats*, and fish herrings throughout the night, as the wind and weather would permit, until the 24th of August in the said year 1793, *landing the said herrings daily* as the same were taken, and salted and packed the same, and for that purpose using salt and barrels, part of the stores of the said buss or vessel: that the herrings so taken by the crew of the said buss or vessel as aforesaid, between the said 16th day of July and 24th day of August 1793 (both these days being included), amounted to 313 barrels of herrings once packed, being a full cargo of fish, the said quantity of herrings exceeding the proportion of four barrels of herrings, once packed, for every ton of the said buss or vessel, by admeasurement: that afterwards, to wit, on the said 24th day of August, the said buss or vessel laden with the said 313 barrels of herrings, sailed out of the harbour of Staxigo aforesaid at two of the clock afternoon, and arrived in the harbour of Wick aforesaid at eleven of the clock afternoon, and from that time the said buss or vessel lay *in that harbour* (the crew thereof continuing to fish *in manner aforesaid*, with little success) until the 2d day of September following. And the said Donald Miller and Benjamin Miller further gave in evidence, by the admission of the said James Edgar, etc. that on the said 2d day of September, the collector and comptroller of the customs at the said port of Thurso did repair on board of the said buss or vessel so lying in the harbour of Wick aforesaid, and did view the condition thereof, and of its lading: and did certify the same, together with their observations thereon, and also the real tonnage of the said buss or vessel, and the names of the master and other persons on board; and the said Donald Miller, master of the said buss or vessel, did also make oath before the collector of the [537] said port in the terms directed by aforesaid act, and did deliver up the licence granted to him by the collector and comp-

troller of the said port of Thurso at the time when the said buss or vessel cleared out as aforesaid; which certificate, licence, and oath, together with an account of the fish taken by the said buss or vessel, were transmitted by the said collector and comptroller of the said port of Thurso, to, and were, on the 14th day of November in the said year 1793, received by the said James Edgar, etc.; and that the said Donald and Benjamin Miller did then require of the said James Edgar, etc. to cause or order payment to be made to them the said Donald and Benjamin Miller, or their assigns, of the bounty of 20s. per ton, according to the admeasurement of the said buss or vessel so certified as aforesaid, amounting to the sum of, etc.; and that the said James Edgar, etc. did then, each of them, refuse to cause or order the said sum, or any part thereof, to be paid to the said D. and B. Miller; and that the said sum, and every penny thereof, doth remain unpaid. And the said D. and B. Miller gave further in evidence, by one other witness, that he the said witness was employed in fishing upon the white herring buss bounty establishment since the year 1787: that he was so employed as master and part owner of a buss: that he was licensed different times at the port of Stornoway, and once at the port of Leith: that he has fished on the west coast of the highlands, and in Thurso bay: that he had several times seen busses, upon the bounty establishment, on the west coast of the highlands, lying aground while their boats were employed in the fishery, which has happened to him in the year 1794, and several other years: that their doing so consisted with the knowledge of the officers of the customs at Stornoway, which was their outfit port: that such busses as were in the situation aforesaid received the bounty: that all busses carry on the fishing by boats, whether the busses themselves be aground or afloat: that from the manner of fitting out busses, and the nature of the white herring fishery, there is not accommodation to cure the herrings caught by the crews of the said busses, in a plentiful fishing, on board: that the busses are under the necessity of curing the herrings on shore, and that this is the general practice in the buss bounty fishing: that the officers of the customs of the ports where the said witness had fished were in the knowledge of this fact: that upon every occasion when the said witness had seen busses fitted out upon the bounty establishment, and when herrings were to be got at the ports or harbours where they were fitted out, he had seen such busses commence and carry on the fishery, by means of their boats, in those ports or harbours where they were fitted out; and that the said witness had done so himself; and that the said last-mentioned busses lay sometimes aground and sometimes afloat; and that the officers of the customs at such outfit ports or harbours were in the knowledge thereof; and that the fish so caught were allowed as making part of their cargoes, or the time there spent as making part of the three months required by law for busses to lie upon the fishing, if they do not sooner complete their cargoes; and in particular, that at the port of Stornoway, in the year 1794, he has seen [538] busses that were fitted out at said port for fishing herrings, and that he did so himself said year, and knows that others had done so: that on such occasions, when he or those others had no intelligence of the herrings appearing in other places, they began to fish with their boats at that port where they were cleared out, in the mean time, before they moved to any other port: that he, by his own experience, and information from others, knows that the herrings which were so taken by the busses at the outfit port were accounted as part of the cargoes of the said busses; and that the time in which the busses were so employed in fishing at the places where they were cleared out, and before they sailed from the outfit port, was accounted part of the three months in which such busses were required to fish, commencing the said computation of time from the boats first setting their nets: that he himself has received the bounty on the tonnage of such busses, in the situation above described: that he the said witness had been upon the east coast of Caithness and in the harbour of Staxigo, in vessels; and in the town of Wick, by land; and that, in the opinion of him the said witness, busses cannot fish with safety in any other manner than by lying in one or other of these harbours, and sending the crews of the busses to sea in boats to fish: that, in the opinion of him the said witness, it is more difficult, hazardous, and expensive to fish upon the east coast of Caithness than in the west highland lochs: that 20s. per ton will not reimburse the owner of a buss, who fits out such buss in terms of the statute. And the said Donald and Benjamin Miller gave further in evidence, by one other wit-

ness, that frequently, since the year 1787, he the said witness had seen busses, which were fitted out at the port of Stornoway to fish herrings, on the bounty establishment, begin to fish before they sailed from the said port of Stornoway; and that the said busses, while they so fished, (which they did by the means of their boats), were sometimes aground and sometimes afloat; and that all this was known to the officers of the customs at Stornoway; and that once since the said year 1787, he the said witness had seen a buss, fitted out at the port of Ishe Martin for the purpose aforesaid, begin to fish after she cleared out from that port, but before she sailed from Lochbroom, upon which the said port lies: that the herrings so fished as aforesaid at Stornoway and Lochbroom were cured and barrelled up, and laid upon the shore, as part of the cargo which was to receive the bounty, which barrels he the said witness saw upon the shore; and the said witness was informed by the masters and owners of such vessels that the time during which they were so employed in fishing, before they sailed from the outfit port, was accounted or reckoned as part of the three months that such vessels are required to be employed in fishing; and that he was also informed by the masters and owners, that the bounty on the tonnage of such vessels as aforesaid had been paid to them: that accordingly, to the best of the knowledge and belief of the said witness, it was the general practice for the crews of the busses to fish the herrings by their boats, and for the busses to be either aground or afloat, as most convenient, and for the crews to cure the herrings on shore; and that [539] accordingly, to the best of the knowledge and belief of the said witness, it was the general practice upon the whole of the west coast of Scotland for busses, put upon the bounty establishment, to fish at the places where they are so put on, if fish are to be there got at the time. And the said Donald and Benjamin Miller gave in evidence by one other witness, that he, the said witness, had been acquainted with the state of the white herring fishery on the coast of Caithness for twenty-one years past: that, from the manner of fitting out busses, as prescribed by law, and by the instructions from the board of customs, of filling the said busses with salt, and as many empty barrels and other stores as they can contain, there is not accommodation to cure the herrings, caught in a plentiful fishery by the crews of the said busses, on board; and that it is necessary, and is the general practice of the buss bounty fishing, to fish by boats, and to cure the fish on shore: that because the east coast of Caithness is much exposed and dangerous, and because of the nature of the fishing upon that coast, to carry on the herring fishery there with effect, busses must generally lie in the harbour of Wick or Staxigo, and fish by sending their boats out to sea to catch the herrings, there being no other place upon that coast for busses to take shelter in: that the fishing on the east coast of Caithness is more hazardous than the fishing in the west highland lochs: that the coast of Caithness is much more tempestuous than the coast of the west highlands: that the busses *Maggy Lauder* and *John* of Anstruther, and other busses from the frith of Forth which got the bounties, lay in the harbour of Wick, and fished their cargoes by sending their boats to sea; and that the said busses cured their herrings so taken by their boats on shore; and that the fishing was in no manner carried on by the said busses, otherwise than by the *Jean* of Staxigo. And the said Donald and Benjamin Miller gave further in evidence, by the admission of the said James Edgar, etc. that, on the first of April 1784, the commissioners of the customs addressed a letter to the collectors and comptrollers of the different ports in Scotland, taking notice of a memorial from the accomptant of the salt duty, stating the injuries suffered by the adventurers in the buss bounty white herring fishery, from their being restricted to fish on the coast of Scotland, without any authority for such restriction from the acts 11 Geo. III. ch. 31. and 19 Geo. III. ch. 36. which acts (it was in the said letter stated) gave the most unlimited scope for carrying on the said fishery in any part of the British seas, and therefore directing the said collectors and comptrollers to vary the form of the oaths taken by the masters of busses, and the licences granted to them; the licences to bear, that such vessel is to proceed upon the British white herring fishery, instead of saying that she is to proceed upon a voyage to the north-west highlands, as was then the practice; and, on administering the oath on the sufferance inwards, the master be required to swear that the herrings were British taken, and taken by the crew of such vessels only, instead of making them swear that they were caught on the coasts of Scotland: that, in the year 1786,



sundry busses, fitted out at Port Glasgow and Greenock, pursuant to the provision of the acts [540] made in the 11th, 19th, and 25th years of the reign of his present majesty, for the encouragement of the herring fishery, which were then in force, proceeded to Brassey Sound in Scotland, and other distant parts to fish; and, not having there met with success in the fishery, did, before the expiration of the term of three months, during which such vessels were by the said acts required to continue fishing, return to Crawford's Dyke bay in the river Clyde, situate between Port Glasgow and Greenock, where there was then a fishery of herrings, and did there continue fishing till the expiration of the term of three months, or until they obtained full cargoes of fish, and then returned into the harbours of Port Glasgow and Greenock aforesaid, and there discharged their cargoes; and the collector and comptroller of the customs at Port Glasgow, before they would make out certificates for the said busses in terms of the three last-mentioned statutes, stated the case of these vessels to the commissioners of the customs at Edinburgh, and requested their directions thereupon, in regard that the said vessels had returned into port, that is to say, into Crawford's Dyke bay, within the limits of the port of Port Glasgow, before the expiration of the said term of three months, or before they had taken full cargoes; and that the said commissioners of the customs, upon considering the case, ordered the said busses to be certified for the bounty of 30s. per ton, granted by the said three last-mentioned acts, and did cause the said bounty to be paid thereon; and that afterwards, in the same year 1786, the collector and comptroller of Port Glasgow transmitted to the commissioners, the certificates and other documents required by the said three last-mentioned statutes, then in force, for two busses or vessels called the *Janet* and the *Mary*, and in their letter transmitting the same, stated to the said commissioners that the said two vessels fished all their herrings in the Clyde at Crawford's Dyke bay, having never proceeded out of the said river to sea; and that the said commissioners, after considering what was so stated, did cause the bounties due by the said three acts then in force to be paid on the said two last-mentioned vessels: that the examiner of the salt duties at Edinburgh, being the officer appointed by the said commissioners of the customs to examine licences, certificates, and oaths, respecting busses or vessels fitted out pursuant to the several acts of parliament now in force, and to certify to the said commissioners whether the requisites of the said acts appeared thereby to be performed to entitle the owners thereof to the bounties thereby granted, having, in the month of October 1789, stated to the collector and comptroller of Thurso certain observations which occurred to him on the examination of the documents transmitted to the said commissioners, for busses fitted out at that port in the then last season, and required their answers thereto, the said collector and comptroller, in their answer, stated to the said examiner, among other things, that the said busses were all cleared out at the creeks of Wick and Staxigo: that in the then last season there was an early prospect of a plentiful herring fishing at those places, and that therefore the busses, after being fitted out for the fishing, did not proceed to sea, but lay in harbour, sending their [541] men and nets in boats to sea to fish: that the said examiner of the salt duty did not communicate the said answer of the said collector and comptroller to the said commissioners, but certified the requisites of the statutes to have been duly performed with respect to the last-mentioned busses, and the bounty of 20s. per ton was paid thereon accordingly; and the reason why the said examiner did so certify, without first stating the matter to the said commissioners, was, that he understood it to be settled, under the opinion of the late solicitor of the customs, that busses, after being licensed, might begin and end their fishing in port, and that it was in conformity to this construction in the cases that occurred at Port Glasgow, Greenock, and Fortwilliam, in the years 1786, 1787, and 1788, that he the said examiner did certify so as aforesaid; and that accordingly in every year since the commencement of the act of the 26th of the king, the bounties were regularly paid to the owners of the different busses fitted out upon the coast of Caithness in the years prior to the year 1792, which had fished precisely in the same manner with the aforesaid buss belonging to the said Donald and Benjamin Miller, whenever there was plenty of herring upon that coast: that at the time of the outfit, the said Donald and Benjamin Miller received no notice, nor did the said commissioners of the customs give any notification whatever, that it was necessary for the busses fitted out at Wick and Staxigo, or elsewhere, to fish in a different manner from what had

been formerly done by the busses fitted out at these ports, and in other places occasionally visited by the herrings, except that in the month of October 1792, the commissioners of the customs suspended their order for payments of the bounties on 28 busses, but without signifying to the owners thereof their reasons for so doing; which busses had been fitted out in the year 1792, at Thurso, Wick, and Staxigo, and had taken the whole or part of their cargoes while they lay in the harbours where they were fitted out, or had lain in the harbours where they were fitted out during the whole or part of the three months during which they were stated by the masters and owners to have been upon the fishing; and on the 25th of November 1793 the said commissioners finally refused their order for payment of the said bounties. Whereupon the counsel, learned in the law, for the said James Edgar, etc. did then and there insist, before the chief baron and other barons aforesaid, that the said several matters, so produced and given in evidence on the part of the said Donald and Benjamin Miller as aforesaid, were not sufficient to maintain and prove the said issue on the part of the said Donald and Benjamin Miller, for that it appeared thereby that the crew only of the said buss or vessel had proceeded on the said fishery in boats; but that the said buss or vessel had, during the time of the said fishery, remained in the harbour of Wick, where she was fitted out, and in the harbour of Staxigo, within two miles of the said harbour of Wick, and had not been herself employed in the said fishery; wherefore the said buss or vessel could not, upon the evidence aforesaid, be held and deemed to have proceeded upon the British white herring fishery, according to the true intent and meaning of the aforesaid statute, so as to entitle the said Donald and [542] Benjamin Miller, the owners of the said buss or vessel, to the bounty of 20s. per ton granted by the said statute; and that therefore the said Donald and Benjamin Miller ought to be barred of their said action, and they the said defendants (plaintiffs in error) acquitted thereof; and thereupon, the said defendants, by their counsel aforesaid, did then and there pray the chief baron and other barons aforesaid to say and declare to the jury aforesaid, that the said buss or vessel ought not, upon the evidence so given, to be held and deemed to have proceeded on the British white herring fishery according to the true intent and meaning of the aforesaid statute, so as to entitle the said Donald and Benjamin Miller, the owners thereof, to the bounty of 20s. per ton granted by the said statute; and that therefore the said Donald and Benjamin Miller ought to be barred of the action aforesaid. But to this the counsel, learned in the law, on behalf of the said Donald and Benjamin Miller, did then and there answer and insist, before the chief baron and other barons aforesaid, that, upon the matters and evidence aforesaid, so produced and proved on behalf of the said Donald and Benjamin Miller as aforesaid, the said buss or vessel ought to be held and deemed to have proceeded on the British white herring fishery according to the true intent and meaning of the aforesaid statute, for that it appeared thereby that the aforesaid buss or vessel had proceeded upon, and been actually employed in, the British white herring fishery, and no otherwise; and that the crew of the said buss had fished her cargo in the only possible way, and in the same manner as the fishing had been invariably carried on upon the coasts of Scotland ever since the commencement of the British white herring fishery, and according to the true intent and meaning of the aforesaid statute, so as to entitle them the said Donald and Benjamin Miller, the owners thereof, to the bounty of 20s. per ton granted by the said statute, and to maintain their said action against the defendants. And the said chief baron, with the consent and concurrence of the other barons aforesaid, did then and there declare his and their opinion to the jury aforesaid, that, upon the said several matters so produced and proved on the part of the said Donald and Benjamin Miller, the said buss or vessel ought to be held and deemed to have proceeded upon the British white herring fishery according to the true intent and meaning of the aforesaid statute, so as to entitle the said Donald and Benjamin Miller, the owners of the buss or vessel, to the bounty of 20s. per ton, granted by the said statute, and to maintain their said action against the defendants, and with that direction left the same to the said jury; and the jury aforesaid then and there gave their verdict for the said Donald and Benjamin Miller, and £85 9s. 3d. damages. Whereupon the said counsel for the said defendants did then and there, on behalf of the said defendants, except to the opinion of the said chief baron

and the other barons aforesaid, and insisted that the said several matters so produced in evidence by the said plaintiffs (defendants in error) were not sufficient to maintain their said action, but that they the said plaintiffs ought to be barred thereof, and they the said defendants be acquitted thereof; and inasmuch as the said several matters do not appear by the record of the verdict [543] aforesaid, the said counsel for them the said defendants did then and there proposee their said exception to the opinion of the said chief baron and the other barons aforesaid, so delivered to the said jury, and requested them the said chief baron, etc. to put their seals to this bill of exceptions, according to the form of the statute, etc.; and thereupon the said chief baron, etc. did seal this bill of exceptions, pursuant to the aforesaid statute, etc. etc."

Judgement being given for the defendants in error, the plaintiffs in error brought a writ of error returnable in parliament, and assigned the common errors, to which the defendants pleaded *in nullo est erratum*.

The plaintiffs in error submitted (J. Scott, R. Dundas, J. Mitford) to the House the following reasons for reversing the judgement of the Scotch court of exchequer:

It is incumbent on persons claiming a bounty to shew that they have faithfully, unequivocally, and strictly complied with the conditions upon which the bounty is given. The evidence in this case (or rather what is called evidence in the proceedings, but the admission of which might itself not improperly have made the subject of a bill of exceptions, being in great part mere hearsay, and in other part mere reports of *opinions* of mariners and fishermen upon questions of law) does not prove, on the part of the defendants in error, a compliance, in point of law, with the conditions prescribed by the act of parliament upon which the action is founded, either according to the words or the spirit of that act.

*First, as to the words of the act:*

By the 2d sect. the conditions (amongst others) are, that the decked buss or vessel shall *clear out of some port*, and shall *proceed* immediately upon the said fishery, and shall *there* begin and continue to fish for the space of three months, unless such buss or vessel shall within that space of time *return* into port with a full cargo, etc.

By the 3d sect. no person shall be entitled to the bounty for any buss or vessel which shall not *proceed* directly upon the said fishery, *from* that part of the united kingdom to which such buss or vessel shall belong; and the master and owners shall take out a licence to *proceed* on her intended *voyage*, etc.

By the 4th sect. before any such buss or vessel shall proceed on such *voyage*, the owner and master shall make oath, that it is really and truly their firm purpose and determined resolution that such buss shall *proceed* immediately upon the *British white herring fishery*, and *there* to continue fishing for the space of three calendar months; and the officer of the customs at such port is required to give licence and authority to *proceed* on such *voyage* as aforesaid, etc.

By the 5th sect. on the *return* of such buss or vessel into any port, the master shall make oath that such buss or vessel did, without delay, proceed *from* the port in such licence mentioned, *to* or *upon* the British white herring fishery, and did *there* remain and continue, etc. And the commissioners being fully satisfied of the faithful dealing of the master, etc. with respect to *such voyage* and fishing (N.B. The declaration in stating this part of the case drops the word "*voyage*" altogether), shall cause payment, etc. And the master is required to make oath, upon his return into port, that the vessel has not been on any *other voyage*.

[544] By the 7th sect. the bounty is directed to be paid by an officer of the customs for that part of Great Britain *from* whence the buss or vessel shall have *departed*, etc.

By the 8th sect. a bounty upon the barrel is given to *busses* in addition to that upon the tonnage. But the words of the 11th sect. giving a bounty upon the barrel also to *boats*, are remarkable: "Whereas the said bounties (viz. those upon the barrel granted to *busses*) will afford encouragement to *those fisheries alone* that are carried on either by *decked vessels*, fitted out under *such* regulations, and *continuing at sea* for such time, as *herein-before* respectively mentioned and directed, or by such open boats as are employed on the same coasts with those vessels, and find, in the masters of such vessels, *purchasers* of the fish they take," etc. (N.B. This word "*purchasers*" shews that the boats here meant are not the boats belonging to the buss.)

The words, *continuing at sea*, strongly point out that the bounties granted upon

busses, and their cargoes, are intended to be given to such only as *proceed to and continue at sea*, and consequently cannot be payable on a buss that never goes to sea, but lies in the harbour where she was fitted out during the whole of the fishing.

By former acts (see particularly the 11th Geo. III. c. 31. sect. 4.) the busses were directed to *proceed* to certain places of rendezvous particularly named, and to be at such places at certain fixed and appointed times. Such *precision* as to place and time, being found inconvenient, was repealed by the 25th Geo. III. c. 65. and the general term of *the British white herring fishery* substituted in its room; but the same language, with respect to all the other circumstances, as is here relied upon by the plaintiffs in error, (except in matters unconnected with the question in this case), is cautiously and studiously retained.

From all the expressions above cited, and others in the act, it appears to demonstration that the words *British white herring fishery* are used, perhaps, somewhat loosely, (but which arises from the necessity of the thing, the stations for the fishery constantly shifting as the shoals move), to describe places and stations for an employment, not the employment itself (N.B. The declaration states a proceeding upon the said fishing); and that those places or stations are *at sea*. Those words, and the word *voyage*, are used throughout the act as convertible terms. In several sections where the words "*such voyage*," and "*such voyage as aforesaid*," are made use of, the only *voyage* that can be collected from the words used before is that to or upon *the British white herring fishery*.

Such are the words of the act. It is necessary to add that the evidence in this case not only does not prove, but directly negatives every one of the conditions expressed or implied in these words. Here is no *proceeding* or *departing from* any port to or upon any *voyage*, and *there beginning and remaining*, or continuing to fish; or any *returning* into port. The buss remains in the same port in which it cleared out. It *proceeds* from one harbour to another, in the same port; the distance between which is only two miles, never out of sight of either harbour for one moment. It is then said to have *returned into* the port, which it had *never left*: and it is not attempted to be proved, or even alleged, in the declaration, that it had ever made any *voyage*, or continued *at sea*, for any space of [545] time at all. In one thing, indeed, the defendants in error may be said to have complied with the requisites of the act, they have made a *safe* oath, that "the vessel had not been upon any *other voyage*." They have thought proper likewise to produce evidence of their *intention to proceed* upon a voyage to the west coasts: such evidence is perfectly immaterial. Intention may excuse from a penalty, but cannot confer a right. But the producing of such evidence pretty plainly betrays an acknowledgement of some evidence of a *voyage* being thought necessary.

*Secondly, as to the spirit and object of the act.*

The object of the act, and indeed of all the acts which gave a bounty upon tonnage, appears manifestly to be in great part that of encouraging shipping and navigation, and the breeding of able and experienced seamen. Such an object can be attained only by encouraging a kind of fishery, which is carried on by means of vessels which, by their strength, equipment, and number of hands, are fit to make considerable voyages, and to keep the seas for some length of time. A mere boat fishery is plainly inadequate to this end; and it is greatly for this end that the buss fishery has been so distinguishedly countenanced and encouraged by the legislature; as appears from the preambles of several of the acts, and particularly from that of the 25th Geo. 3. c. 65.

The bounties have accordingly been for some time granted *exclusively* to busses; and no bounty was ever conferred upon the boat fishery till 26 Geo. 3. c. 81. by which, *for the first time*, a bounty was granted to the boat fishery of 1s. upon the barrel, for herrings landed from any boat or vessel *not* entitled to the bounty upon the tonnage. In the same spirit of encouraging navigation and the training up of seamen, it appears to be required that the master should have, upon the return into port, the *number of men* by law required to be on board of the said buss or vessel.

If such is the object and spirit of the act, the construction contended for by the defendants in error completely frustrates and repeals it. The buss becomes a mere stalking horse; and not one witness was called, in this case, to prove that it was used for any necessary or appropriate purpose of navigation or fishery, that might not as well have been answered by a hut upon the shore.

The grounds, upon which the defendants in error attempted to support their construction of the act, are wholly untenable. The alleged want of accommodation on board; the expence and difficulty upon certain coasts of carrying on the fishery in any other manner; and that the invariable practice is to carry it on in the manner they have done; all prove too much. For, if these allegations are true, what all the world has hitherto believed of following the shoals is a mere chimera; the herring fishery by *busses* is now, at least, at an end; the act is useless and *impracticable*; and a new law ought to be made, better adapted to the nature of things. But it is a manifest absurdity, under such circumstances, to claim a bounty, *by virtue* of the act in question.

[546] As to determinations of the commissioners of the customs, supposing the cases in which determinations were given had been similar to the present, and the commissioners had been a court of competent jurisdiction to decide upon questions of law; it would, even in that case, have been a novel attempt to establish a claim to a bounty, as by a side-wind in the way of a compensation for damages incurred through reliance on erroneous decisions of such a jurisdiction: but the cases in which these determinations were given are essentially different from the present, and the commissioners have no jurisdiction to decide upon points of law. They have a publick trust to execute; in doing which, if they happen to deviate into error, they are bound, whenever they discover it, to betake themselves to the right course. The practice of the officers was unknown to the commissioners, otherwise than as it appeared by the documents transmitted to them, according to which every requisite of the law appeared to have been performed. But supposing the practice, as it is stated in the evidence, to have been known to, and acquiesced in, by them, it only shews that the commissioners were mistaken. But the defendants in error are peculiarly unfortunate in complaining of want of notice of the grounds of a new determination, while they admit that before fitting out their vessels the commissioners had suspended payment of the bounties upon a great number of vessels *precisely in the same circumstances with their own*. In reality, a practice contrary to law has too long prevailed: the plaintiffs, on discovering it, took every proper measure to put a stop to it. In opposition to these measures originated the present action, in which it comes now to be decided by a judgement of the court, in the last resort, whether the practices alluded to, which are avowed and maintained by the defendants in error and others, be or be not conformable to law.

The defendants in error assigned (W. Gray, W. Adam) the following reasons for affirming the judgement:

I. That it is admitted by the plaintiffs in error that the buss or vessel called the *Jean* of Staxigo, belonging to the defendants in error, was properly fitted out for the British white herring fishery, and did clear out of the port of Thurso for the said fishery, by taking and receiving the necessary papers and documents from the custom house there; and that all the conditions, requisites, matters, and things directed by the act of parliament, previous to proceeding on the fishery, were done and performed with respect to the said buss or vessel.

II. It appears from the evidence stated in the bill of exceptions, that the said buss or vessel, after being cleared out in the custom house of Thurso, being the port of the precinct, did proceed immediately upon the said fishery, by sending her boats and crew with her nets to fish, which is the invariable mode of fishing for herrings upon all the coasts of Scotland, the busses the meanwhile lying in harbours aground or afloat as circumstances may require and admit of; and that upon the coasts of Caithness, which are in an extraor-[547]-dinary degree dangerous, busses cannot fish in any other *than the general way*, which is, by lying in one or other of the harbours of Thurso, Wick, or Staxigo, and sending their boats and crews to fish in the manner before mentioned.

III. That it hath been always the practice, since the repeal of rendezvousing, by the act 25 Geo. 3. c. 65. for busses to remain in the outfit harbour when fish are to be caught there, and to proceed upon the fishery by their boats and crews. That this practice was agreeable to the words and spirit of that and the subsequent British white herring fishery acts, and as such was well known and sanctioned by the plaintiffs in error, and the different officers of the customs acting under them, who certified the dispatches and paid the bounties under that practice in every instance that occurred; and the defendants in error, who followed out all the re-

quisites of the act of parliament, under the inspection of the officers of the customs, and in the usual manner, had not the most distant notice that they ought on the present occasion to have followed a mode of conduct different from that which had repeatedly received the approbation and sanction of the plaintiffs in error. A circumstance, while it proves that the former practice, even in the apprehension of the plaintiffs in error, was proper and regular, shews at the same time the hardship put upon the defendants in error, (who had fitted out the *Jean* of Staxigo at a very great expence), by the construction lately attempted to be given to the law by the plaintiffs in error.

IV. The construction contended for by the plaintiffs in error, as it is directly contrary to all proceeding which has hitherto taken place, and to the construction formerly given by the plaintiffs in error, and all those who acted under them, and on whose understanding of it the defendants completely relied, so it does not seem to be warranted by the words of the act. The oath which the act 26 Geo. 3. c. 81. § 4. prescribes to be taken by the master and owner is, "That it is really and truly their firm purpose and determined resolution, that such buss or vessel, as then manned, furnished, and accoutered, shall *proceed immediately upon* the British white herring fishery," etc. It appears by the evidence that the *Jean* of Staxigo did so: that the instructions given to the master were, to proceed to the north-west Highlands in case the herrings did not start, and he was not successful on the coast of Caithness: That the buss accordingly set sail, but, meeting with contrary winds, was obliged to put back to Staxigo. In the meantime the herrings appeared again on the coast of Caithness, and a full cargo was got, in the only way the fishing can be or ever has been carried on upon the coasts of Scotland, viz. by the crew of the buss going in their boats and fishing them.

To the objection of the appellants, "That the crew only of the said buss or vessel had proceeded on the said fishery in boats; but that the said buss or vessel had, during the time of the said fishery, remained in the harbour of Wick, where she was fitted out, and in [548] the harbour of Staxigo, etc. implying (as was most strenuously insisted in upon the trial) that the buss ought to have made a voyage, to entitle her to the bounty;" it was answered,

That busses, properly fitted and cleared out, proceed upon the fishery the moment they shoot or wet their nets, and take herrings any where in the British seas. It is impossible to contend with success that the act intended that a voyage should be taken to a distant quarter, when the seas the busses were thus to leave were swarming with herrings, and while it was extremely doubtful whether herrings could be got in the quarter to which she was to sail.

The exception taken by the plaintiffs in error proceeds upon a misconstruction of the 26 Geo. 3. c. 81. which provides that the officers of the customs, on the return of a buss, should certify her condition, and should also administer an oath to the master, "That such buss or vessel did without delay proceed from the port in such licence mentioned upon its last clearance, from thence outwards *to or upon* the British white herring fishery," etc. These words, however, when considered and compared with the oath which the owner and master are obliged to take on clearing outwards,—that the vessel shall *immediately proceed upon* the white herring fishery, and independent altogether of the spirit and object of the statute, (which are most completely acted up to by the busses taking full cargoes), mean nothing more than that the buss or vessel should proceed upon the white herring fishery according to the only mode in which that fishery could be carried on.

The buss in question proceeded upon the herring fishery in virtue of her clearance outwards, as without such clearance she could not have proceeded at all upon the establishment, and so in fact literally fulfilled the words of the statute, by which they are entitled to proceed either *to or upon* the said fishery; and having therefore proceeded upon the said fishery from the port, in the only way in which they could proceed upon that fishery, consonant with the owner and master's oaths on clearing outwards, they have done every thing that even this clause required. Indeed the alternative of proceeding *to or upon* the herring fishery, together with the abolition of rendezvousing, by the act of 25 Geo. 3. c. 65. point out evidently the intention of the legislature, that in case the herring fishery was at hand, the busses should be entitled to proceed immediately upon it; or if at a distance, they should immediately

proceed on a voyage to it. The main object being to look out for herrings and catch them wherever found in the British seas.

The defendants in error apprehend that the plaintiffs have been led to misinterpret the meaning and intention of the legislature, and of the words of the oath and of the statute, from confounding the fishery which takes place on the coasts, and which can only be executed by boats, (the fishing ground being in the vicinity of the shores, where it would be impracticable to shoot nets from the busses), with the deep sea fishing taken notice of in the 14th sect. of this act, and which can alone be carried on by busses, in the [549] middle of the north seas or in any ocean, fitted up for that purpose, with apartments in their holds for stowing away their nets, containing their salt, and curing their fish when caught, and for which greater premiums are provided, in contradistinction to the ordinary buss fishing carried on along the coasts of the kingdom; where, if the busses were even fitted up to shoot their nets without the assistance of boats, (and which they are disqualified from by the existing law appointing busses on this establishment to have on board as many barrels as they are capable of containing), they would not accomplish it once in a season, without running the risk of losing their nets, or what is more probable, the crews, busses, and nets.

After hearing counsel in this cause, the following question was then put to the judges:

Whether upon the matters stated in this record the plaintiffs [*in the original action, the defendants in error*] have shewn that they had a good cause of action to recover the bounty of 20s. per ton, given by the statute made in the 26th year of the reign of his present majesty for the more effectual management of British fisheries?

Whereupon the lord chief baron [Macdonald] of the court of exchequer delivered the unanimous opinion of the judges present in the negative. (See 3 Anst. 930.)

ORDERED and ADJUDGED, That the judgement given in the court of exchequer in Scotland be, and the same is hereby REVERSED. (MSS. Jour. *sub. ann.* 1797.)

[It is thought sufficient in this place to state shortly, without detailing the case at full length, that § 14. of the statute 38 Geo. 3. c. 92. for regulating the Scotch distilleries, (by which section a penalty of £500 is imposed upon distillers in Scotland working their stills on Sundays, declaring that the licence-duties thereby imposed shall be held and taken as the duties for six *working-days* in the week), originated from the case of *Easton, Fraser, and Co.* (distillers) plaintiffs, v. *Brown and al.* (commissioners of excise for Scotland), defendants, in error: heard before the House of Lords April 3, 1798. In that case the distillers had attempted, by working their stills on Sundays, to obtain a drawback on spirits made for the English market, (under stats. 28 Geo. 3. c. 46. and 33 Geo. 3. c. 61.) beyond the duty payable by them for their stills in Scotland: and thus, in fact, to secure a *bounty* to themselves, which would essentially injure the revenue. An action of debt was brought by the plaintiffs in error against the defendants, in the Scotch Court of exchequer, to recover £5433 0s. 11d. alleged to be due to them on balance of accounts for such drawbacks. The jury found a special verdict, which was argued before the said court of exchequer, who gave judgement for the defendants, on the ground that the plaintiffs could not lawfully work their stills on Sundays, according to the true intent of the acts; the calculations of duties and drawbacks in which were made on the produce of stills according to six working-days only in a week. This judgement was affirmed in the House of Lords.]

## [550] STATUTE OF DISTRIBUTION.

CASE 1.—DAVID HAY BALFOUR, & al.,—*Appellants*; HENRIETTA SCOTT, *Respondent* (et è contra) [11th April 1793].

[*Mews'* Dig. viii. 270; 1 Scots R.R. 692. · 10 Rul. Cas. 327. See *Brodie v. Barry*, 1813, 2 V. and B. 127: *Baring v. Ashburton*, 1886, 54 L.T. 463.]

If a Scotchman dies intestate, having his domicile in England, his whole personal estate as well in Scotland as England shall be distributed according to the law of England; and an heir (of entail) to whom his heritable or real estate in Scotland descends shall not be obliged to collate (or bring into *hotch pot*) such

heritable estate; inasmuch as the title of the heir to a share of the intestate's personal estate accrues by the law of England.

So in the case of *Ommanney v. Douglas*, heard before the House of Lords 8th March 1796, it was also DECLARED that the succession to the testator's property should be regulated by the law of England.

The question there was principally as to the *fact* of his domicile. The court of session held, that his succession should be regulated by the law of Scotland. "in respect he was born in Scotland and occasionally had a domicile there; that he died in Scotland, where some of his children were boarded, and that he had not at the time a domicile any where else." The House of Lords reversed this interlocutor of the court of session, on the ground that the facts of the case did not bear it out: and the respondents in their printed case admitted it as completely fixed and settled, "That the *lex domicilii*, and not the *lex rei sitae*, governs the whole moveable succession of the deceased, both testate and intestate, where there is personal property in different places, and subject to different laws."

The arguments at large on the question of the preference of the *lex domicilii* to the *lex loci rei sitae*, as curious, and likely to be applicable in future cases, are collected in an appendix to this case: from the cases of *Bruce v. Bruce* and *Hog v. Lashley*, determined in the House of Lords, the former on April 15th, 1790, and the latter on the 7th May 1792. The Editor is indebted to Mr. Gwillim, the able editor of Bacon's Abridgment, for the perusal of the latter of these cases. See p. 462. of the appendix at the end of the 7th volume of that very valuable book.

See also *Bempde v. Johnstone*, and *Graham v. Johnstone*, 3 Vez. junr. 198. that the place of an intestate's residence is *primâ facie* to be considered as his domicile: but which may be rebutted and supported by circumstances.

The lord chancellor (Loughborough), in giving judgement on that case, observed, that "the case of *Ommanney* and *Douglas* was one of the strongest cases: it came before the house of lords with all the respect due to the court of session on the very point, and under circumstances that affected the feelings of every one; for, the consequences of the judgement, which the house of lords found themselves obliged to give, (reversing the judgement of the court of session), were harsh and cruel."

David Scott, great-grandfather of both parties, stood vested in the unlimited fee of the estate of Scotstarvet in Scotland.

His son David married (Nov. 30, 1716) Louisa Gordon, daughter of sir Robert Gordon of Gordonstoun, and by their contract of marriage, David the *first* provided his estate of Scotstarvet to his son David the *second*, and the heirs male of the marriage; whom failing, to the heirs male of his son of any other marriage; whom failing, to his other heirs and assignees whatsoever.

Of this marriage there were several children, viz. David third, last of Scotstarvet, general John Scott the respondent's father, Elizabeth Scott, who married Peter Hay of Leys, esquire, grandfather to the appellant David Hay Balfour, Katherine a party in the court below, but who has not appealed, and Lucy one of the present appellants.

[551] David the second executed (Jan. 7, 1743) a settlement of his land of Scotstarvet, and whole other estate, on himself for life, and David third, his eldest son, in fee, and the heirs male of his body; whom failing, to his second son John and the heirs male of his body; whom failing, to the other heirs male of his body; whom failing, to the heirs whomsoever of his own body; whom all failing, to his other heirs and assignees whatsoever; "the eldest heir female excluding heirs portioners, and succeeding without division through the whole course, and in every degree of the succession, in all time coming."

By this settlement, David second reserved power to alter; and it is provided, that the whole heirs of entail, male and female, succeeding to the estate, shall be obliged to use and bear the surname, arms, and designation of Scott of Scotstarvet; and that a female so succeeding shall be obliged to marry a gentleman of the name of Scott, or who shall assume that surname; and in case of contravention by any of the heirs, it is provided, that the person so contravening, or the wife where the husband contravenes, shall for him or herself only, forfeit the estate which shall descend to the person, though procreated of the contravener's body, who would succeed if the contravener were naturally dead.



In consequence of the reserved power, David the second executed (June 4, 1762) a new settlement of his estate to the said David his eldest son, and the heirs male of his body; whom failing, to the same destination of heirs as before, under the fetters of a strict entail directed against David alone.

David the second died (1767), whereupon his eldest son David the third entered to the possession of the estate.

David the third brought an action (1771) in the court of session against his younger brother John, (the respondent's father), and the whole other heirs of entail then in life, for setting aside the deed executed by his father in 1762, as being granted *contra fidem tabularum nuptialium*; and also in regard that he, as heir male of the marriage between his father and Miss Lucy Gordon, was entitled to the fee-simple of the whole estate in the contract of marriage, and that his father had no power to impose upon him any restrictions or prohibitions whatever. In this action, the court of session reduced and set aside the deed in question (March 11, 1773). From this period downwards to his death, David the third enjoyed the estate of Scotstarvet, under the settlement of 1743, by which the fee was vested in him.

His younger brother, general John Scott, predeceased him in 1775, leaving issue three daughters, the respondent and her two younger sisters, Lucy and Johanna.

David the third resided in Scotland for some years after his father's death; but in 1774 he sold off all the furniture of his mansion house of *third-part*, the furniture in one room excepted, and went to London, where he took the lease of a house, and also the lease of chambers in Gray's Inn, and there he continued till his death, bestowing his whole time and attention on a very considerable property he had in the public funds. He came to Scotland on different [552] occasions to visit his friends, but never resided at his mansion-house of *third-part*; and for the last three years of his life never was in Scotland. He died at London, and was buried there, in February 1785, leaving no issue, and no settlement whatever of his affairs.

His property at his death consisted of a monied estate in England, where his residence was, to the amount of between £60,000 and £70,000 sterling, invested in navy and victualling bills, and other government securities.

His property in Scotland consisted, 1st, of his estate of Scotstarvet; 2dly, an adjudication led at his instance against David Loch's estate of Carnbee for about £1000 sterling: and, lastly, his personal estate, amounting to £1200 or £1500, and chiefly composed of arrears of rent.

The titles made up to the Scotch property were as follows: the respondent obtained herself served heir of entail and provision in special to her uncle in the estate of Scotstarvet, in terms of the settlement 1743; but no titles as yet have been made up to the adjudication, or any other right descendible to the heirs of line.

Mr. Scott's nearest in kin at his death were six in number; the respondent and her two sisters, his nieces by the deceased general Scott, his brother; John Hay Balfour of Leys, and Katherine and Lucy Hay, his nephew and nieces by the deceased Mrs. Hay of Leys, his sister. The Scotch executry was confirmed by five of the said six nearest in kin, viz. the respondent's two sisters, and her three cousins. The respondent entered a caveat, that the procedure should in no respect prejudice her right and interest in the said personal estate, or any part thereof. This method was taken on account of a question which it was foreseen might arise respecting collation.

As to the personal estate in England, the guardians of the respondent, with the other five nearest in kin and their guardians, concurred in granting powers to John Way, of Lincoln's-Inn-Fields, esq. to take out letters of administration, and manage the same: he has made some payments to the appellants, and the remainder continues in his hands.

John Hay of Leys, father of the present appellant, David Hay Balfour, and Katherine and Lucy Hays, sisters to John, and their husbands for their interest, soon after brought a declaratory action before the court of session against the respondent Henrietta Scott. The summons prays to have it found and declared, "that the succession to the personal estate or executry of the said David Scott, wherever situated, ought to be regulated by the laws of Scotland, of which he was a native, and according to the ordinary and usual rules of succession, in the case of persons natives of that country dying intestate; and that of course the said defender, Miss Henrietta Scott, cannot claim any share of the said executry, and at the same time

claim in the character of heir, without collating: that if she takes up, or has taken up, the succession to her uncle's heritable estate *exclusive*, as heir to him, whether of provision or otherwise, she will fall to collate the same with the pursuers and the other executors of Mr. Scott, in the event of and immediately [553] upon her taking a share as one of the nearest of kin of the executry belonging to him, situated at the time of his death either in Scotland or England; and in case she has already drawn or received such share, she ought to be decerned to collate with the executors the heritage of her said uncle, taken up by her in the character of heir to him as aforesaid, or otherwise; and at any rate to repeat and pay back to the pursuers such sum or sums as she may have so drawn from the said movable estate and executry."

This action came before the lord justice clerk (sir Thomas Miller) ordinary (Feb. 19, 1787), who, after hearing counsel and advising memorials, took the cause to report, and ordered informations.

Upon the part of the respondent it was pleaded, 1mo, that in so far as regarded the English property, the succession must be governed by the law of England, because the effects were situated there; and it was (they said) an established rule in the law of Scotland, that the *lex rei sitae* governed every question of intestate succession. In support of that proposition, the respondent referred to a variety of decisions which had determined the point; particularly the case, *Davidson v. Elcherson*, 15th January 1778, and *Henderson v. M'Lean*, *eo die*, and *Morris v. Wright*, 19th January 1785, in which last the court "without entering into a particular discussion of the general question, considered the point as now firmly established, that the *lex loci* ought to be the rule." That the government securities, of which Mr. Scott died possessed, were locally situated in England, were payable there, and transferrable by the English laws and forms alone; of consequence she was entitled to that share of the English property which the law of England gave her, and where she was advised the rule of collation which prevails in Scotland did not exist.

For the appellants it was upon this point maintained upon general arguments, and under the authority of a decision, *Browns against Brown*, 28th November 1774, that the *lex rei sitae* ought not to be applied to such a question; but that the *lex domicilii* was the only general rule which could regulate the intestate succession of the deceased; and that in this case, Mr. Scott, though he died in London, had his legal domicile in Scotland: and it was farther maintained, that even supposing the succession to the personal estate in England was to be regulated by the law of England, still it would be incumbent on the respondent, by the law of Scotland, if she took the Scotstarvet estate in Scotland, to collate the same with the other nearest of kin with whom she shared the personal property in England.

It was replied for the respondent, that it being now a settled point that the *lex rei sitae* was to govern all questions of intestate succession, it was too late to go back to general arguments: that it was by no means clear upon what principle the court decided the case of *Brown*; but there was reason to presume, from the words of that decree, that the local situation of the effects entered into consideration in determining it; and that at all events it had been admitted by the subsequent practice to be an erroneous decision: that the government securities in which Mr. Scott's English estate was vested, though due by Great Britain, and not by England as a *sepa*-[554]-rate state, were locally situated in England, and were to all intents and purposes English securities: and, lastly, that the respondent would take, by the authority of an English court of law, such part of the English estate as she was entitled to; and that a court of law in Scotland had no power on that account to take from her any part of the heritable estate to which she succeeded in Scotland, and there was not the least foundation for any such thing in the law of Scotland.

The respondent maintained, in the second place, that even supposing the *lex domicilii* was to be held as the rule, still the law of England would govern the succession, because Mr. Scott had been domiciled for many years in England, and continued so when he died: that though his real estate in Scotland was considerable, being about £1500 a-year, yet his personal property in the funds was still more so, and capable (which was not the case with his land estate) of being increased by a proper attention to an unlimited degree. For this reason he resolved to *abandon* that country, reside in London, and devote his whole time and attention to the management and increase of his great property in the funds. In prosecution of this plan, he sold off all the

furniture which was in the house upon his estate in Scotland, except that of one room, and left no other servant in the house but a gardener. After this he visited Scotland occasionally; and for the last seven or eight years of his life, he was but once or twice in it; and at these times did not stay a single night at his own house, where indeed there was no accommodation for him, but lodged at the country-house of the respondent. For the last three years of his life he was not out of London. There he had chambers in one part of the town, and a house in another, with a family and domestics, and there he was occupied in managing and increasing the great personal estate he had in the funds.

It was contended for the respondent, therefore, that there was nothing in the circumstances urged for the appellant, to show that Mr. Scott was domiciled in Scotland, which were chiefly these, that he was a native of Scotland, possessed of a real estate, and held a public office in Scotland. The respondent observed, that although it was true that Mr. Scott originally, and in the early part of his life, was a domiciled Scotchman, there was nothing to hinder him from altering that, and establishing to himself a different domicile. The writers on the civil law very accurately treat the subject; and Voet in particular defines the domicile to be the place, "*in quo larem rerumq. ac fortune suarum summam constituit unde rursus non sit discessurus si nihil avocet undeque cum profectus est peregrinari videtur.*" (De Jud. No. 92. et sequend.)

In a subsequent paragraph, the same author expresses himself thus: *Quoties autem non certo constat ubi quis domicilium constitutum habeat, et an animus sit inde non discedendi, ad conjecturas probabiles recurrendum (est) ex variis circumstantiis petitis: \*\*\*\* Si in aliquo loco majorem bonorum partem possideat, aut bonis dividendis quae alibi possidebat in aliam urbem cum familia se contulerit ibique assidue versatus fuerit vel jus civitatis aliquo in loco sibi acquisiverit atque [555] ita illic habitet.*" (Ibid. No. 97.) Every word of these authorities applies to the case of Mr. Scott. The *summa fortunarum suarum* he had placed in London; he never left it, unless for a few weeks to attend his affairs in Scotland; and when he did leave it, *peregrinari videtur*, he had dismantled his own house in Scotland, and rendered it incapable of being his residence, and lodged as a stranger or traveller would in the house of the respondent. In the very terms of the last authority, his *major pars bonorum* was in London; he had sold the effects *quo alibi possidebat*; and he had betaken himself with his family in *aliam urbem*, and where *assidue versatus fuerit*, having, as already said, devoted his whole time and attention to the management of his fortune in the stocks.

Although Mr. Scott held a public office in Scotland, it was a mere sinecure, the business of which he did by a deputy, so that it had no connection with his domicile, or any tendency to found one. Great numbers of the subjects of this country, who have never been out of Britain, have very lucrative offices in the West Indies, and other places abroad; but it never was supposed that such offices constituted a domicile in Jamaica or other foreign parts. In like manner the circumstance of his having a real estate in Scotland could have as little influence in fixing his domicile.

The respondent further observed, that the conduct of the appellants themselves afforded incontestible evidence of the fact, that Mr. Scott died domiciled in England. For in the case of moveable succession, the executor, or nearest in kin, is bound to make up a title by confirmation, which is the *additio hereditatis in mobilibus*; and that is done either in the general commissary court of Scotland, at Edinburgh, or in the commissary court of one of those particular commissary districts into which Scotland is divided. Where a person dies within the bounds of a particular commissariot, it is incumbent only, and only competent for the executor to expedite his confirmation in the commissary court of that district where the deceased had his domicile, as was found in the case of the creditors of lord Mersington, observed by Fountainhall, 7th January 1708; and the case of lord Kimmergham's creditors, 19th January 1753; but when the deceased resides, or is domiciled abroad, it is then necessary to confirm before the general commissary court at Edinburgh: the appellants therefore, if they had considered Mr. Scott's domicile to have been in Scotland, ought and would have confirmed his executry before the commissariot of St. Andrew's, within which the estate and former country-house of that gentleman is situated; nor could a valid confirmation have been expedite by them elsewhere, but

instead of this, they confirmed before the commissaries of Edinburgh, the proper court where a person deceased has no domicile in this country, which shews that they themselves were sensible that Mr. Scott had no proper residence or domicile in Scotland.

The respondent therefore submitted, that whether the English estate was to be considered *ratione rei sitae*, or *ratione domicilii*, it was in either event perfectly clear, that it was to be regulated by the law [556] of England; and that the rights of the parties *quoad* that estate, ought to be determined by the courts of law in England: that the only question which remained was relative to the Scotch executry, or personal estate; and whether, in order to pave the way for the respondent's claiming with effect her share as next of kin of that personalty, it was or was not incumbent on her to collate the estate of Scotstarvet, which she took under the special deed of her grandfather.

For the respondent it was maintained, that though she was bound to collate heirship moveables, the adjudication over the lands of Carnbee, or any other effects descendible *ab intestato* to her as heir of line, yet she was not bound to collate the Scotstarvet estate, which she took as heir of entail and provision: for this purpose the respondent referred to the nature and origin of collation, which was a rule of the Roman law, first introduced by the edict of the praetor to preserve equality betwixt the *forisfamiliated* children, or *emancipates*, and the *sui haeredes*, who remained in family with the father, the last of whom were bound, if the former chose to collate what they had previously acquired, to admit them to an equal share of the whole succession to their father. But it was shewn from several authorities, that this did not take place wherever a collation was discharged by the will of the father, either expressed or presumed; nor did the privilege of collation extend to what a child had acquired, not by succession as heir at law, but by legacy or other singular title: "*Nec aliud dicendum*," says Voet, (tit. 37. lib. 6. No. 25.) "*signis neu jure haeredis sed tantum particulari titula puta legali aut fidei commissi adeoque extero jure notabilem adipiscatur partem patrimonii parentis defuncti*, c. 1. §. *sed etsi legalis* 7. ff. *h. t. l. a patre* 10. l. *filiam cum* 16. c. *h. t. l. si pater* 4. *De totis collatione*." Nor

did it take place in collateral succession, Idem No. 6. This civil law collation is exactly followed in the law of Scotland, in the case of moveable succession, where, in ascertaining the amount of the *legitim*\* due to children, all special provisions obtained from the father out of his personal estate must in that case be thrown in.

In the case of collation betwixt heir and executor, which is somewhat different from either of the two kinds of collation just mentioned, it seemed for a long time to have been understood among the Scotch lawyers, that the rule extended not beyond immediate descendants: lord Stair speaks of collations as merely a question among *bairns*. But it was admitted for the respondent, that since the year 1743, when the decision *Chancellor v. Chancellors* was pronounced, observed by lord Kilkerran, p. 154. collation was understood to extend to collaterals, and that in the words of the reporter it was then for the first time, and has since been understood, a settled point, "That the heir is, upon collating the heritage, entitled to his share of the moveables, not only in the case of children succeeding to their father, but also in the collateral succession."

[557] But holding this extension of collation to collaterals to be well founded, still it is clear that it can only apply to the heir *ab intestato*, not the person who succeeds by a special deed, such as an heir of provision, and far less an heir of entail. The law of Scotland having established a distinction betwixt the heritable and moveable succession, and given the first to the heir, and the second to the next of kin, it left the former at liberty, if he found it for his advantage, to participate in common with his younger brothers and sisters in the whole mass of their father's succession, and allowed him to relinquish that feudal privilege of taking the heritage to himself exclusively, and by dividing it alongst with the other children, and adopting that exact equality among the whole family, for attaining which the rule of collation was first introduced. Collation betwixt the heir and the nearest of kin implies, in its very nature, that the succession is *ab intestato*, i.e. by the provision of law, and not

\* The child's right to a certain share of the father's personal estate: See Appendix to this case.

by virtue of any special provision or will. It is a remedy introduced by the law to correct an inequality which the law itself makes; but it could never be meant that the law should interfere to correct an inequality made *provisione hominis*; for here the succession is regulated by will, not by law; and therefore the rules which take place in legal succession are out of the question.

It was argued for the appellants, and admitted on the part of the respondents, That in the case of an estate being conveyed by a father to his eldest son or grandson, the necessity of collating was not thereby excluded; and that it was so found in the case of Murray, 16 July 1678, observed by lord Stair: that the grantee in such case took by special deed, as much as the respondent did in the present case the estate of Scotstarvet: but it was answered, that the reason of this was obvious; the grantee being in such case *alioqui successurus*, and taking the estate, not as a purchaser, but *praeceptione haereditatis*, and as heir at law, the full operation of which he had in him, as much as if he had made up titles by service. In such case it might justly be presumed, that nothing more was intended than to supersede the necessity of a service. The grantee required nothing more by the deed than what he had by the law, and might take under the one, or serve heir under the other character, as he pleased; no person having any interest or title to oblige him to adopt the one in preference to the other.

But in the respondent's case it was impossible to maintain, that the Scotstarvet estate was conveyed to her, upon whom it would otherwise have devolved *ab intestato*. No daughter can ever be held in law to be *alioqui successurae*; because there is always a chance of her being excluded by a son. And hence it is, that a daughter, or heir collateral, taking by special conveyance, is not understood to be liable upon the passive title of *praeceptio*. But supposing the expression could admit of being applied to one who was *possibly*, but is not *certainly* to succeed by law, which is the only legal meaning, it still could not apply to the case of the respondent, who was not *alioqui successura* in any sense. She and her two sisters might be said to be *alioqui successurae* in this improper sense, and all three [558] together and equally; but not any one of them as heir *ab intestato*.

No heir portioner can be said to be heir *ab intestato* by herself, or in any particular part of the legal succession of heirs portioners is *pro indiviso in unam quamque glebam*; and there is no such thing as one of them succeeding without the rest. Supposing two-thirds had been conveyed or provided to a stranger, the remaining third would not have descended at law to the respondent, but to her and her two sisters, who would have been heirs portioners in it.

When any one of the heirs portioners is disinherited in whole or in part, there is an end to the legal succession, and consequently the demand of collation, as much as when a father conveyed his estate to a second son, or a brother to a brother, who is not his heir, to the prejudice of him who is, in which cases no collation could take place. Such conveyance, like the deed 1743, may have the effect of bringing in the heir at law upon the personal estate, yet collation cannot be demanded from the grantee, whose character as one of the nearest of kin entitles him to a share of the personalty *ab intestato*, but he takes the real estate upon quite a different title.

The respondent referred, in support of her doctrine, to various authorities, and particularly to the decision *Ricart v. Ricarts*, 19th November 1720, observed by lord Kaines, and to which Mr. Erskine refers in the following passage, as settling the point in the law of Scotland: "It is only the legal heir *ab intestato* who is thus obliged to collate the heritage with the other next of kin, in order to have the benefit of the moveable succession; where, therefore, in the case of daughters only, the heritable estate is settled on the eldest by an entail or destination, she is entitled upon her father's death to her just share of the moveables with the other daughters, without collating that estate; Kaines, 20; for she succeeds to the heritage by provision of the father, who had full power over it; and that provision can in no degree affect the moveable estate, which by the legal succession descends equally to her and her younger sisters." (B. 3. T. 9. sec. 3.)

In that case it was contended for the younger sisters, that the succession to the personalty ought to belong to them, excluding the eldest as heir of entail; "otherwise there would be a very notable disproportion betwixt the succession of the pursuers and defenders, whose relation to the deceased are equal; and in this case, the value

of the tailzied is so great, that she would not collate, nor could she by the quality of the entail."

It was answered, "That in so far as the father by an entail has preferred one of the daughters, she succeeds in that estate by the will of the father, who was pleased to exclude heirs portioners; and as to the rest of his estate, it descends *tanquam ab intestato*, and is devolved equally to all the daughters; and there is no different channel of succession amongst daughters, either as to the heritage or moveables, and consequently no seclusion of an heir, because there is no privilege to elder or younger daughters [559] as to heritage; and the seclusion of the heir from the moveables is properly *ab intestato*, where the heir male is preferred in the heritage to the younger sons or daughters. It is true, if an entail was made in favour of the heir male, who would have the preference *ab intestato*, the express will of the father could not alter that destination of law as to the moveables, which was to fall to the legal succession. But suppose a father should entail his heritable estate to a second or third son, not *alioqui successurus*, such an heir of tailzie would not be excluded from his share of moveables as nearest of kin."

The interlocutor was in these words: "That Catharine Riccart, heir of entail to a part of her father's heritable estate, hath right as heir portioner to a third of the unentailed estate, notwithstanding her succession by virtue of the tailzie; as likewise hath right to a third of the moveables with the petitioner, her two sisters, and that without collation of any part of the tailzied estate."

In the present case the respondent succeeds to her uncle as heir of entail under the deed 1743; and though it is not an entail of the strictest kind, yet it is still attended with limitations and restrictions which will tie up the respondent to a certain extent in the free use of her property. She takes under that destination as the eldest of three portioners, to the exclusion of the other two, who would have succeeded in course of law. She is herself excluded from taking in that character, and is called *provisione*, and becomes therefore *haeres factus*, or heir of entail, in the proper sense of the word. She is at the same time laid under an obligation to bear the surname and arms of Scott, and marry a gentleman of that name, or one who will assume it; and these conditions are enforced by an irritancy. These conditions are by no means of a trivial nature, as they not only affect her personal liberty, but may occasion to her the loss of another estate, if she should be called to the succession of it, under the conditions of using no other name and arms than those of the family to whom the estate belonged. The respondent therefore is disabled by her grandfather's will from throwing this estate into the mass of her uncle's succession; nor can she counteract or defeat that settlement either with propriety or safety to herself: the condition of bearing the name and arms, etc. being enforced by an irritancy and forfeiture of a right to the estate.

It was argued for the appellants, that the decision in the case of Riccart did not apply; because the sisters in that case sustained equally the character of heirs and nearest in kin; and there were not, as in the present case, other nearest in kin different from the heir. But this answer does not seem to be at all satisfactory; for if it be true in general, as contended for by the appellants, that collation applies to the case of an heir of entail taking by special deed, Catharine Riccart ought in that case to have collated with her sisters, what she thus took as an heir of provision to their prejudice; or if she could not collate, she ought to have been excluded [560] from claiming any share of the personal estate, as one of the nearest in kin.

The appellants finding themselves pinched by this decision, admitted, that the respondent, in a question with her sisters alone, would not be obliged to collate. But it surely sounds very strange, that the respondent, who could not be compelled to collate by her own sisters, should be obliged to do so by the appellants, who are no more than her cousins; and that her sisters, who by themselves could not oblige her to collate, should acquire that right from being joined with the appellants. A consequence so absurd suffices of itself to shew, that the principles and reasonings of the appellants labour under some very essential fallacy and defect.

It was likewise maintained for the appellants, that in this case, the respondent being heir of the investiture, and bound to make up her titles by service to her uncle in that character, was in no different situation as to the rule of collation, than if she took the estate *ab intestato*, by the mere act of the law.

But to this it was answered, that though for the most part (but not always) in the case of real estate, the rule of descent pointed out by an investiture, the heirs succeeding under the investiture may either be heirs at law, or heirs of provision, according as the descent is left to the ordinary legal rule, or is governed by a special rule devised by the party, and whenever the legal descent is in the smallest degree altered and cut off (which was the case by the deed 1743), the heirs of such investiture are accounted in the eye of law, and in the proper sense of the word, heirs of entail, and to a certain extent are held to be strangers. Lord Stair says, "heirs of line are heirs generally; not only because they may be served by a general service, but chiefly because they most generally represent the deceased." He adds, that in respect of them, "heirs male of tailie and provision *are* accounted as strangers." (B. 3. F. 5. sec. 8.)

It is plain, therefore, that an heir may succeed to an estate by the investitures of it, and yet may have very little of the character of heir, and nothing at all of the character of heir at law in him. It may be necessary for him to make up his titles by service, in order to connect him with the feudal right of the estate; and yet, in the sense of the law, he may be a stranger. To say, therefore, that the respondent is heir of investiture to the late Scotstarvet, and that her titles are made up to him by service, is truly saying nothing more, than that the fee was in the late Scotstarvet, and consequently must be taken out of him by the usual form of a service: but the conclusion does not certainly follow, that the respondent is her uncle's heir at law, or heir of line in that estate, that she is his legal or general representative, or that the rules of intestate succession can at all apply to such a case. Collation is a rule of intestate succession, and the respondent claiming her share of the intestate succession to her uncle's personal estate can only be obliged to throw in what she receives as heir at law, out of the intestate succession, to his real estate, or rather what devolves upon her and her sisters by the distinction of law; for it is perfectly clear, that, [561] taking her individually, nothing can come to her in that character, exclusive of her sisters; and whatever she takes along with them, such as the adjudication upon the estate of Carnbee, and heirship moveables, she is ready in conjunction with them to collate.

A distinction was likewise taken upon the part of the appellants, between the case of the respondent succeeding as heir under the investiture 1743 to a remote predecessor, and the hypothetical one of her having taken the estate by a special deed of her uncle himself, the late Mr. Scott; in which last, if it was not admitted, it was at least tacitly supposed, that it would have been more easy for the respondent to have maintained that she took the estate, not *preceptione*, but as a *precipuum*, and fell, like a second son in similar circumstances, to be considered as a purchaser, not as an heir succeeding *preceptione*.

It was answered, that this was a distinction without any solid difference, which had no foundation in law, and no authority in practice: that even were the doctrine solid, the respondent would nevertheless be entitled to avail herself of it. For if her grandfather made the settlement 1743, her uncle, who had power to alter it, not only continued it, but set aside a subsequent entail of his father's, which in several respects militated against him. She, therefore, having taken the estate by the will of her uncle as a purchaser, was entitled to the estate as a *precipuum*.

The court of session, upon advising these informations, pronounced the following judgements (Nov. 16, 1787): "Upon the report of the lord justice clerk, and having advised the informations given in by both parties, the lords find the defender, Miss Scott, is not entitled to claim any part of the executry of her uncle David Scott, of Scotstarvet, in Scotland, without collating her heritable estate, to which she succeeds as heir; finds the succession to the said David Scott his personal estate in England falls to be regulated by the law of England; and therefore, in so far as respects it, assoilzies the defender from the process of declarator, and decerns."

Mutual reclaiming petitions were presented by both parties against this judgement; the appellants reclaiming against the last part of the interlocutor, which found, that the succession to the personal estate in England was to be regulated by the law of England; and the respondent reclaiming against the first part of it, by which she was excluded from the personal estate in Scotland, unless she chose to collate the estate of Scotstarvet. But the court of session, upon advising these petitions, with

answers to each, were pleased to adhere to their former judgement in both points (June 17, 1788).

The appellants (in the original appeal) conceiving themselves to be aggrieved by so much of the aforesaid two interlocutors, as found the succession to the said David Scott's personal estate in England was to be regulated by the law of England, prayed that the same might be reversed: but the following reasons for its affirmance were stated (R. Dundas, J. Scott, J. Anstruther, Jn. Anstruther, J. A. Park, W. Dundas) in the printed case of the respondents, on that appeal.

[562] I. It is a point settled, and at rest in the law of Scotland, that the *lex rei sitae* is the rule which governs intestate succession in personal estate; and that the property in navy bills, and other government securities belonging to the deceased David Scott, being locally situated in England, payable in London, and transferrable only by the forms of the law of that country, must be distributed by the rules of the law of England.

The principle, that the *lex rei sitae* is to regulate the succession of personal as well as real property, has been acknowledged and established as a part of the law of Scotland, by a long series of decisions, both ancient and modern. Haddington, 1st February 1611, *Purves contra Chasholm*, abridged in the Dictionary, vol. i. p. 320; Durie, 9th December 1623, *Henderson's bairns contra debtors*; and July 16th, 1634, *Melville contra Drummond*; decisions during usurpation, 6th June 1656, *Craig contra Lord Traquair*; Gilmour and Stair, 19th January 1665, *Lewis contra Shaw*; Dirleton, 19th July 1666, *Bisset contra Brown*; Harcarse (executry), March 1683, *Archbishop of Glasgow contra Brunsfield*; and March 1684, *Dryden contra Elliot and Ainslie*; *Duncan contra Murray*, in 1740, mentioned in Kilkerran's report of Brown's case in 1744; February 1st, 1770, *Lorimer contra Mortimer*, mentioned in the reports of some of the later cases; Ogilvy, 13th January 1778, *Elcherson contra Davidson*; another decision pronounced the same day, in the case of *Henderson contra M'Laen*; and Fac. Coll. 18th January 1785, *Morris contra Wright*. The same doctrine is supported by the authority of lord Stair, *Institutes*, b. 1. t. 1. sec. 16. and lord Bankton, b. 1. t. 1. secs. 82, 83. The words of the last learned author are very express: "For the same reason in legal succession, whether of personal or real estate, the rule is, that those are called to it, who by the laws of the place where the subject lies, are entitled, and not they who are the lineal successors by the law of the country where the proprietor resided and died; for the succession at law takes place only by authority of the law where it is claimed."

II. Even if the *lex domicilii* is to be held as the governing rule in cases of intestate succession in general, or in the present case in particular, still, as Mr. Scott lived for many years, and was domiciled in England, the succession to his personal estate, wherever situated, must be governed by the rules of intestate succession which prevail in England.

Both the *rei situs* and the domicil concurring to fix the law of England for the rule of succession of the English personal estate, the appellants, in their reclaiming petition to the court of session, seemed almost to concede this point. They said, that they would argue the case on the supposition, not on the admission, that the succession to the personalty in England must be left to be decided by the law of England; and for so doing they assigned their reason in these words: "Sensible that your lordship decided that point, with the merits of it, as fully and ably stated to you as can again be done; and that you are ruled by a set of precedents, (alluding to those in favour [563] of the *lex rei sitae*), of which they have little hope of getting the better in this court." But still they were pleased to deny the conclusion, that the respondent could take her share of the personal estate in England, without collating the real estate in Scotland, and they stated the following objection:

Supposing the respondent to take her share of the personalty in England by the law of England, and to incur no obligation by her so doing, or by the law to collate any real estate, still, when she takes the real estate in Scotland, the law of that country subjects her to an obligation of collating that real estate with those who are equally near in kin to the deceased, if she interferes with them by taking any share of his personal estate, wherever situated, or by whatever law she succeeds to it; and that the Scotch courts, within whose jurisdiction her land estate is situated, may compel her performance of this obligation.



*Answer.* This obligation proceeds upon a total misconception of the nature of the doctrine of collation in the law of Scotland, which is no part of the law of succession in reality, but an article, or part of the law of personal succession. It is not an obligation laid upon the heir, but a privilege or exception in his favour: by succeeding to the heritable estate, the heir comes under no obligation, whatever to the other nearest in kin. The rule in personal succession by the law of Scotland is, that the heir shall have no part, where there are other kinsmen in equal degree; with this exception however, or privilege in his favour, that if he chuses to collate the real estate, and throw it in with the personal, he may then have his share of the whole, which the law of Scotland, upon such collation being made, distributes equally among all the nearest in kin. It is plain, that this can have no relation to a personal estate which is not taken or succeeded to by the law of Scotland, but by the law of another country; and if the law of that country requires no collation, the heir in the Scots estate can never be under any obligation to collate. He claims and takes nothing by virtue of the Scotch law in personal succession; and it is only in case of his claiming, and to enable him to claim, a share of the personal succession under that law, that there can be any collation.

The respondent in the original appeal, on the other hand conceiving herself to be aggrieved by so much of the two aforesaid interlocutors of the 16th November 1787, and 17th June 1788, has found that the defender, Miss Scott, was not entitled to claim any part of the executry of her uncle David Scott of Scotstarvet, in Scotland, without collating her heritable estate, to which she succeeded as heir, entered A CROSS APPEAL therefrom to the house of lords; and the following reasons were assigned for its reversal.

I. The rule of collation extends only to heirs *ab intestato*, who are *alioqui successuri*, not to *haeredes facti*, or of entail, who take *provisione hominis*, or by the special deed or will of a predecessor; not *provisione legis*, or by the mere act of the law.

A man can have but one heir at law, otherwise called *heir general* or *heir of line*; (excepting the case of heirs portioners); but he may [564] have an indefinite number of heirs of entail, as many as he has different estates. But the law of collation is a law of legal succession, and applies only to the *heir*, i.e. the heir at law; and all the writers on the law of Scotland seem to lay it clearly down, that it is only the heir at law who succeeds *ab intestato*, that can be obliged to collate. See Balfour, tit. Heirs and Successors, p. 233. Lord Stair, b. 3. tit. 8. § 48. M'Kenzie, b. 3. tit. 9. § 11. Bankton, vol. 2. p. 285. Mr. Erskine, in the passage above quoted; and the decision in the case of Riccart, also above referred to.

It is the heir at law only, that has the heirship moveables; so says lord Stair: "The heir of line hath right to the heirship moveables, and not the heir of conquest" (*conquestus*, acquisition), b. 3. tit. 5. § 6. And again, "the apparent heir of line, and no other, can be liable by intromission with heirship moveables, because the same can only belong to the heir of line," b. 3. tit. 6. § 6. And by parity of reason, it is the heir of line only, not any heir of entail or provision, that is excluded from any further share of the personal succession, unless he collates.

The reason of the thing farther demonstrates, that it is the *heir at law* only who collates, and that it is only the real estate he succeeds to as such, that is to be collated. For what is it that he desires to be admitted to? It is a share of the intestate's succession at law in the personal estate. And why is he excluded? Because the law has given him the intestate succession in the real estate. What then, from the reason of the thing, must he collate in order to be admitted? Plainly, that real estate which he succeeds to as heir at law, and on account of which alone he was excluded. If he can say either, that he takes no real estate by law, or that he brings into the common mass what he does take, he removes the ground of exclusion. There is no reason that he should bring in what he takes by *deed*; because, to be admitted to the legal succession of one kind, it is enough that he renounces the legal succession of another. An heir of entail succeeds by deed or grant, by the express will of the owner, and not by the disposition of law, as Mr. Erskine expresses it; and it is obvious, that whether by the deed or will of the immediate or more remote predecessor that the lands are taken, still it is equally *provisione hominis non provisione legis*.

The heir by collating is only admitted to a share of the personal succession *ab intestato*. If another of the nearest in kin has got a large legacy left him, either by an immediate or more remote predecessor, the heir will not be admitted to any share

of this by collation ; and as nothing is got of a personal nature, that comes *provisione hominis*, so, for the same reason, nothing should be given in the nature of real estate that comes in the same way.

II. In the present case the respondent does not succeed to any part of the Scottarvet estate, as heir *ab intestato* to her uncle ; nor was she *alioqui successura* to him. She takes as heir of entail and provision to her grandfather under the settlement 1743, which disinherits both her and her sisters, as heirs portioners, and compels her to hold this estate under various restrictions and irritancies. And farther, she was not *alioqui successura* to the late Scottarvet, be[565]-cause it was always possible that he could have had children of his own.

III. That though she takes up this estate by a service as heir of provision or entail, or succeeds as heir of the investiture, still it does not follow that she is bound to collate the real estate before she can be admitted to share in the personal estate as next in kin. Her making up titles by service, is the mere form of getting into the right of possession of an estate. She is not heir at law, but of entail, not *alioqui successura* as heir at law ; and therefore it cannot be incumbent on her to collate such estate ; and besides being disabled from collating by the settlement 1743, it is impossible that rule can apply to her, or her right as nearest of kin on that account be impaired.

IV. That her uncle having continued the settlement 1743 in force, which he had full power to alter, must be presumed to have consented to this deed, equally as if he had executed it himself ; in which last case it was admitted there would have been no *preceptio hereditatis*, nor any room for collation.

On the part of the appellants in the original, who were consequently respondents in the cross appeal, the following reasons were assigned (W. Grant, W. Tait) :

(*Upon the original appeal*) :

I. Because under all the circumstances, the right to, and distribution of, the personal estate of the late David Scott, must be regulated by the law of Scotland, to which country he is to be held as having belonged at his death : and therefore, though the courts of England were necessarily resorted to *in order to make a title* for the recovery and receipt of his effects, that, and even the respondent Henrietta's actually taking a share as entitled by the law of England, makes no difference on the substantial rights of the parties ; and she is under every obligation, which would have attached on her if the effects had been in every sense situated in Scotland, or the deceased literally domiciled there.

II. Because, even if the deceased should be accounted as domiciled in England, and his personal estate there distributable according to the rules of the law of England, the respondent Henrietta, by taking the real estate in Scotland, has subjected herself to all the obligations which are consequential by the law of the latter country, one of which is, either to refrain from touching the personal estate to the prejudice of the other next of kin, or to collate the real ; and when the law is sought to be applied in Scotland against her and an estate subject to the jurisdiction of the courts of Scotland, it can have no influence that the act was done in a country where such obligation is unknown, or where the same consequences do not follow as to real estates situated in that country.

(*Upon the cross appeal*) :

Because it is established in the law of Scotland, that one cannot take real estate as heir, and at the same time claim a share of the personal estate, if there are persons in the same degree of kindred to the ancestor, without collating the real estate ; and there is nei[566]-ther reason nor authority for the respondent's proposition, that the rule does not apply to those who succeed collaterally ; and as little for the argument, that her case forms another exception, because she does not take as heir of line, or *ab intestato*, by the act of the law, but by virtue of a special destination, in the character of heir of provision. In fact, she does take *ab intestato*, the late Mr. Scott, though he had it in his power, having made no will or disposition of his estate, but suffered it to go agreeably to the former limitations. But, at any rate, an heir of provision is as much barred from interfering with the executry or personal estate, or, if he does interfere, is as much liable to collate as an heir of line, in competition with those who do not stand in the relation of heirs to the deceased. The heir, how-

ever he comes by that character, is, as such, barred from taking that of an executor or personal representative, if there be another equal in blood or degree, who is not an heir: and he has no way of surmounting that bar, but by divesting himself of the first character by collation: it is a privilege which he may exercise or not at his pleasure, but, till he exercises it, he is an absolute stranger to the moveable succession.

BUT after hearing counsel it was ORDERED and ADJUDGED, That the original appeal be dismissed, and that [so much of] the interlocutors [as is] complained of by the cross appeal be reversed: And it is DECLARED, That the said Henrietta Scott is entitled to claim her distributive share in the whole personal estate of her said uncle David Scott of Scotstarvet, in Scotland, without collating his heritable estate to which she succeeded as heir, inasmuch as she claims the said share of the said personal estate by the law of England, where the said DAVID had his domicile at the time of his death. (See MSS. Jour. sub anno 1793.)

## APPENDIX.

## No. I.

[See the note at the head of the preceding case.]

[1 Scots R. R. 636. S. C. 2 Bos. and P. 229 n. See *Jopp v. Wood*, 1865, 4 De G. J. and S. 616: Ind. Act No. X. of 1865, ss. 10, 11.]

In the case of *Bruce v. Bruce*, April 15th, 1790, it was determined that the effects of a Scotsman dying in India, where he had been some years in the service of the English East India company, (which effects were, at the time of his death, part in India, part in England, and part on the sea; this latter part consisting of bills on the East India company), were distributable according to the law of England; though the intestate had at times signified an intention of returning to Scotland, and had appointed attorneys in Scotland, to whom he had remitted the above bills. The question, what shall be considered as the domicile of the party, is in all cases rather a question of fact than of law.

It was decided under all the circumstances of this case, both that the domicile of the deceased intestate was in the English dominions, [567] and that his *res sitae fuerunt* in England also; the determination of the court of Session, and afterwards of the House of Lords, was therefore in favour of a relation of the half blood, who was entitled by the law of England, but excluded by the law of Scotland; but the preference of the *lex domicilii* to the *lex rei sitae* was not necessarily in issue. The following were the reasons assigned (J. Scott, W. Alexander), in the case of the appellants (the relations of the whole blood), for reversing the interlocutors of the lord ordinary and court of session.

I. Because the *lex domicilii creditoris*, and not the *lex rei sitae*, ought to govern the distribution. The principle upon which the court below has proceeded, is not established in the law of Scotland, is contrary to the practice of all nations, and must introduce great litigation and confusion.

When the authorities of the Scots law are examined, it will be found that the only legislative declaration which has any relation to the subject, is in favour of the *lex domicilii*; that the decisions of the court, and the opinions of the institutional writers, contradict each other, and that no judgement has ever been pronounced upon this question in the last resort: so that your lordships are still at liberty to give authority to that class of cases, and to those opinions most consistent with the practice of other nations, policy, and convenience.

The oldest authority is an act of parliament made in 1426, which is in these words. "*Item eodem die rex ex deliberatione trium statuum in parlamento congregatorum decrevit quod causae omnium mercatorum et incolarum regni Scotiae in Zelandia Flandria vel alibi extra regnum decedentium qui se causa merchandiarum suarum peregrinationis, vel aliqua quacunque causa (dummodo causa non morandi extra regnum) se transtulerunt debent tractari coram suis ordinariis infra regnum a quibus sua testamenta confirmantur non obstante quod quaedam ex bonis hujusmodi decedentium tempore sui obitus fuerunt in Anglia vel in partibus transmarinis.*" It is fair to presume that the purpose of the legislature, in enacting that these causes

should be determined by the judges of the land, was, to have them determined by the law of the land. In that view, and as there is the closest analogy between testamentary causes and intestacies, the appellants apprehend that this act amounts to a legislative declaration in favour of the principle for which they now contend: for it directs that the effects of Scotsmen shall be governed by the law of Scotland wherever they are situated.

The earliest case cited is that of Henderson's bairns (children), reported in Durie, fol. 88. Col. Henderson was killed at the siege of Bergenopzoom, and by his will he bequeathed his money to his children equally. The whole money was lent out on heritable securities, and therefore the bequest was a bequest of real estate. The judgement of the court was, "That none of the children but the heir who was entitled by the law of Scotland could recover these bonds." And the opinion is stated thus: "Neither could any other country law have place in Scotland, for any [568] thing being within Scotland but the proper law of the country itself."

The next case in order of time is, *Melvill v. Drummond*, Durie, fol. 723. It was: suit by the widow of a testator, claiming a heritable bond as a legacy from him. The court decreed against the widow. The opinion stated is in these words: "*Bona tam mobilia quam immobilia regulantur juxta leges regni et loci in quo bona ea jacent et sita sunt.*"

Both these cases are very loosely stated in the reports. The point determined, however, relating to real estates, has nothing to do with this question. And even the opinion, which at first sight appears in favour of the respondent, contains a principle very different from that now adopted by the court: for the local situation to which the words of the book refer, is the local situation at the time of the suit. Their idea was, that when any thing came within their jurisdiction, their jurisprudence also attached upon it, and they might entertain a reasonable hope that, by adhering to this principle, there would be no necessity of determining upon foreign laws at all. If this was the principle, the cases can never be argued for the respondent, but, if they have any weight, are in favour of the appellant, because the property is within the Scots jurisdiction; and it is also evident that by misapplying this principle, (that is) by applying it to the locality at the death of the intestate, the court has introduced, in a tenfold degree, the mischiefs which their predecessors meant to avoid.

The next case cited is *Shaw v. Lewins*, 1 Stair's Decisions, fol. 252. Shaw, resident in London, made a nuncupative will, which was proved in the English ecclesiastical court. It was argued in favour of the will, "that the former determinations did not affect this question. They indeed ascertained that no real estate in Scotland could pass by devise, although the will were made in a country in which real estate might be devised: that in this case the question was rather upon the form and solemnity, which ought always to be according to the law of the country where the act is done: that instruments made in France or Holland before one notary were enforced in Scotland, though if made in Scotland they must have had the signature of the party, and two witnesses, or have been made before two notaries and four witnesses," the court found, "that this was not a question upon the manner of probation, in which case they would have followed the law of the place: but they said that the question was upon the essentials of a right, and therefore that the solemnity of writing not being interposed, it was null *in substantialibus*." The learned judges of that day were it seems of opinion that a question, whether a man's last will might be proved by parole, or must be proved by written evidence? was not a question upon the manner of probation. So far as this case is an authority, the appellants admit that is against them, for there is the closest analogy between intestacies and testamentary cases.

[569] The next case is *Brown and Duff v. Bizet*, 1 Stair's Decisions, fol. 398. and Dirleton's Decisions, fol. 10. The report in Dirleton is only a short note of the point determined; but in Stair the facts and interlocutor are stated at large. Brown was the widow, and Duff the only child of Andrew Duff, a merchant, who resided and died in Poland. They sued Bizet, a debtor of Andrew Duff's estate, without having confirmed, as it is called in the Scots ecclesiastical court; and the question was, whether without confirmation they could maintain the action? The argument in their favour was, that they were entitled by the laws of Poland, where Andrew Duff resided before his death, *animo morandi*; and then they cited the old act of parliament above mentioned. The reporter thus states the interlocutor: "the lords found that the

testament behoved to be confirmed by the commissaries of Edinburgh; for, having considered the old act of parliament, they found that the point then ordered was to which judicatures the merchants going abroad to trade should be liable, and that such as went abroad not *animo remanendi*, should be subject to the jurisdiction of that place where their testament should be confirmed (*viz.* where they had their domicile), but those that went out of the country to remain are excepted: but nothing expressed where their testament should be confirmed." And therefore they found that the plaintiffs could not sue without *confirmation*. The point determined is immaterial to this question, although it has been often cited as in favour of the other side. It would be the same thing here, where no man can sue without probate or administration. But what is remarkable in the case is, that the judges recognise the old act of parliament, and seem to admit that it would govern a question upon the equitable right, though it could not govern the question upon the legal authority to sue.

The next case cited is *Brown v. Brown*, reported in lord Kilkerran, *voce* Foreign, fol. 199.—and in Falconer, fol. 11.—Both these authors agree exactly in their report. The facts of this case are stated more minutely, the arguments of the counsel and the opinion of the court more largely, than in any of the former, and it is the first direct determination upon the present question. The facts are these: Captain Brown of the Royal Scots died at Edinburgh intestate, having some Irish debentures and notes and bonds, which he had acquired while he was with his regiment in Ireland. The parties in the cause were Thomas Brown, nephew of the intestate and the son of a deceased brother, claiming a proportion of these Irish debentures *jure representationis*, by the law of Ireland, and John Brown, the only surviving brother, who claimed the whole by the law of Scotland: and the question was, whether the *lex rei sitæ*, or the *lex domicilii*, should govern the distribution of that particular part of the intestate's estate? The question came first before the commissary, where it was determined, "that captain Brown, being originally a Scotsman, and never having a fixed domicile elsewhere, and the property in question being of a personal and moveable nature, that the distribution was to be regulated by the law of [570] Scotland." Afterwards the question came before the lords of session upon a bill of advocation. In the argument the former cases were cited and considered, and it was agreed, that being mostly upon heritable estate they did not bind the principal case; and the court refused the bill of advocation. Falconer adds, "That the lords agreed that this case was to be determined by the law of nations, and by it *the domicile of the creditor to be rule.*" When your lordships turn to this case, and observe how both the reporters agree in every circumstance, and how fully and distinctly the facts and the argument are stated, you will not doubt the accuracy of the report.

The next case cited is *Morrison and others v. the earl of Sutherland*, reported in lord Kilkerran, in fol. 209. The respondent will rely upon this case, not upon account of the point decided, but upon account of an opinion said by the reporter to have been entertained by the court. The case itself was this: upon a commission of lunacy in England, Morrison was found lunatic, and a committee appointed: that committee instituted a suit in Scotland, by attorney, against the earl of Sutherland upon a bond. The cause came before the court of session, and they seemed to be of opinion, that the commission of lunacy had no effect in Scotland, and the committee no right to sue. This was represented to the lord chancellor Hardwicke, and to obviate the difficulty, he directed access to be given to the lunatic, who thereupon signed a letter of attorney reciting the facts, and, among others, the commission in England, and authorising the same attorney to sue. The cause came a second time before the court of session, who decided against the plaintiffs: holding first that the attorney could not maintain the action in the name of the committee, because the commission passed no right in Scotland; and secondly, that he could not maintain the action in the name of the lunatic, because the authority recited the lunacy, and therefore was *felo de se*. So that the court held that Mr. Morrison could not sue because he was a lunatic; and at the same instant decreed, that the committee could not sue, because he was not a lunatic. So far the case bears very little upon the present question. But the reporter adds, "Some other points were spoke to, though they could receive no judgement. Concerning real estates all lawyers are agreed, that they can only be governed by the law of the country where they are situated: but as to moveables, lawyers are not agreed. Some hold that wherever they are

situated they are to be held as *in loco domicilii* of the creditor, and *nomina debitorum habentur loco mobilia*. Others hold, that even moveables are to be governed *secundum leges loci* where they are situated. And to this last opinion the court seemed to lean, though very different from the judgement given between the representatives of Brown of Braid, *supra*, 28th November 1744." This is certainly a very slender authority, even as it stands in the Scots reporter, for the utmost stated is, that lawyers *doubt*, and that the court *seemed to lean*; but when your lordships are informed what passed afterwards, it will appear to be an authority [571] on the other side, so far as it is an authority at all. The cause came afterwards before your lordships, when the judgement was reversed. It appears from the report of the case of *Thorn and Watkins*, 2 Vez. 37. that there was also in your lordships house some conversation upon this point. Lord Hardwicke giving his opinion in that cause, on this very question in favour of the *lex domicilii*, is represented by the reporter as expressing himself in the following words: "The reason is, that all debts follow the person, not of the debtor in respect of the right of property, but of the creditor to whom due. Therefore, in the case of a freeman of London, debts due to him any where are distributable according to the custom (otherwise it would be most mischievous if they were to follow the person of the debtor); and of that opinion I was in *Pipon and Pipon*. This also came in question in the house of lords lately in a case arising on the lunacy of Mr. Morrison; for there the question was, whether the rule would be the same in the courts of Scotland? and the opinion was, that it would be the same." So that in the very case of Morrison, lord Hardwicke, sitting in the court of appeal as a judge of the Scots law, gave a decided opinion upon this question in favour of the argument maintained by the appellants.

The next case is *Mortimer v. Lorimer*, in February 1770. This case is not to be found in any book of authority, except in a note in the 1773 edition of Mr. Erskine's Institutes, fol. 601. and there it is stated very generally. The note is in the following words: "In the question about the succession of William Lorimer, a Scotsman, who had passed the greatest part of his life in Scotland, but for some years before his death had resided chiefly in England, though sometimes in Scotland, and died at sea in a voyage to Italy, whither he was going for his health; the lords found that his succession must be regulated by the law of Scotland." Although it is very apparent upon what grounds the author of this note understood the court to have proceeded, yet the note itself is too general and too loose to have such reliance placed upon it. But in the memorials presented to the court of session in the subsequent cases, where *Mortimer v. Lorimer* is considered as an authority, the words of the interlocutor itself are stated from the record, and they are these: "In respect the testator William Lorimer was a Scotsman, who had passed the greatest part of his life in Scotland, and thereafter had resided some time in England, and at other times in Scotland, and after making his will left Britain in order to reside sometime in Italy, but died at sea in his voyage thither; finds, that his succession, in so far as not regulated by the will, must be regulated by the law of Scotland: therefore," etc. Now wherever the property was situated at the death of Lorimer, the case is a distinct authority for the appellants. For even supposing it to have been found in Scotland, as the court in pronouncing the judgement did not rely upon that circumstance, but relying on circumstances of citizenship, in effect excluded it, it follows that this case is an explicit declaration in favour of the *lex domicilii*.

The two next cases were determined upon the same day, the 13th of January 1778, and are to be found in the Faculty Collection of [572] that year under the names of *Davidson v. Elcherson*; and, *Henderson v. Maclean*; the case of *Davidson v. Elcherson* was as follows: William Murray resided at Hamburgh, and died there. Marion Elcherson his mother claimed the effects, as entitled by the laws of that country. The next of kin by the law of Scotland confirmed in the commissary court of Edinburgh, and assigned their right to Davidson. One Parish a merchant at Hamburgh had possession of the greatest part of his effects, among which were £300 Scots bank notes. Parish brought that species of suit which is called a multiplepoinding. In the suit the question of right between Davidson claiming by the law of Scotland, and Elcherson claiming by the law of Hamburgh, was argued. "The court found that the distribution of moveables in this case must be regulated by the laws of Hamburgh where the moveables are and were situated at the death of Murray; that no action

for such distribution lies, or is competent before this court; therefore dismisses the process of multiplepoinding, and competition relative thereto."

Captain Maclean a Scotsman and engineer in the service of the India company was mortally wounded in the trenches at the siege of Tingaricote in the Mogul country. On the morning of that day, aware of the danger to which he was to be exposed, he wrote his will in his pocket book with a pencil, by which he bequeathed all his property between his father, brother, and sister. As soon as he was carried out of the trenches it was written over in ink and signed by him; and he died immediately after. The whole of his property consisted of debts owing to him by officers upon the same expedition. A woman who at the time of the suit was the wife of a horse-hirer in Haddington, together with her husband, instituted a suit to have her proportion as the testator's widow. His relations resisted the claim, the more especially, as captain Maclean had frequently during his life, at the time he was desiring his relations to educate with care a natural son he had by her, always desired them to have no connection with her. The supposed widow, however, prevailed in the commissary court, established her marriage, and then instituted a suit in the court of session for the money. But the court of session rejected her demand, and established the will.

These two cases certainly shew that at that time the opinion of the court was in favour of the *lex loci*.

The last case relied on, *Morris v. Wright*, is not an authority, being appealed, and standing now in your lordships paper.

These are all the cases that have been cited as having any relation to the point; and the appellants hope, that if your lordships shall not think the weight of authority to be on their side, at least you will be of opinion that the cases on the other side are neither so numerous nor so powerful as to decide the question.

The oldest cases which had any relation to the subject, did not touch the principle contended for by the appellants, except perhaps that where action was refused on administration granted in England upon a nuncupative will made there, which was not approved of by the eminent lawyers of the time. Sir John Nesbet of Dirleton, [573] in his treatise, intitled, *Doubts and Questions*, states, under the word *mobilia* the following proposition: "*Mobilia sequuntur conditionem personae sive domini adeo ut ejus ossibus adhaereant active et passive, immobilia autem coherent territorio*;" and sir James Stuart in his answer, says, "If *mobilia* have *situm* seems to be an improper question, it is more proper that *mobilia sequuntur personam*." Two of the latest and most acute institutional writers lay it down, "That the succession of moveables is regulated, not by the law of the country in which they locally are, but by the owners *patria* or domicile, whence he came, and whither he intends to return." Erskine, b. iii. tit. 9. sec. 4. Lord Kaim's Principles of Equity, b. iii. c. 8. sec. 4.

II. All the foreign jurists agree that the *lex domicilii* ought to govern the distribution, and the practice of surrounding nations coincides with that opinion.

In Grotius and Puffendorff the appellants can find nothing material on this subject; but Vattel, who is a writer of great reputation, gives a distinct opinion, liv. ii. cap. 8. sec. 110. "*Puisque l'étranger demeure citoyen de son pays et membre de sa nation, les biens qu'il de laisse en mourant dans un pays étranger doivent naturellement passer à ceux qui sont héritier suivant les loix de l'état dont il est membre. Mais cette règle générale n'empêche point que les biens immeubles ne doivent suivre les dispositions des loix du pays où ils sont situés.*"

In the *Corpus Juris* there is nothing upon this subject, because at the time that code was collected, and promulgated, the empire, which contained the whole civilized portion of the globe, was governed by one law. But all the civilians are explicit. Voet, in his commentary, lib. 38. tit. 17. sec. 34. says, "*Caeterum occasione variantium circa successionem intestatum statutorum, generaliter observandum est, bona defuncti immobilia, et quae juris interpretatione pro talibus habentur, deferri secundum leges loci in quo sita sunt; adeo ut tot censi debeant diversa patrimonialia, ac tot hereditates, quot locis diverso jure utentibus immobilia existunt. Mobilia vero ex lege domicilii ipsius defuncti, vel quia semper domino presentia esse finguntur, vel ex comitate passim usu inter gentes recepta.*" And for this he cites a multitude of authorities. See also Vinnius, in his *Select Questions*, l. ii. c. 19. Van Lewen Censura Forensis, lib. iii. c. 12. sec. ult.

Upon these principles the English law is established. In *Pipon and Pipon*, Trin. 1744, in Chan. lord Hardwicke gave a clear opinion upon this question. In *Burn and Cole*, Privy Council, 1 April 1762, it was determined, that when a testator resident in England died, the judge of the probate in the plantations was bound by probate granted here. In *Thorne and Watkins*, October 30, 1750, 2 Vez. fo. 35. lord Hardwicke determined the point. And lately in a cause of *Kilpatrick v. Kilpatrick*, lord Kenyon, when master of the rolls, upon the same principle applied the law of Scotland to money in court, upon the master's report, stating what that law was. The order bears date 27 July 1787. (Mr. Ambler MS. cases, fo. 25 of his book. *Thorne v. Watkins*, 2 Vez. 35. *Kilpatrick v. Kilpatrick*, Rolls, 27 July 1787. See more fully in the arguments in the case of *Hog v. Lashley*.)

[574] So also the Dutch law.—Huber, who was a judge of the supreme court of Friesland, in his celebrated book called *Praelectiones Juris Civilis et Hodierni*, states the law of his country thus, part 1. lib. iii. tit. 13. sec. 219. "*Non potest omitti questio frequens in foris hodiernis, a juris Romani tamen aliena terminos; quia saepe fit, ut diversum jus succedendi ab intestato in locis ubi defunctis habuit domicilium atque in iis locis ubi bona sita sunt, obtineat, dubitatur, secundum atriis loci leges successio regendi sit. Communis et recta sententia est, in rebus immobilibus servandum esse jus loci in quo bona sunt sita; quia cum partem ejusdem territorii faciant, diversae jurisdictiones legibus adfusi non possunt; verum in mobilibus nihil esse causae cur aliud quam jus domicilii sequamur, quia res mobiles non habent affectionem versus territorium sed ad personam patres familias duntaxat; qui aliud quam quod in loco domicilii obtinebat voluisse videri non potest.*"—So again in part. 2. lib. 1. tit. 3. sec. 15. "*Nec aliud juris erit in successionibus ab intestato; si defunctus sit pater familias, cujus bona in diversis locis imperii scita sunt quantum attinet ad immobilia servatur jus loci in quo situs eorum est; quod mobilia, servatur jus quod illis loci est, ubi testator habuit domicilium.*"

This appears also to be the law of France. Denisart in his *Collection de Jurisprudence*, voce *Domicile*, secs. 3, 4. "*C'est le domicile qui regle le partage des succession mobilière; aussi, par exemple, si un particulier decede ayant son domicile a Paris son succession mobilière sera réglée et appartiendra à ceux qui la coutume de Paris appelle pour etre ses heritiers.*"

III. If the *lex loci* be established, great inconveniencies and absurdities will follow. By the law of Scotland there is a *communio bonorum* between the husband and wife. When the husband dies, the wife is entitled to a moiety notwithstanding any will he can make, but during the coverture he has the management. If the *lex loci* be the rule, it will be easy without varying his mode of life, without any inconvenience to himself, to disappoint this right entirely, by investing his money in government securities, or lending it to persons residing in England.

If the *lex domicilii* is to be the guide, as a man can have but one chief domicile, the whole inheritance must be governed in all cases by one uniform rule. But if the *lex loci* is to be the guide, then the court may be required in the distribution of the same estate to inquire into the different laws of many foreign nations. The same circumstance must be attended with great inconvenience to families; for it is plain, that to apply law to every detached portion of an estate is to multiply the sources of litigation in an infinite degree.

Again, it is surely a very gross absurdity, that while a man himself shall be residing quietly in Scotland, the rule to govern his succession shall be constantly varying as his debtors, without his participation, shall happen to pass from one country to another.

In what manner will the clashing jurisdiction of the two countries be reconciled? If a Scotsman has money in the funds and dies [575] intestate, the Scots court will apply the English laws, because the books are kept at the Bank; and the English courts the Scots law, because the intestate was a Scotsman. And your lordships, if the question comes by appeal from Scotland, must determine one way; if by appeal from the court of chancery, the other, respecting the very same property.

All these inconveniencies and absurdities will be avoided by establishing the *lex domicilii*; for then one rule only will be applied to the whole succession, and the same rule will be applied in every country.

IV. Supposing the *lex loci* to govern, where the effects are situated within the



limits of a country; yet where the effects have no such situation the *lex domicilii* must be the rule from necessity. £5476 2s. 3d. of major Bruce's succession were bills of exchange drawn by the company in India upon the company in England, and at the time of his death were floating upon the sea. Now whatever may be the rule with respect to securities that are not negotiable, yet negotiable securities are situate where they lie. Thus in the case of Davidson and Elcherson the court held, that notes payable by the bank of Scotland, but found at Hamburg, were situated at Hamburg; therefore these bills of exchange not being within the local jurisdiction of any nation, recourse must from necessity be had to the *lex domicilii*.

V. Major Bruce's domicile was in Scotland. Domicile is a word of a very different import from residence or habitation; ambassadors, envoys, exiles, reside, or inhabit, in foreign countries; but it is agreed by all authors that they remain domiciled in their own. The same instances prove, that it is not the mere length of time during which residence abroad continues, which constitutes domicile; for *however long* a person in any of those characters may be supposed to reside abroad, he will still remain *domiciled* at home.

Your lordships have, therefore, to fix a very important question, namely, what the circumstances, which to this purpose, exclusively, constitute the *domicile*? The appellants submit that the following are the principles by which every case of this kind must be determined: 1. That every man has a domicile in his native country till he acquire another. 2. That he can acquire another only by establishing himself there *animo morandi*.

These principles are stated by all the authors of greatest reputation. Vattel. liv. 1. c. 19. sec. 218. "*Le domicile est l'habitation en quelque lieu dans l'intention d'y demeurer toujours. Un homme n'établit donc point son domicile quelque part, à moins qu'il se fasse suffisamment connoître, soit tacitement, soit par une déclaration expresse son intention de s'y fixer.*" And again, "*Le domicile ou d'origine est celui qui la naissance nous donne la ou notre pere a le sien et nous sommes causeur le retenir tant que nous ne l'abandonons pas pour en choisir un autre.*"

The same principles are adopted in the Scots law. The old act of parliament above cited of 1426, subjects to the Scots jurisdiction all Scotsmen abroad, but it expressly excepts those who were there [576] *animo morandi*. Mr. Erskine, in the passage above cited, lib. 3. tit. 9. sec. 4. states it in the same manner, "*sine animo remanendi.*"

Therefore, when there is actual residence abroad, *quo animo* is the question; and this, in the nature of it, is a question of fact to be determined upon the evidence. Now in this case nothing is left to presumption, for there is the most direct and positive testimony that major Bruce was not abroad *animo morandi*.

Objection I. The first circumstance upon which the interlocutor fixes as constituting the intestate's domicile in India, is, "That he had not fixed the time of his return."

Answer. This circumstance can in no view of the case have any weight; for if the *animus*, the *intention*, be *immaterial*, then it must be so, whether fixed to a particular time or not. On the other hand, if the *intention* be the gist of the case, how can it be varied by the *actual return*, being so near as to enable the party to fix the time.

Objection II. The other circumstance which the interlocutor states to constitute the domicile in India is, "That major Bruce was not in the service of the crown."

Answer. This objection supposes, that the India company is an English company as opposed to a Scots company. But the appellants deny the premises. They submit that the India company is a British company, because it is incorporated by a charter from the British crown, derives its power from an act of the British parliament, and enjoys a monopoly in Scotland as well as in England. 2dly. If the premises were true, the conclusion would not follow. They admit, that when a Briton enters into the service of the French or any other foreign state, an irresistible presumption arises that he intends to abandon his *original domicile*, because he enters into engagements incompatible with his original allegiance. But they deny that the same presumption arises when both states are under the dominion of the same crown, and inseparably united.

VI. On the whole the appellants concluded by contending that major Bruce was

by birth a Scotsman. He meant to return to Scotland as soon as he could. He transmitted his property to Scotland as fast as he acquired it. All his relations are inhabitants of that country. Every circumstance of his life and his express declarations prove, that he looked upon himself to be a citizen of Scotland; and therefore they hoped the house would reverse the interlocutors complained of, and direct his property to be distributed according to the law of Scotland.

[577]

## APPENDIX.

## No. II.

[See the note at the head of the preceding case.]

7th May 1792.

[1 Scots R.R. 667. Cf. 2 Scots R.R. 182, and *De Nicols v. Currier*, 1900, 69 L.J. Ch. 109.]

In the case of *Hog v. Lashley*, 7th May 1792, the argument on this question of the *lex domicilii* and the *lex loci* arose from two interlocutors; one of the lord ordinary, which found "that there was no ground for distinguishing between Scots and English effects: because the succession to a defunct's effects ought to be regulated, not by the different laws of the many different countries in which these may happen to be locally situated at the time of his death, but by the law of the domicile; and because it had been in several cases so determined in England." Another interlocutor of the whole court of session found expressly, "that the succession to the personal effects of the deceased, wherever situated, must be regulated by the *lex domicilii*."

The appellant contended, 1mo, that by the more modern decisions of the court of session, particularly in the case of Lord Banff; the case of *Lorimer* against *Mortimer*, decided in 1770; the case of *Elcherston* against *Davidson* in 1778; and the case of *Morris* against *Wright* in 1785; it had been established that the succession to personal estate *ab intestato*, was to be regulated not by the law of the country where the defunct had his domicile, but by the laws of the different countries in which his said personal estate happened to be situated at the time of his death.

2do, That whatever might be the rule with regard to succession *ab intestato*, the power of making a will was *juris gentium*, and therefore any restraints upon the liberty of testing, imposed by the *lex domicilii*, must be confined to effects over which that law extends, and can be attended with no consequence in other countries where no such restraints prevail: that the power of alienation is inherent in the right of every proprietor; and as a testament is a species of alienation, so one who can alienate his property in a foreign country, notwithstanding any restraints upon alienation, or the mode of alienation, in his own, must be equally at liberty to dispose of it by testament, whatever limitations may, in that respect, be imposed by the law of his domicile, from which he withdraws his effects, by the very act of placing them elsewhere: that the fiction of law mentioned by some foreign writers, *mobilia non habent situm vel sequelam*, deserved no regard; reality was alone to be attended to; and moveables had, in truth, a local situation: the same was likewise the case with *nomina debitorum*; the proper *situs* whereof was the place of the debtor's residence, as there only the [578] subject existed upon which the right of the proprietor was to operate; and there only it could have any substantial effects: that it had been repeatedly decided that the right to a debt due in Scotland, does not vest *ipso jure* in the assignees under an English commission of bankruptcy; but if the debt, or *nomen debitoris*, was understood to be in England, and if the transmission of the right of exaction was to be regulated only by the law of the creditor's domicile, the direct contrary would follow, and the assignees would have a complete right *ipso jure*; in like manner it has been found, that the assignation of a debt due by a debtor in Scotland, is not complete without intimation, whatever be the law of the creditor's country; which is inconsistent with the respondent's hypothesis. Whether, therefore, the *situs* of debts is to be judged of by the rules of the law of Scotland, or by general principles derived from the intrinsic nature and reason of the thing, the conclusion must be the same, that the debt is situated where it must be recovered; that is, where the debtor resides.

There were also two other arguments merely on the extent and operation of the Scotch law of legitim.

In answer to these pleas the respondents contended, 1mo, that as the municipal regulations of different states are frequently at variance with each other, the question must frequently occur, whether the law of one country or of another ought to be the prevailing rule; and in all such cases recourse must be had to the law of nations, which settles the duties that one state owes to another in their mutual intercourse, in the same manner as the law of nature, when applied to men considered in their first condition, imposes certain duties on individuals. In cases of succession, a distinction has been universally adopted between moveables and landed property: in every country of modern Europe it is established, that the succession to the latter must be governed by the laws of the state in which it is situated; it makes a part of the territory of such state, from which it cannot be removed; but moveables being fixed to no particular place, may be removed at will from one kingdom to another; and it often happens, in the course of modern commerce, that moveables of immense value, belonging to the subjects of one state, are lodged within the territory of another, subject however to be withdrawn at the pleasure of the owners; hence have arisen those celebrated maxims *mobilia non habent situm*, and *mobilia sequuntur personam*—the plain meaning of which is obviously this, that nations will not consider the local situation of moveables in any question concerning them; and that they will dispose of the moveable property within their territory, belonging to a stranger, in the same manner as if it were with him in his own country. The more ancient decisions of the courts of law in Scotland did accordingly embrace the same system; even as recently as the year 1744, it was held in the case of *Brown contra Brown*, that the succession to certain debentures and promissory notes due in Ireland, was to be regulated by the law of Scotland, where the defunct had his domicile; and although in some later cases the court [579] had adopted a different opinion, that was owing to its being erroneously taken for granted, that the courts in England, in judging of effects locally situated there, proceeded according to the rules of the law of England, without any regard to the *lex domicilii*; but that this was clearly a mistake, the court of session had occasion to be well informed, from what passed upon the decision of a late case before your lordships, *Bruce versus Bruce*, from the decisions of the English courts, and from authorities on the law of England.

2do, That if the *lex domicilii* must regulate the course of succession *ab intestato*, it must in the like manner regulate every question with regard to the defunct's power of testing upon his moveable or personal estate. To say that a will is *juris gentium*, and being protected by that law, must be good all the world over, except where it is fettered by municipal restraints, is a mere fallacy. The sole province of the *jus gentium* is to decide upon controversies betwixt one state and another; but if it is once admitted, that the domicile of a defunct is the circumstance upon which such controversies, with regard to succession to personal estate, is to be determined, it can be a matter of no consequence whether the defunct has made a will or not; for by the very same law that would regulate his succession *ab intestato*, every question relative to his power of testing must of necessity be decided. To appeal to the inherent rights arising from property cannot avail the appellant; a man may no doubt alienate his property of whatever kind, provided he does not thereby transgress the law of the country where it is situated; but with regard to his power of testing, he must of necessity submit to the law of that country of which, by his fixing his domicile there, he has become a subject; his property, wherever situated, is in effect a part of the total property of that country; it is therefore interested in the distribution thereof; and of course every restraint which its law imposes upon the *facultas testandi*, must be equally binding upon him, *quoad* effects locally situated without, as within its territory. It is presumed, *fictione juris*, that the whole of his personal estate is with the owner in his own country; and it is a necessary consequence, that his power of disposing of it by will must depend upon the law of that country. "*Sed considerandum, quodam fictione juris, seu malis, praesumptione, hanc de mobilibus determinationem conceptam niti: cum enim certo stabiliqque haec situ careant, nec certo sint alligata loco; sed ad arbitrium domini undique in domicili locum revocari facile ac reduci possint, et maximum domino plerumque commodum, adferre soleant cum ei sunt praesentia; visum fuit, hanc inde conjecturam surgere, quod dominus velle censetur, ut illic omnia sua sint mobilia aut saltem esse intelligantur, ubi fortunarum suarum larem summamque constituit, id est in loco domicilii: proinde si quid*

*domicilii iudex constituerit, id ad mobilia, ubicunque sita, non alia pertinebit ratione, quam quia illa in ipso domicilii loco esse concipiuntur.*" (Voet. Tit. de Statutis, sec. 11.)

And these answers were enlarged upon, and enforced by the following reasons annexed to the respondent's case in the House of Lords. (R. Dundas, J. Scott, A. Wight, W. Adam, J. Clerk.)

[580] I. The question, whether succession to personal estate *ab intestato*, must be governed by the Laws of the country, where the defunct was domiciliated, or of all the different countries, where his funds happen locally to be at the time of his death! is a question *juris gentium*; a law, though not consisting of positive institutions, yet recognized in every civilized state, and by which a nation is considered as an individual, and its duties to other nations, and its conduct towards them as individuals, are pointed out and directed. In every case where a doubt arises, whether the law of one country, or that of another, ought to be followed, recourse must be had to this *jus gentium*, there being no other rule of decision. But once this point is settled, the case becomes strictly municipal; and what is the law of nations, becomes of necessity the law of that state where the suit is instituted.

A distinction has been made in every country of modern Europe, in cases of succession, between *bona immobilia*, and *bona mobilia*, and this distinction makes part of the *jus gentium*. Landed property has been universally considered as most important; and as it cannot be moved from one country to another, but makes a part of the territory of the state in which it is situated, the owners thereof are in effect citizens of that state, and *qua* such bound to conform to its laws, the rules whereof must govern not only the mode of transferring the land from one to another, but also the course of succession. Moveables stand, however, in a different predicament; they are fixed to no particular place, but may be removed at will from one state to another. They are accordingly held *sequi personam* of the owner; and the very same principle upon which the succession to landed property is regulated by the *lex loci rei sitae*, dictates the propriety of governing the succession of moveables or personal estate, wheresoever situated, by the law of that country to which the owner properly belongs. A late political writer, Dr. Adam Smith, justly observes, that the wealth of a state is an aggregate of the wealth of all the individuals in it; and in like manner it is laid down by the writers on the law of nations, that the property of individuals is the property of the state, and the sum of all the wealth of individuals is the total wealth of the state. Hence the Goods of an individual, although passing into a foreign country, still belong to the state of which he is a member; and the country, where they accidentally are situated at the time of his death, can have neither right nor interest to regulate the succession. "*Les biens d'un particulier ne cessent pas d'être à lui, parce qu'il se trouve en pais étranger, et ils sont encore partie de la totalité des biens de sa nation. Les prétentions que le seigneur du territoire voudroit former sur les biens d'un étranger, seroient donc également contraire aux droits du propriétaire, et à ceux de la nation dont il est membre.*" (Vatell, liv. 2. c. 8. sec. 109. sec. 181.). Hence it is justly held by the law of nations, that moveables belonging to strangers shall be equally safe both to the owners and to their country, as if they were locally situated within it, and must, in respect to the right of succession, be regulated by the law of that country, i.e. the state in which he has fixed his [581] domicile; or, as it is said by the writers, *ubi sedem fortunarum figerit*; the words *patria* and *domicilium* being among these writers convertible terms.

This rule is also founded on other just and wise principles. One may have moveable property in a number of different countries, each of which may entertain different systems of distribution. If, therefore, *lex loci rei sitae* were to govern his succession, a separate distribution would take place in every different country where his property happened to be situated; and as no man can be supposed acquainted with the laws of every foreign country, he would be uncertain what was to become of his succession. Even after making a will, he could not know what effect it would have, as almost in every country there are restraints upon the *testamenti factio*, unknown to the generality of the subjects of other states. Nay, what is still worse, a debtor, by changing his former residence, and fixing his domicile in another country, would be able to govern the succession of his creditor, without his own knowledge.

The *lex domicilii* has accordingly been recognized by all the writers on the law of nations, and by the civilians, as the rule by which the succession to *bona mobilia*, or personal estate, ought to be regulated.

This rule seems accordingly to be adopted in every nation in Europe. From several of the Authorities in the appendix, it appears to be so universally throughout the Dutch, Flemish, and German Provinces. The law of France is also the same: "*C'est le domicile qui regle le partage des successions mobilières; ainsi par exemple, si un particulier decede ayant son domicile a Paris, sa succession mobilière sera réglée et appartiendra a ceux, qui la coutume de Paris appelle pour être ses héritiers.*" (Denisart Coll. de Juris Prud. Voce Domicile, sec. 3 and 4.)

The law of England is also the same: in the case of *Burn v. Coll*, Privy Council, 1st April 1762, it was determined, that when a testator resident in England died, the judge of the probate in the plantations was bound by the probate granted in England. In *Pipon v. Pipon*, Trin. 1744, in Chancery, it was decided, that succession in moveables is regulated by the *lex domicilii*. This decision is referred to in the case of *Thorne v. Watkins*, which was decided in the court of chancery in 1750, and is collected in Vezey's Reports, vol. ii. p. 35. On the margin of the report there is the following note, which is a sort of title or rubric: "English subject residing and dying here, and administration here, with debts or *Choses in Action*, due in Scotland, distributable as the rest of his personal estate. So if in other foreign countries; debts follow the person of the creditor, not debtor. (See also *Hunter v. Potts*, 4 Term Rep. K. B. 182: *Foubert v. Turst*, ante vol. 1. p. 129. of these Parliament cases.)

That the same rule was understood to prevail in Scotland, till an erroneous idea was entertained with regard to the practice in England, is equally clear.

Dirleton, in one part of his work (and p. 39. Voce Nomina debitorum), throws out a doubt upon this subject in the following words: "If *nomina* which are not *res* but *entia rationis*, have *situm*; when the debtor is in Scotland *animò* [582] *remanendi*, and the debt is contracted with him as residing there? *ratio dubitandi*, they are thought and called a personal interest, and therefore should *sequi personam*: *contra* they are *res in obligatione et potentia*." But Sir James Stewart, in his answer, speaks decidedly upon the subject: "*Nomina debitorum* are not accounted *res*, nor yet are they mere *entia rationis*, but in plain Scots are debts; and whether they have *situm* or not, requires a distinction, if the *situs* should be that of the debtor, or that of the creditor; but personal debts are thought *sequi personam creditoris*; yet what may be the consequence, when the debtor lives in one kingdom and the creditor in another, is very uncertain; but *cum sequuntur personam creditoris*. I should think, that wherever the creditor either transmits or forfeits his right, it should go accordingly."

Dirleton repeats the same doubt again, under the word *mobilia*: but, in the same page, he states it not as a doubt, but as a clear proposition, That, "*mobilia sequuntur conditionem personae sui domini, adeo ut ejus ossibus adherant active et passive; immobilia autem coherent territorio*:" And Stewart, in his answer says, "If *mobilia* has *situm*, seems to be an improper question; for it is more proper, that *mobilia sequuntur personam*; and as to the question, if an Englishman in Scotland could make a nuncupative testament, as to moveables in Scotland, to me it is without doubt, and that even a Scotchman, residing and dying in England, may also make a nuncupative testament reaching his moveables. But in our law, we have a rule as to the probation by witness, limiting the same to £100 Scots, which being a rule of judgement, might incline our judges to reject a nuncupative testament, though made in England. The court of session seems to have proceeded upon this last-mentioned circumstance, in denying effect to English nuncupative testaments in Scotland; as indeed it is a general rule with respect to process and execution, as well as making up legal titles to any subject, that the forms of the country where the proceedings are instituted, must be observed."

Mr. Erskine's authority is clear and express upon this Subject (I. 3. T. 9. sec. 4.): "Where a Scotchman dies abroad, *sine animò remanendi*, the legal succession of his moveable estate in Scotland must descend to his next of kin, according to the law of Scotland; and where a foreigner dies in this country, *sine animò remanendi*, the moveables which he brought with him hither ought to be regulated, not by the law of the country in which they locally were, but by that of the proprietor's *patria* or *domicile* whence he came, and whither he intends again to return. This rule is

founded on the law of nations; and the reason of it is the same in both cases, that since all succession *ab intestato* is grounded on the presumed will of the deceased, the estate ought to descend to him, whom the law of his own country calls to the succession, as the person whom it presumes to be most favoured by the deceased, see *Principles of Equity*, p. 279, and the decision there quoted; Falc. 1. November 28th 1744, Brown; which however is contrary to some former [583] decisions, though conformable to the opinion of the most celebrated civilians. As *nomina debitorum*, or personal debts, are moveable in the strictest sense, their succession is therefore descendible, according to the *lex patriae* or *domicilii*, wherever they may be locally situated or be due."

It may here, in passing, be observed, That Mr. Erskine speaks rather inaccurately, when he supposes that all succession *ab intestato* is grounded upon the presumed will of the deceased; such presumed will can only apply to the part of a man's estate, over which he has the power of testing; and the preference that is given to the *lex domicilii*, does not arise from the *presumpta voluntas* of the deceased concerning the distribution of his effects, but from its being presumed, that he wished to have them with himself in the place of his domicile, and meant to collect them all there.

It is true, that in some cases decided since that of *Brown*, referred to in the above passage of Mr. Erskine, the court of session adopted a different rule; but these judgments proceeded altogether upon a mistake with regard to the practice in England.

The first regarded the succession to personal effects situated in England, that belonged to Alexander lord Banff, who died at Lisbon in November 1746, without making a will. The competitors were, an aunt by the father's side, who was next of kin according to the law of Scotland, and three brothers uterine, who were preferable by the law of England. It was stated, that the defunct's principal domicile was in Scotland, and that he never had any settled domicile in England; but sir Dudley Ryder, at that time Attorney General, having given an opinion that the succession to effects situated in England was to be governed by the law of England, it came to be taken for granted, both in that and in subsequent cases, that the judges in England did in such questions regard only the *lex loci rei sitae*. It was accordingly stated in the next case of *Lorimer* against *Mortimer*, decided in 1770, "That, by the law of England, effects, as well heritable as moveable, situated in England, do descend *ab intestato*, agreeably to the rules of descent established by the laws of England, without any regard to the *lex domicilii*;" and this proposition was not so much as controverted by the other party. In like manner, in the case of *Elcherson* versus *Davidson* decided in 1778, the same erroneous statement was made in the following words: "if a Scotsman leave effects in England, the person entitled by the law of England will obtain letters of Administration in Doctors Commons; and it will be in vain for an uncle or an aunt to compete with a mother, no such thing being known in the law of England; and in conferring the office in Doctors Commons, the civilians there will not give themselves the trouble to inquire what the law of Scotland is with respect to succession."

The same mistake led to a similar decision in the case of *Morris* in 1785. But when the case of *Bruce v. Bruce* came to be determined by your lordships two years ago, the cloud was dispelled and the court of session became sensible of their error.

[584] It may at times be attended with some difficulty to determine what is a person's proper domicile; and in some cases, the court of session seems on that account to have adopted the *lex originis*; but when the domicile is ascertained, the succession must be regulated by the law which there prevails.

II. But if the succession *ab intestato* is to be regulated by the *lex domicilii*, the same law must likewise regulate the power of testing upon personal estate. The writers upon the law of nations, and the civilians, are equally clear upon this point, as appears from the authorities to be found in the appendix.

The same rule takes place in England. The principles laid down by Lord Hardwicke in the case of *Thorn v. Watkins* apply equally to testate as to intestate succession. And in 1787 a decree, almost precisely in point, was given by one of your Lordships' number (Lord Kenyon), then Master of the Rolls, in the case of *Kilpatrick v. Kilpatrick*, which stood thus: Kilpatrick of Bengal, made his will in 1781, bequeathing certain legacies to be paid, partly out of his effects

in India, and partly out of his effects he had in England; among others, he bequeathed £300 to Archibald Fleming, a Scotchman, residing in Scotland. On Kilpatrick's death, this £300 became a vested interest in the legatee, was a *Chose in Action* recoverable from the executors in England, and consequently an English debt, which Fleming might have disposed of by testament, if he had lived in England. Fleming did not recover payment of the legacy, but died in 1783, having made a will, disposing of his whole estate and effects to Farquharson, and appointing him executor. Fleming's widow, however, put in her claim to the half of his personal estate, as being entitled thereto by the law of Scotland, *jure relictæ*; and in particular, to the half of Kilpatrick's legacy; and one of the masters in chancery having reported, that he conceived the widow to be entitled to one moiety of the legacy, it was ordered, "That it should be referred back to the said master to review his said report of the 17th day of this instant July, and to state to the court the ground on which he founded the opinion mentioned in his said report; and that the matter of the said petition should stand over in the mean time: In pursuance whereof, the said master by his report, bearing date this day, certified, that he had reviewed his report of the 17th day of this instant July, and that the opinion therein mentioned was grounded on the answer given by Hay Campbell, Esq. Lord Advocate of Scotland, to a case laid before him on behalf of the defendant Ann Fleming, respecting her right to a share of the legacy in question: In which answer the said Lord Advocate declared, *That by the law of Scotland, those effects which were called simply moveable, belonging either to husband or wife at the time of the marriage, fell under the communion of goods between the married parties; and in which also the children, if any existed, had an interest; and that the husband, jure mariti, had the administration and disposal of them while the marriage subsisted, but upon the dissolution thereof a division took place, [585] and the wife (if she was the survivor) took one third \* as their legitim in case a widow existed, and one half if no widow; and that the remaining share alone the husband could dispose of by testament: for that he could not by any testamentary deed exclude the children's legitim, or the wife's jus relictæ, and that the jus relictæ might however be excluded by settlements or provisions made upon the wife, with her own consent, before or after marriage; and that in Scotland there was no distinction between choses in action, and effects actually recovered.* Therefore, such being the doctrine of the law of Scotland, laid down by a gentleman of Mr. Campbell's eminence for professional learning, he, the said master, made no difficulty of subscribing thereto; and upon these principles founded his opinion, that the petitioner, Ann Fleming, the widow of the said defendant Archibald Fleming, not having any settlement or provision made upon her by her husband, and he having died without issue, she was entitled to one moiety of the legacy in question, and the interest thereof." Upon which the Master of the Rolls ordered, "That the said Master's reports, bearing date respectively the 17th and 25th days of this instant July, be confirmed; and that one moiety of the sum of £356 17s. 4d. cash in the bank, placed to the credit of their cause, on the account of the defendant Archibald Fleming, be paid to the petitioner Ann Fleming, the widow of the late defendant Archibald Flem-

\* Here a few words appear to be wanting in the copy of the decree.—The words omitted appear to be the following, "if there was no child, or if a child, one-half as her *jus relictæ*; and the children one-third."—The following statement is extracted from a subsequent part of the case, not connected with the present question.

"The general rules of succession, with respect to the moveable estate of a person deceased, have subsisted in the law of Scotland, with little alteration, as far back as any written records of the law are extant. When the defunct leaves a widow, and child or children, his moveable estate, after payment of debts, is divided into three equal parts, one of which goes to the widow, and is called the *jus relictæ*; another goes to the child, or children, under the name of *Legitim*, (an expression borrowed from the Roman law,) portion natural, or bairns part of gear; and the remaining third is held to be the dead's part, which may be disposed of by testament; and if not so disposed of, will fall to the children likewise, as nearest in kin. If there is a widow and no children, the division is bipartite, the wife being entitled to one half, as *jus relictæ*, and the dead's part is the other part: or if the defunct has left a child or children, but no widow, the division is also bipartite; one half being accounted legitim, and the other half dead's part."

ing; and the other moiety thereof to the defendant Archibald Farquharson, the executor of the said defendant Archibald Fleming." It seems scarcely necessary to observe, that the decree must have been the same if the question had been between the executor of Fleming and the children of Fleming claiming their legitim.

Although the case has not hitherto directly occurred as a subject of decision in the courts of law in Scotland, the plea that the respondents are now maintaining, will upon inquiry be found to be supported in several of the ancient statutes of that country.

In the *Statuta Willielmi* there is a chapter "*De hospitio et testamento peregrinorum*," from which it is plain that their succession was not regulated by the laws of the kingdom, "*si testari voluerint liberam [586] inde habeant facultatem quorum ordinatio inconcussa servetur.*" And if they died intestate, "*bona eorum per manus episcopi, in cujus episcopatu sunt, perveniant; et tradantur si fieri potest heredibus, vel in pias causas erogentur.*" There is no division here into Dead's part, Relict's, and children's part: But by the act 1425. c. 48. "*that all the king's lieges live and be governed by the laws of the realme; item, It is ordained be the king be consent and deliverance of the three estates, that all and sundry the Kingis lieges of the realme live and be governed under the Kingis lawes and Statutes of the realme allanerlie, and under na particular lawes nor special privileged, nor be na laws of other countries or realmes.*" The act 1503, c. 79. is nearly in the same terms, and it is remarkable, that the enactment is not, that the laws of Scotland and no other shall be used *within the realm*, but that all and sundry King's lieges be governed by these laws; nor is this expression casual, for it is repeated in the act 1503; and agreeably to this way of speaking the King was *Rex Scotorum* not *Scotiae*; his right of sovereignty being over the people rather than the territory. The act 1436, c. 88. has very justly been considered as another legislative enactment in favour of the *lex domicilii*, in cases of succession "*Eodem die rex, ex deliberatione trium statusum in parlamento congregatorum, decrevit, quod causae omnium mercatorum et incolarum regni Scotiae, in Zelandia, Flandria, vel alibi extra regnum decedentium, qui se causa merchandisuarum suarum, peregrinationis, vel aliqua quacunque causa (dummodo causa non morandi extra regnum) se transtulerunt, debent tractari coram suis ordinariis infra regnum, a quibus sua testamenta confirmantur, non obstante, quod quaedam ex bonis hujusmodi decedentium, tempore sui obitus fuerunt in Anglia vel in partibus transmarinis.*" It is fair to presume that the purpose of the legislature in enacting that these causes should be determined by the judges of the land, was to have them determined by the law of the land. In that view this act amounts to a legislative declaration in favour of the principle for which the respondents contend; for it directs that the effects of Scotchmen shall be governed by the law of Scotland wherever they are situated.

Dirleton states the following doubt: "If *mobilia* or *nomina* belonging to strangers (e.g. in England) should be confirmed here? or if it be sufficient they should be confirmed in England? *Ratio dubitandi, sequuntur personam*: on the other part they are a Scotch subject or interest." Sir James Stewart, his commentator, is however completely decided, and answers this last question as follows: "we met with this before, and it is still thought, that *mobilia et nomina* in this country belonging to strangers do transfer according to the law of the country where the owner resides and dies, *quia sequuntur personam.*" Dirleton himself indeed, *voce testament*, seems to acknowledge that the *lex domicilii* is the rule, as follows: "*Quae ratio*, that a testament made in France or Holland according to the custom there, which is different from ours, should be sustained in Scotland, as to any Scots interest [587] falling under the same?" Stewart in his answer to this doubt, which is not as to what is law, but merely to the reason of it, expresses the same decided opinion as formerly: "A testament made by a person dying in France or Holland according to the custom there, should be sustained in Scotland, though the custom be different; and even as to a Scotch interest falling under the same, because *testamenti factio* ought in all reason to follow the person; and persons dying any where, ought to be allowed to act or testate according to the custom of the place, as to all their *jura personalia.*"

Lord Kames suggests a case in point, and gives a decided opinion for the respondents. After laying down the doctrine of intestate succession, he proceeds as follows: "But what if he, a Scotch husband, have made a will, dividing his moveables among



his blood relations, leaving nothing of his moveables in England to his wife; her contract of marriage affords an effectual claim against him, which he cannot evade by any voluntary deed: and even without a contract, as the *jus relictæ* is established by the law of Scotland beyond the power of the husband to alter, she ought to have her proportion of these transient moveables, as the English judges are in this case bound by the law of Scotland, not by their own. To fortify this doctrine, I urge the following argument: where two persons joining in marriage are satisfied with the legal provisions, there is no occasion for a contract, and the parties may be held as agreeing that the law of the land shall be the rule. It is in effect the same as if the parties had subscribed a short minute, bearing, that the *jus relictæ*, and every other particular between them, should be regulated by the law of their country; and such an agreement expressed or implied must be binding all the world over, to support the relict's claim against the testament of a deceased husband. It may however happen, that two persons carelessly join in marriage, having an object in view very distant from a legal provision. Law does not admit of a presumption against rational conduct; but though it should be admitted, it will not avail: as every man is bound in conscience to obey the laws of his country, the husband, when disposed to think, will find his wife entitled by that law to the *jus relictæ*, and will see that an attempt to disappoint her would be against conscience. This must be evident to him when at home, and it must be equally evident that change of place cannot relieve him. At any rate, the *jus relictæ* must have its effect as to his moveables in Scotland; and it would not be a little heteroclete, that his transient effects should be withdrawn, for no better reason, than that they happen accidentally to be in a foreign country, where the *jus relictæ* does not obtain. (B. 3. C. 8. sec. 3.)

[588] *The following authorities were stated at length at the end of the respondent's case, from the writers on the law of nations, and the civilians, in favour of the lex domicilii.*

“Puisque l'étranger demeure citoyen de son pays et membre de sa nation, les biens qu'il laisse en mourant dans un pays étranger, doivent naturellement passer à ceux qui sont héritiers suivant les lois de l'état dont il est membre. Mais cette règle générale n'empêche point que les biens immeubles ne doivent suivre les dispositions des lois du pays où ils sont situés.—Mais quant aux biens mobiliers, argent et autres effets, qu'il possède ailleurs, qu'il a auprès de lui, ou qui suivent sa personne; il faut distinguer entre les lois locales, dont l'effet ne peut s'étendre au dehors du territoire et les lois qui affectent proprement la qualité de citoyen. L'étranger demeurant citoyen de sa patrie il est toujours lié par ces dernières lois, en quelque lieu qu'il se trouve, et il doit s'y conformer dans la disposition de ses biens libres, de ses biens mobiliers quelconques. Les lois de cette espèce, du pays où il se trouve, et dont il n'est pas citoyen, ne l'obligent point. Ainsi un homme qui teste et meurt en pays étranger, ne peut ôter à sa veuve la portion de ses biens mobiliers assignée à cette veuve par les lois de la patrie. Ainsi un Genevois, obligé par la loi de Genève à laisser une légitime à ses frères, ou à ses cousins, s'ils sont ses plus proches héritiers, ne peut les en priver en testant dans un pays étranger, tant qu'il demeure citoyen de Genève; et un étranger mourant à Genève n'est point tenu de se conformer à cet égard aux lois de la république. C'est tout le contraire pour les lois locales; elles reglent ce qui peut se faire dans le territoire et ne s'étendent point au dehors.” (Vattel, liv. 2. cap. 8. sec. 110, 111.)

“Etenim regulariter mobilia ubicunque naturaliter existerent illic censentur esse ubi dominus domicilium fovet, immobilia illic ubi vera sunt. Indeque immobilia regenda lege loci in quo sita sunt, mobilia vero ex lege domicilii domini; cum ergo actiones personales saltem ex communi consensu eas quæ ad rem mobilem tendunt mobilibus annumerari dictum sit; consequens est ut licet proprie nullibi situm habeant tanquam incorporales, tamen illic esse censentur ubi creditor in cujus domino et patrimonio actiones sunt, domicilium fixit.” (Voet, lib. 1. tit. 8. sec. .)

“Mobilia tamen ratione in dispositionibus testamentariis dum quaeritur an illæ in universum permittendæ sint nec ne, uti et ab intestato successioneibus donationibus inter conjuges vetitis permissivæ, et aliis similibus, de juris rigore communi, quasi gentium omnium consensu laxatum est, sic ut ex comitate profecta regula praxi universali invaluerit, mobilia in dubio regi lege loci in quo eorum

dominus domicilium fovet, ubicunque illa vere extiterint." (Tit. 4. de Statu. sec. 12.)

"Irritum proprie dicitur testamentum, cum testator maximam, mediam, vel minimam patitur capitis diminutionem, atque ita [589] activam testamenti factionem habere desinit ex status mutatione. § alio autem 4 Instit. quib. mod. testam. infirm. l. si quis 6, § irritum 5 ff. h. t. Et quamvis hodie apud nos et plerosque alios nulla capitis diminutio testamenti semel recte conditi vires perimat; tamen si quis habitans in loco, in quo minor annorum numerus in testatore requiritur, veluti in testari licet, veluti in Hollandia, ibidem anno decimo quinto testamentum fecerit, deinde vero domicilium alia transtulerit, ubi necdum per aetatem testari licet, veluti ultrajectum, ubi plena pubertas in masculo testatore exigitur, testamentum ejus quantum ad mobilia per talem migrationem irritum efficitur. Idemque eveniet, si Hollandus uxorem heredem instituerit (quod ibi licitum) deinde vero ad aliam migret regionem, ibique domicilium figat, ubi gratificatio inter conjuges ne supremo quidem elogio permissa est; nam et hoc in casu mobiliu intuitu in irritum deducitur voluntas ejus; cum mobilia in successione testata vel intestata regantur ex lege domicilii defuncti, adeoque res devenit in hisce ad eum casum, a quo propter qualitatem testatoris, vel honorati, initium habere nequit. Neque enim sufficit in honorato, quod tempore facti testamenti capax sit, sed et tempore mortis testatoris eum capacem esse, necesse est. § in extraneis 4 Instit. de hered. qualit. et differentia. Et quod attinet aetatem in testatore requisitam, illa utique testatoris qualitatem concernit, quam a jure habet, adeoque illa testandi habilitas aut inhabilitas, quae ex aetate est, proxime accedit ad illam, quae ex eo est, quod quis vel paterfamilias vel filius familias sit; ac proinde, uti testator paterfamilias sibi imputare debet, quod sese alteri adrogandum dederit et sic sese exuerit testandi facultate: ita quoque, qui ex Hollandia domicilium transfert ad eum locum in quo per aetatem necdum testari potest." (Lib. 28. tit. 3 sec. 12.)

Ulric Huber, after laying down certain axioms relative to the municipal laws of particular states, thence deduces the following position: "Cuncta negotia et acta, tam in judicio quam extra judicium, seu mortis causa sive inter vivos, secundum jus certi loci rite celebrata, valent, etiam ubi diversa juris observatio viget, ac ubi sic inita, quemadmodum facta sunt, non valerent. E contra, negotia et acta certo loco contra leges ejus loci celebrata, cum sint ab initio invalida, nusquam valere possunt; idque non modo respectu hominum, qui in loco contractus habent domicilium, sed et illorum, qui ad tempus ibidem commorantur. Sub hac tamen exceptione; si rectores alterius populi ex inde notabili incommodo afficerentur, ut hi talibus actis atque negotiis usum effectumque dare non teneantur, secundum tertii axiomatis limitationem." (Pars 2. Lib. 1. Tit. 3. sec. 3.) And after illustrating this rule by different examples, from testaments, contracts, decrees, actions, marriages, and the qualities of persons; under which last he seems to comprehend the power of testing, he says: "Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, qua tales personae alibi gaudent vel subjecti sunt, fruuntur et subjiciantur. Hinc qui apud nos in tutela, curave sunt, ut adolescentes, filii fam. [590] prodigi, mulieres nuptae, ubique pro personis curae subjectis habentur, et jure, quod cura singulis in locis tribuit, utuntur, fruuntur. (Sec. 13.)—Sunt, qui hunc effectum qualitatis personalis ita interpretantur, ut qui certo loco, major aut minor, pubes aut impubes, filius aut paterfamilias sub curatore vel extra curam est, ubique tali jure fruatur, eique subjiciatur, quo fruitur et cui subjicitur in eo loco, ubi primum talis factus est, aut talis habetur; proinde, quod in patria potest aut non potest facere, id eum nusquam non posse vel prohiberi facere. Quae res mihi non videtur habere rationem, quia nimia inde *συνχυσίς* jurium et onus pro vicinis, ex aliorum legibus oriretur. Exemplis momentum rei patebit. Filiusfam, in Frisia non potest facere testamentum. Proficiscitur in Hollandiam ibique facit testamentum, quaeritur, an valeat? Puto valere utique in Hollandia, per regulam primam et secundam, quod leges afficiant omnes eos, qui sunt in aliquo territorio: nec civile sit, ut Batavi de negotio apud se gesto, suis legibus neglectis, secundum alienas judicent. Attamen verum est, id heic in Frisia non habiturum esse effectum, per regulam tertiam, quod eo modo nihil facilius foret, quam leges nostras a civibus eludi, sicut eluderentur omni die. Sed alibi tale testamentum valebit, etiam ubi filiusfam. non licet facere testamentum,

qui cessat ibi illa ratio eludendi juris patrii per suos cives: quod in tali specie non foret commissum. (Sec. 14.)—Hoc exemplum spectabat actum ob personalem qualitatem domi prohibitum. Dabimus aliud de actu domi licito, sed illic, ubi celebratus est, prohibito, in suprema curia quandoque judicatum. Rudolphus Monsema natus annos 17, Groninga diebus quatuordecim postquam illuc migraverat, ut pharmaceuticam disceret, testamentum condiderat, quod ei in Frisia liberum erat facere, sed Groningae, ait D. Nauta relator hujus judicati, non licet idem puberibus infra 20 annos, nec tempore morbi fatalis, neque de bonis haereditariis ultra partem dimidiam. Decesserat ex eo morbo adolescens, herede patruo, materteris legato dimissis, quae testamentum dicebant nullum, utpote factum contra jus loci. Heres urgere, personalem qualitatem ubique circumferri, et jus ei in patria competens alibi quoque valere; sed judicatum est contra testamentum, convenienter ei quod diximus, praesertim, cum heic eludendi juris patrii affectatio nulla fuisset."

Rodenbourg not only lays down the general principle in his treatise "De jure quod oritur ex statutorum vel consuetudinum discrepantium conflictu," but also refers to many particular cases in which the law of the domicile applies to testate as well as to intestate succession. It will suffice to state the rule itself in his own words. (Cap. 2. Tit. 1. in fine.) In one passage he says, "Mobilia quippe illa non ideo subjacent statuto, quod personale illud sit, sed quod mobilia certo ac fixo situ carentia, ibi quemque situm velle habere, ac existere intelligimus, ubi larem ac fortunarum fixit summam. Quare quodcumque domicilii iudex de mobilibus statuerit, non ideo in alibi existentibus obtinere dixeris, quod vires extra territorium porrigat statutum, nedum quod personale sit, sed quod in domicilii loco mobilia intelligantur existere." (Tit. 2.) And in another [591] "Diximus mobilia situm habere intelligi, ubi dominus instruxerit domicilium, nec aliter mutare eundem, quam una cum domicilio. Et subest ratio, mobilia quippe, cum perpetuum ac fixum, ut res foli, locum non habeant, totum illud dependeat necesse est a destinatione ejus, cujus ea res est, ut ibi habeantur mobilia existere, ubi esse ea voluerit dominus: haud aliter ac ipsamet persona, ibi esse, vel domicilium habere accipitur, ubi semet esse voluerit. Igitur ibi mobilia sua quemque velle ut existant credimus, ubi degit ipse, laremque favet ac fortunarum habet summam. Quo jure et nomina non immerito censueris, ut ea in successionibus et similibus mobilium rerum sortiantur naturam."

By the 39th article of the 16th title of the laws of Meckline, it is declared, that "Omnia bona mobilia, aurum, argentum, gemmae, ornamenta, pecunia numerata, sive quae in nominibus debentur haereditati, intra fines jurisdictionis reique publicae Mechliniensis, quocumque loco ea reperta fuerint, ita dividuntur, ut ea bona mobilia quae intra pomoerium Mechliniense reperiuntur."

Christinaeus thus begins his commentary upon this law: "Mobilia ergo quae sunt extra territorium statuentium, debent judicari perinde ac si forent in eo loco in quo erat persona defuncti, secundum tradita a Do. Andr. Gayl. Pract. Observ. lib. 2. Observ. 124. num. 18. quia, uti ibidem dicit, bona mobilia respiciunt personam." Here follow several authorities, after which the author thus proceeds: "Idem dicendum sit in nominibus dubitorum, eo quod actio personalis semper cohaereat ossibus personae, et ab ea separari nequeat. Ac proinde non habent situm."

The fifth head of his commentary upon this article states the Question: "An hic articulus locum habeat tam in causa testati quam intestati?" with regard to which he observes, "Ejusque ratione cum statutum hoc, ibi, Alle havelyche geoden; (omnia bona mobilia) et ibi Gelt ende schulden, generaliter loquatur, diu multumque me referente agitatum disputatumque fuit in causa Caroli vanden Wiele et consortium actorum, contra haeredes domicellae Annae Bernaerts viduae quondam Arnoldi vanden Wiele, ejusque institutae haeredis reos, an hic articulus locum haberet tam in causa testati quam intestati: et sanior pars censuit eundem locum habere, cum statutum non constituat differentiam inter succedendi modum, sed indistincte declaret, mobilia et nomina, ubicumque locorum reperta, haberi debere pro repertis in loco domus mortuariæ; ut inde recte consequatur maritum et uxorem, cum haec mobilia et nomina habeantur quasi subjurisdictione Mechliniensi sita, de his aliter disponere non potuisse per testamentum in mutuum favorem et commodum, quam ex praescripto statuti, hoc est coram magistratu Mechliniensi, nam si testati et intestati causam probe spectemus, nulla hac in parte constituenda videtur differentia."

[THE APPEAL in this case was barely dismissed, and the interlocutors complained of affirmed; but the Editor has no opportunity of knowing from anything that appears on this case, to what extent [592] the House of Lords coincided with the reasons adduced by the Respondents.]

The following extracts from the Appellant's case will, in some measure, shew the state of the argument on the contrary side of the question. The reasons, as stated in that case, were merely short deductions from these arguments.]

It was argued (T. Erskine, W. Grant, J. Anstruther), that the right of succession is a consequence of the right of property, and that a right of alienation is necessarily inherent in a right of property: the same reasoning which supports the right of alienation and conveyance *inter vivos*, applies equally to transferring property by testamentary deeds; and accordingly it has been so treated by every writer upon the law, and particularly by Grotius, and by Lord Stair, B. 3, Title 4. § 2. The former of these writers expresses himself in the following terms: "*Quaquam enim testamentum ut actus alii formam certam accipere possit a jure civili ipsa tamen ejus substantia cognata est dominio, et eo dato juris naturalis;*" and the latter says, that Every right being a faculty or power of exaction, or disposal, it is a chief interest and effect of it that the owner may dispose thereof, not only to take effect presently, but, if he please, after his death; and, by the law of nature, the sole will of the owner is sufficient to pass his right, if communicable, to take effect in his life, or after his death: so then the first rule of succession, in equity, is the express will of the owner, willing such and such persons to succeed him in whole or in part."

Testamentary succession being therefore founded on the nature of property itself, is the original species of succession; and legal succession, or succession *ab intestato*, can only take place as subsidiary to, and in the absence of the express declared will of the deceased. It has accordingly been held by all writers as founded on the presumed will of the proprietor, which is not to be understood to mean the will which it is to be presumed the party actually had, but that which it is to be presumed he either had or would have had if he had willed at all upon the subject. Grotius, L. 2. C. 7. § 3. says, "*Successio ab intestato quae dicitur posito dominio remota omni lege civili ex conjectura voluntatis naturalem habet originem.*" Puffendorf, l. 4. c. 11. § 1. treats it thus: "*Ex dispositione legis naturalis sine expresso et peculiari facto prioris domini dominia rerum transire dicuntur in successione ab intestato scilicet cum eo dominii vis foret attributor ut quis de rebus suis possit disponere non solum quoad ipse—in vivis esset sed etiam efficaciter in mortis eventum in alios transferre probabile non videatur si quis super bonis suis, nihil deprehenderetur disposuisse cum illa a morte sua pro derelictis habita cui vis occupanti voluisse pateri igitur sequendum hic defuncti voluntatem probabilissime presump-tam ratio naturalis dictabat.*"

Lord Stair, throughout his whole title of succession, B. 3. t. 4. treats succession *ab intestato* as founded on the presumed or conjectured will of the deceased, and expressly says, s. 3. where there is no express will, "the presumed will of the defunct takes place."

[593] If the will of the proprietor forms the groundwork of the natural right of succession, and if succession *ab intestato* be founded also upon that will, to be presumed according to some rule which each particular country may think best for that purpose; it will follow, that all restraints upon the will of the proprietor, or upon his power of disposing, established by the municipal laws of any country, are *pro tanto* contrary to the nature of property, and infringements upon natural right: they are therefore to be construed strictly even by the courts of justice of that state by which they are imposed, and are not to be extended to another state, when the law leaves an absolute power of disposal in the owners of property.

If there be no positive law regulating the succession to property situated in another state, and if succession *ab intestato* be nothing more than a rule established for discovering the presumed will of the deceased, the rule adopted for that purpose may either be the *lex domicilii* of the deceased, or the law of the *locus rei sitae*, according as the one or other shall be thought most proper for the purpose. Both countries act upon the same principles, viz. a desire to carry into effect the will of the deceased, although they may have adopted different means of attaining their conclusion; but the question cannot arise in the case of testamentary succession, because

it is idle to discuss whether this or that rule be the most proper for discovering the presumed will of a person who has expressly declared what his will is.

Property situated in another country can only pass by the law of that country where it is situated. The *lex domicilii* of the owner is in every respect a foreign law, and has no binding operation as law in the country where the property is situated; and when adopted, it is not adopted as a law to regulate property: but as a rule of presumption can only be appealed to in a case where there is room for presumption, and in such cases it may perhaps be the best rule of presumption after succession *ab intestato* is established, it seems no unreasonable supposition that when a person dies without a will, he means to leave his succession to be regulated as the law shall direct; and if such a supposition is to take place, it is equally reasonable to suppose that he meant his property to be regulated by that law which he knew best; or in other words, by the *lex domicilii*; and the appellant would hazard nothing in admitting that such presumptions are fair and reasonable in any case where presumptions can at all take place.

It was further argued, That there is no reason for distinguishing alienation by will, from any other species of alienation. If a person having property in England, alienates that property by an instrument valid by the laws of England for that purpose, it seems perfectly immaterial to inquire, whether such an instrument was valid by the laws of the country where he happened to reside at the time; it is not intended to have any operation there, nor intended to convey property situated there.

[594] It is enough if it be valid by the law of the country where it is intended to operate; and it would be carrying the argument a great way, to say, that in order effectually to alienate property situated in another country, it is not only necessary to do it by an instrument effectual by the law of the country where the property is situated; but also, that the instrument must be one which would have been effectual to have transferred the property, if it had been situated in the place where the party resided.

And therefore, unless it can be contended that there is some distinction between alienation by will, and other modes of alienation, it is sufficient to inquire whether the instrument is valid to transfer property situated in England, a point which cannot be disputed after probate has been granted by the proper ecclesiastical court.

But further; This is not a case where the alienation could not have been made by the law of Scotland; for it is admitted, that the right to legitim might have been defeated a thousand ways by conveyance *inter vivos*, by changing the nature of the property, by vesting it in heritable bonds, in personal bonds, secluding executors' bonds, bonds with substitutions; or even in bonds with a substitution to such person as he should name by any writing under his hand; therefore, as the thing might have been done by one mode or other, according to the law of Scotland, the question comes to be, Whether in order to transfer property in England, which property might have been legally transferred according to the law of both countries, it be necessary to use the English or Scotch form of conveyance? or whether a conveyance valid by the laws of England, becomes invalid, merely because the person executing it happens to live in Scotland? It has been often contended and properly decided, that a conveyance of personal property, if executed according to the forms of the *lex domicilii*, is sufficient to convey property, although situated in another country; because the person is supposed to be conversant in the law of his own country only. It is upon this principle that the deeds of one country are sustained in another; but it never was contended, that if a person living in a foreign country, made himself acquainted with the laws of the country where his property was situated, and endeavoured to convey it according to those laws, that this very act rendered his conveyance invalid; and that no conveyance can be valid but one executed according to the forms of the *lex domicilii*, although it be executed according to the forms of the law in *loco rei sitae*.

It was also observed by the appellants, that one great argument used by Lord Hardwick, in the case of Thorn and Watkins, in favour of the *lex domicilii* taking place in intestate succession, namely, that a contrary decision would destroy the credit of the funds, must, in this case of testate succession, operate directly the contrary way; for if it shall be held, that the property of [595] Scotchmen situated in

England, is liable to the claim of legitim, it necessarily follows, that every Scotchman who wishes to have a power of disposing of his property by will or testamentary deed, must withdraw his property from the funds, and transfer it to Scotland.

The respondent, in the course of his arguments, laid much stress upon the supposed maxim, that *mobilia non habent situs*, and are to be considered as having no proper local situation, but as being attached to the person of the proprietor, and therefore situated at the place of his domicile. If this maxim be true to its utmost extent, then unquestionably there can be no dispute what law is to take place; for in every possible case, the *lex domicilii*, and the law of the *locus rei sitae*, must be the same. It is because the maxim is not true, that the question is raised; for, in the very terms of it, it supposes the *situs* of the property to be in one place, and the domicile of the person in another.

It would be idle to discuss, whether property situated in England was to be governed by the law of England, if it were an incontrovertible proposition of law, that no domiciled Scotchman could have moveable property situated in England. It is however unquestionably true, that to many purposes, moveables have a *situs*, and may be described by it.

The maxim can mean no more than a short way of expressing the opinion of those who think that the *lex domicilii* should regulate succession *ab intestato* in moveables; and therefore this maxim, or rather this section, may be very much laid out of the question; the true state of it being, by what law is testate succession in *mobilibus* to be regulated, when the domicile is in one place, and the *situs* of the moveables in another? It may also be observed, that this maxim or fiction of some foreign jurists (for they are by no means all agreed on it) has no force in this country as a maxim of law. It can derive its force only from the reasoning by which it is supported. It is therefore by a discussion of that reasoning, by which it is proved that the *lex domicilii* ought to take place in opposition to the law of *locus rei sitae*, that the question is to be decided, and not by a quotation of the maxim that *mobilia non habent situs*. Indeed, it is in itself nothing more than a fiction, invented and supported as a means of getting rid of the difficulty of the reasoning, by converting a question of fact into a proposition of law; and it is accordingly treated by its warmest supporters as a pure fiction.

From the quotation from Voet, lib. 1. tit. 4. pars 2. *de statut.* sect. 11. relied upon by the respondent (see *ante*, p. 579), it was contended by the appellant to be clearly understood by that author as nothing more than a fiction or presumption, established for discovering the presumed will of a person. Where that will is not expressed and confined to that case, the appellant has no occasion to dispute its truth, or the propriety of its application. It may however be remarked, that it would be more simple to [596] say, that when a person dies intestate, it may be fairly presumed, that he intended his property to be divided at his death by the law of his own country, with which he was acquainted, than to have recourse to any fiction whatsoever, the truth of which cannot be supported even by those who are its warmest advocates. For this very same author, lib. 48. tit. 20. sect. 7. treats it as a maxim by no means applicable to all cases; or rather, he confines its application to the single case of intestate succession. In reasoning upon the effect of a forfeiture for a crime in one state, upon property situated in another, after contending that such forfeiture would operate to confiscate immoveable property to the state where it lay, provided the crime was such as would have induced a forfeiture if it had been tried in that state, he adds, "*Nec aliud ex juris rigore statuendum de mobilibus licet enim in materia successionis ab intestato, receptum sit mobilia regi lege, domicilii defuncti quia ubicunque naturaliter existant finguntur domino presentia esse tamen vere subsant potestati atque imperio ejus in cujus territorio inveniuntur.*"—From this quotation it is clear, that Voet does not consider this maxim, so much relied upon by the respondent, as universally true or universally applicable. On the contrary, he considers it as solely relating to the case of intestate succession, and as a presumption established for the discovery of supposed will. With this case, therefore, it has no relation. This, which is fairly to be inferred from the opinions of Voet, is distinctly laid down by Huber, an eminent Dutch lawyer, and one no less an advocate for the *lex domicilii* being the proper rule for determining succession *ab intestato*. He states the question, "*Si quis moriatur*

*intestatus relictis bonis in diversis civitatibus quae non eisdem legibus succedendi utuntur utrum successio deferatur secundum legis reipublici in qua vixit et mortuus est defunctus an ubi sita sunt bona.*" To which he answers, "*Immobilia sequi jus loci in quo sita sunt mobilia cum non faciant partem territorii sed affectionem ad personam ultimi possessoris habeant sequuntur jus loci in quo illi domicilium habuit.*" And then he adds, "*Quod si testatoris vel contrahentes claris verbis expresserunt quid de rebus immobilibus fieri vellent tum ratio juris gentium postulat ut voluntas affectum suum habeat ubicunque sitae sint mobilis immobilisve, cum nihil tam naturali, sit quam ut voluntas domini volentis rem suam in alium transferre rata habeatur ut ait Justinianus in sect. per Traditionem 40 Inst. de Acquir. R. D. Hob. di. Jur. l. 5. sect. 4. tit. sect. 22, 23.*" It might almost be supposed, that this opinion was given upon this very case, and will decide it, as far at least as the opinions of foreign lawyers can have any weight.

But it has been contended, that although it may be true that some moveables have a *situs*, yet that debts *nomina debitoris* follow necessarily the person of the creditor. This, although it were admitted, would not affect a great part of the property, contested in this case, most of which consists of money in the [597] funds, which certainly must peculiarly be considered as having a *situs*; so much, that it cannot be transferred from one hand to another, unless the owner comes himself to the place where it is, or authorises some person to appear and act for him; and accordingly every foreign writer upon the law has stated *depositae montium*, as peculiarly having a *situs*, which bears a strict similarity to money in the funds.

It seems to have been a point by no means settled in the law of Scotland, whether *nomina debitoris* follow the person of the creditor or the debtor: Dirleton, one of the acutest writers on the law of Scotland, puts the questions, *si nomina*, which are not *res*, but *entio rationis* have *situm*, when the debtor is in Scotland, *animo remanendi*, and the debt is contracted with him as residing there? He then states the argument on both sides, and clearly shews to which his own opinion leans. *Ratio dubitandi*, they are thought and called a personal interest; and, therefore, should *sequi personam*: Contra, they are *res in obligationi et potentia*. 2do, If the creditor be forefaulted in France, being a Frenchman, they do not forefault to that king *quia subditus amittet*, only *quia sunt civitatis*. 3tio, They are liable in Scotland to extraordinary taxation. 4to, The debtor is *quasi servus* and *servi habend. situm*; to consider *quid juris* elsewhere, as to Banks, and *montes pietatis*. Stewart, the commentator of Dirleton, leans to the opposite opinion, but with great hesitation.

In a variety of cases the law does suppose debts to have a *situs* in the country of the debtor; a debt due in Scotland does not rest, *ipso jure*, in the assignees under a commission of bankrupt. Now, if they were to be considered as situated in England only, the assignees must have, *ipso jure*, a complete right. The process of arrestment, by the law of Scotland, is founded entirely upon the idea, that the property of a creditor is in the hands of debtor, situated where he is, and must be produced by him upon the decree of forthcoming. It is not used for the purpose of preventing the debtor from paying to his creditor, or for transferring a right from the creditor, but is a process to compel the debtor to deliver up property which he has in his hands really belonging to his creditor, but which that creditor ought to pay to the person using the arrestment. It is therefore not the transference of a right, but a demand to deliver up property; for this purpose, it must be supposed to have an actual *situs* in the place where it is demanded, and where it is required to be delivered up. The decree is looked upon as a judicial assignation of a subject, which therefore must be supposed to be situated in the place where the debtor is; otherwise the judge can have no authority to deliver it up or assign it; for arrestment is not a process in *personam*, but is held by all the writers on the law of Scotland to lay a *nexus* upon the subject itself, and to entitle the arrester to an action, by which he may appropriate it to himself. The only foundation for it therefore is, [598] that debts have a *situs* where the debtor is, and where alone they can be exacted.

But the appellant further apprehends, that a series of decisions has established it as a point of Scotch law, that the *lex loci rei sitae* is the governing rule both in testate and intestate succession; and therefore, if it be the law of England that the law of Scotland, with regard to succession, is to regulate the succession of Scotchmen, dying and leaving property in England, it will necessarily follow that the

operation of the law of Scotland must be confined to property situated in Scotland only. The law of Scotland must therefore be inquired after as a fact; and if a series of decisions are adhered to, the law of Scotland confines itself within the limits of the country, and decides that the law of England must take place with regard to property situated there; it is therefore a matter of no importance to the appellant, whether the law of England or the law of Scotland be held the rule of succession in the present case. If the law of England be, that the law of Scotland shall prevail with regard to the property of Scotchmen situated in England, then the law of Scotland decides, that with regard to such property, the law of England is the rule; if, on the contrary, it be held, that the law of England and its rules of distribution regulate without distinction all property lying within its reach, then equally the appellant must succeed. At the same time it is to be observed, that although it were proved that the *lex domicilii* were the rule as to intestate succession, the argument will not bear upon the case of testamentary succession. Lord Stair, b. 1. t. 1. sect. 16. says, "The law of Scotland regulates the succession and rights of Scotchmen in Scotland, though dying abroad and resident there; expressly laying it down, that though domiciled abroad, the succession to Scotch rights must be governed by Scotch law, and completely disregarding the law of the domicile." Lord Bankton follows the same doctrines, b. 1. t. 1. sect. 82, 83. He says, "The succession of persons residing and dying abroad, devolves according to the laws of the place where the subject lies." He then proceeds to give instances, and concludes, "For the same reason in legal succession, whether of heritage or moveables, the rule is, that those who are called to it, who by the laws of the place where the subject lies are entitled, and not those who are the lineal successors by the law of the country where the proprietor resided and died." These opinions of the most respectable writers upon the Scotch law have been followed by a series of decisions in the courts of that country for near two centuries. The first case which is to be found, is so early as the year 1611, Haddington; and is thus abridged in the Dictionary, vol. 1. p. 320.—"A Scotchman, born bastard, dying in England, his goods will fall under escheat to the king, and his donator will have a right thereto, notwithstanding any testament made by the bastard unconfirmed in England; and [599] albeit it be alleged that bastards have *testamenti factionem* there."

It is clear, that if in this case the *lex domicilii* had been followed, and if it were supposed that all moveables had *situs*, there the decision must have been in favour of the will. And what forms a strong point of similarity between this case and the present is, that the restraint which the law of Scotland imposes upon the *facultas testandi* of bastards is not dissimilar to the restraint which is imposed on a father with respect to *legitim*.

The next case, in point of time, is to be found in Durie, December 9th, 1623. *Henderson's Bairsns contra Debtors*. And although it was a case concerning heritable bonds only, and in which the testator had, by will made in Flanders, instituted all his children his heirs, which testament was not by the law of Scotland valid to pass heritage; yet it is important to mention it here, because the reasons assigned for the judgment clearly shew the opinion of the judges upon the present point. After mentioning that such a testament was valid by the law of Flanders, it is said, "That that testament could not be valuable but for the goods and heritage which was within the province where the testator made his testament, and could not extend to goods and gear which were within another kingdom, when the goods would not fall under that division and testament by the law of the kingdom where the goods and lands lay; but the said goods ought to be asked by that person who would be found to have right thereto, by the law of the kingdom where they were, and not by the law of any other kingdom; neither could the law of any other country have place in Scotland, for any thing being within Scotland, but the proper law of the country itself."—The next case is *Melvill and Drummond*, July 16, 1634, Durie, which also related to heritable bonds, but the *ratio decidendi* is stated to be, that *bona tam mobilia quam immobilia regulantur juxta legis regni and loci quo bona ea jacent et sita sunt*.

The same principle seems to have guided the judges during the usurpation, June 1656, *Craig v. Lord Traquair*, and January 19, 1665, *Levis contra Shaw*, where a nuncupative testament made by a person domiciled in England was found



not effectual to carry moveable estate situated in Scotland, although the will was actually proved in the ecclesiastical court in England; and this case is more deserving of attention, because the very same arguments which are now adduced were then offered without effect. Yet had it ever been imagined by the lawyers of that day, that the *lex domicilii* must govern, and that *mobilia non habent situs*, it is impossible not to have given them effect, and decided a contrary way.

The rule in the law of Scotland, of rejecting nuncupative testaments, is a limitation of the *facultas testandi*; and in this case, the law of Scotland gave effect to its own restraints in the [600] case of goods in Scotland belonging to a domiciled Englishman; it never could intend that Scotch restraints were to operate over property situated in England, although belonging to a person domiciled in Scotland. There are a variety of other cases, all tending to establish the proposition, that the law of Scotland regulates the succession to personal property by the *lex loci rei sitae*: It is unnecessary to do more than mention them. *Bisset v. Brown*, July 19th, 1666, reported by Dirleton; *Archbishop of Glasgow contra Bruntfield*, Mar. 1583; *Dryden v. Elliot*, 1684; both reported in Harcarse; *Lorimer contra Mortimer*, February 1st, 1770; *Elcherson and Davidson*, January 13th, 1778; and *Henderson and Maclean* in the same year; and the only case which supports the contrary doctrine, is that of *Brown and Brown*, November 28th, 1744, reported by Falconer and Kilkerran, which seems never to have been followed, and even to have been disapproved of at the time it was made, as clearly appears, by what is said by Lord Kilkerran, in his report of Morrison's case, Kelk. 214. *voce* Foreign.

The very respectable opinion supposed to be delivered in the house of lords in the case of *Bruce and Bruce*, is thought by the respondent to bear upon this case; but the appellant apprehends, that it was not necessary in that case expressly to determine what was the law of Scotland, because the House of Lords were of opinion, that Mr. Bruce was not domiciled in Scotland; and therefore the law of Scotland could not apply to his case, it not even being pretended that he had any property there. He imagines himself, with the utmost deference to that opinion, still at liberty to contend what the law of Scotland is in his case; and even if it were supposed that that very weighty opinion decided what was the law of Scotland in a case of intestate succession, and what was the best rule of presuming the will of the deceased; yet he still apprehends, that he is at liberty to argue, and hopes he has proved, that the principles upon which that opinion is supposed to be grounded, do not apply to the case of testate succession upon which he relies. If the appellant succeeds in establishing, either that the *lex loci rei sitae* is the rule of Scotch law, with regard to the succession to the moveable estate of Scotchmen, wherever situated; or if he has succeeded in establishing, that the *lex domicilii* is a rule only adopted for the purpose of ascertaining presumed will, and therefore not applicable to this case; it will be unnecessary for him to discuss what is the rule adopted by the law of England. It is quite enough for his purpose, that it is admitted that the law of England looks to the *lex domicilii*, that is, the law of Scotland, which he conceives he has proved to be in his favour.

[601] CASE 2.—SARAH DRUMMOND (Widow of JAMES DRUMMOND, and Guardian to DAVID DRUMMOND her Son),—*Appellant*; JAMES DRUMMOND, & al.,—*Respondents* [20th February 1799].

[See 2 Scots R. R. 18. Discussed in *Brodie v. Barry*, 1813, 2 V. and B. 127, and *Maxwell v. Maxwell*, 1870, L. R. 4 H. L. 506.]

Though the personal estate of a Scotchman dying domiciled in England, must be distributed according to the law of England, yet that shall not affect or interfere with the succession to his real estate in Scotland. Therefore, where for securing a sum of money borrowed, a heritable bond is granted, by which the land in Scotland is rendered liable as the principal debtor there, and the heir pays the said bond by sale of part of the estate, (being at the same time one of the next of kin and administrator,) he shall not come for relief upon

the personal funds in England, as primarily applicable to the payment of such a debt.

See *Balfour v. Scott*, ante, p. 550, and which was relied on as in point by both parties in this appeal: the arguments on each side are well worthy perusal.—This case did not come into the hands of the Editor till the whole of that of *Balfour v. Scott* was printed.

David Drummond was a native of Scotland, but domiciled in England. He died at his house in Sackville-street, London, upon the 27th of July 1791. After having acted for some years in the capacity of clerk to his paternal uncle, William Drummond, wine merchant in London, he was assumed as a partner into a third share of the concern; and in the year 1788, upon William Drummond's retiring from business, he succeeded to the whole, upon paying a sum of money, which was advanced by his maternal uncle, Mr. James Clow, late professor of logic in the university of Glasgow.

In that same year Mr. Clow died, and was succeeded by David Drummond in the lands of Duchally and Pittentian, situated in the county of Perth in Scotland, in virtue of a disposition and settlement executed by Mr. Clow upon the 29th of May 1783, by which these lands were disposed to him and the heirs of his body, whom failing, to James Drummond, his brother, the husband of Mrs. Sarah Drummond, the appellant, and the heirs of his body. Upon the precept of sasine contained in this disposition, David Drummond was duly infefted, conform to instrument of sasine bearing date the 30th of August, and registered at Perth the 10th of October 1788.

In the month of February 1789, David Drummond borrowed from captain George Birrell, some time in the service of the Honourable East India Company, then residing at Kirkcaldy in Scotland, the sum of £2000 sterling, in security of which he granted an heritable bond over these lands of Duchally and Pittentian, to which he succeeded as heir of provision to his uncle Mr. Clow; the heritable bond is dated the 6th, and an [602] instrument of sasine followed upon it, which is dated the 26th, and registered in the register of sasines at Perth upon the 27th, days of February 1789. This money was borrowed of captain Birrell to repay a like sum borrowed in March 1787, by Mr. Drummond, of Newnham and Co. of London.

By the nature and style of an heritable bond in the law of Scotland, the rents and profits of the land are not only disposed to the creditor for payment of the interest stipulated upon the principal sum, but the land itself, as well as the rents, are conveyed to him in security and payment of the money borrowed; so that, in virtue of the infeftment which the creditor is empowered to take by the deed, he may enter into possession till he receive satisfaction of his debt; and, strictly and properly, no more remains to the debtor than a right of redeeming the lands upon payment of the principal sum, with the interest that may be due upon it. According to the stile and tenor of the bond granted upon this occasion by David Drummond, which was conceived and executed in the usual stile and manner of Scotch deeds of that nature, it was contended by the respondents, that it must have been the understanding and intention of the parties that the money was to be paid in Scotland, and that the deed was to have effectual execution in that country only, and according to the law and practice of the place, where the subject over which the heritable right had been created was situated. Accordingly, they observed, in the clause of redemption, special provision is made for redeeming the lands, by payment or legal tender of the principal, interest, and expences to the creditor, and his heirs and representatives, "or, in case of their absence or refusal, by paying the same into the bank of Scotland at Edinburgh."

On the part of the appellants it was contended, that Mr. Drummond appeared to have considered this debt, although constituted in an heritable form *quoad* the creditor, to have been really and truly a charge on his personal estate. Accordingly in his books his stock in trade was made debtor to Newnham and Co. for the £2000 at the time it was borrowed of them, and was afterwards made creditor when the money was repaid. And it was again made debtor to captain Birrell. The appellant contended, therefore, that in fact Mr. Drummond (so far as could be collected from intention not expressed in a regular deed,) had charged his personal estate with this debt, and constituted it debtor for the amount.

Upon the death of David Drummond in July 1791, James Drummond, his brother,

the next substitute in Mr. Clow's deed of settlement, made up titles as heir of provision to the two estates of Duchally and Pittentian; and having sold the estate of Duchally at the price of £3800 (for the very express purpose, as it was contended by the respondents, of freeing his property of the heritable burden created in favour of captain Birrell,) he in May 1792 paid the debt out of the price, together with [603] £128 9s. 10d. of interest, and received from the creditor a discharge and renunciation proceeding upon the following narrative: "And now, seeing that James Drummond, merchant in London, brother german of the deceased David Drummond, and heir of provision in the foressaid lands of Duchally, etc. has upon the 16th day of May last past made payment to me of the foressaid principal sum of £2000 sterling, etc. therefore I have exonerated and discharged, and hereby exoner, quit, and simply for ever discharge, the said James Drummond, his heirs, executors, and successors, and all others whomsoever, the heirs and representatives of the said David Drummond, of the said principal sum,"—and he renounced his right to the lands. This discharge and renunciation was duly registered at Edinburgh the 29th of June 1792.

Besides these two estates in Scotland, to which James Drummond succeeded as heir, David Drummond died likewise possessed of very considerable personal funds, which were chiefly situated in England, where, on account of the business in which he was engaged, he had for several years his principal domicile; though it was his custom, after succeeding to his uncle's estates, to reside for some months every year at the mansion-house of Duchally, in which he always kept furniture and an establishment. From his having died domiciled in England, the succession to these personal funds fell to be regulated by the law of that country, which gives the right of administration to the mother, subject to distribution, however, among her children, all of whom are, equally with her, admitted to a share of the moveable property of the intestate.

As, however, the mother of the defunct in this case was resident in Scotland, and her son, James Drummond, the appellant's husband, was living upon the spot where the personal estate lay, and where all the funds were to be collected, she judged it adviseable to renounce her right of administration in favour of him. To this she was induced partly by the advice of William Drummond, the uncle of the deceased, who took a very active and leading part in all the concerns of the family, and who, from his situation, had naturally a very considerable influence, both over her and her daughters, and, partly from views of convenience, as, had she herself administered, she could only have acted by granting a power of attorney to some person resident in London.

In consequence of this renunciation by his mother, James Drummond came to unite in his person two distinct and separate characters; namely, that of heir, and that of administrator or executor. In the former of these characters he had right to the two estates of Duchally and Pittentian; and having made up his titles by a service according to the Scotch forms, he vested in himself the rights to the lands as it stood in his predecessor, subject to every burden which by the law of the country is imposed upon the heir. In the latter character in which he [604] acted, not only for his own behoof, but also for the equal behoof of his mother and sisters, it was his duty to collect, with all expedition, the personal effects belonging to the deceased, and to distribute them with fairness, according to the respective rights of the parties interested.

Soon after letters of administration were taken out by James Drummond, it appears, that William Drummond, his uncle, was employed to put a value on the stock of wines and furniture belonging to the deceased. According to this valuation they were estimated at no more than £3135 19s. 6d. But with this, as a fair and full estimation, the respondents were certainly not bound to be satisfied. In making it, William Drummond acted entirely on the part of his nephew, without any person having been appointed on the part of the mother and sisters, and, indeed, even without their knowledge, or any intimation having been given them that such a thing was to be done. From anxiety, however, to preserve a good agreement with persons so nearly connected, they were willing to abide by it as just value: and accordingly at that estimation the whole wines and furniture (with the exception of few articles which were sent to the mother at the valuation of £87) were delivered over to James Drummond and his cousin William Lindsay, who had entered into partnership for carrying on the wine trade of the deceased.

Besides the value of these articles, James Drummond had also recovered many of the outstanding debts due to the defunct; and having thus intromitted so largely with the funds, his mother and sisters, the next of kin, naturally expected from him an account of what he had received, and, to that extent at least, a distribution of the personal estate. Many applications were accordingly made to him for this purpose, but all without effect; and for a long time no account whatever could be obtained, or any information with regard to the real estate and amount of the funds which he had undertaken to administer. At length, however, a statement, though a very imperfect one, was produced by him, and various attempts were made, by the intervention of friends, to get the matter settled and concluded in an amicable manner. At one time he even came the length of agreeing, that an heritable security over his lands of Pittentian should be granted for the balance due by him as administrator to the other next of kin, and that a person should be appointed in England to recover for the benefit of all concerned, the remainder of the outstanding debts, which at that time amounted to nearly £2000 sterling. This agreement, however, he afterwards refused to carry into effect; and all other attempts to bring him to a settlement having failed, it became necessary for the mother and sisters to take legal measures for securing and recovering the interest which, equally with him, they had in the funds. With this view, accordingly a commission and power of attorney was granted to Mr. James Drummond, writer to the signet, Edinburgh, [605] and Mr. John Wilson, solicitor at law, London; and in virtue thereof a suit was commenced by them in June 1794, in the prerogative court of Canterbury against the administrator, to compel him to exhibit "a full and particular inventory of all and singular the goods, chattels, and credits, of the deceased, which at any time since his death had come to his hand, possession, or knowledge; to render a true, just, and faithful account of his administration thereof; and likewise to see portions allotted, and distribution made of the goods, chattels, and credits of the said deceased, according to the act of parliament in that case made and provided."

In consequence of this action a state of his management as administrator was at last exhibited: but in stating the different allowances which he claimed in accounting for his administration, he charged the personal estate with the heritable debt which had been contracted by David Drummond over his lands in Scotland, and which had been paid to captain Birrell, the creditor, out of the price of a part of those lands over which the security extended. His claim for this allowance is thus stated in the account: "Also this accountant craves an allowance of the sum of £2000, by him paid, on or about the 16th day of May 1792, to captain George Birrell, in discharge of a debt due and owing to him from the said deceased, by bond dated the 2d day of February 1789. Also this accountant craves an allowance of the sum of £116 Os. 4d. by him paid on or about the said 16th day of May 1792 to the said captain George Birrell, in discharge of interest on the said bond."

In exception to this inventory and account exhibited by the administrator, a plea or allegation was entered on the part of the other next of kin; the seventh article of which related to this heritable debt, and in that it was alleged and propounded "that the said David Drummond was a native of that part of Great Britain called Scotland: and at the time of his decease, and for several years before, was possessed of real estates in that country, and constantly kept an establishment and servants at his mansion-house, on one of the said real estates called Duchally, in which he occasionally resided when in that country; and that the said James Drummond, who is also a native of Scotland, succeeded the said deceased as heir of provision, and as heir, by the law of Scotland, to such real estates of the said deceased, to a very considerable amount; and as such heir became, by the law of Scotland, liable to, and ultimately chargeable with, all the burdens, incumbrances, and debts affecting such real estates, and the interest which should become due and payable on such debts, after the death of the said deceased: that the said deceased, sometime in or about the year 1789, borrowed of the aforesaid captain George Birrell, residing in Kirkcaldy in Scotland, the aforementioned sum of £2000 on the security of two of the said real estates; [606] to wit, an estate called Pittentian, and another estate called Duchally, situated in the sheriffdom of Perth in Scotland; and that such debt and security for the same were due and existing at the time of the deceased's death; and that the whole of the said interest, claimed in the said account, became due and payable after his death.

and are the above mentioned sums of £2000, and the interest thereof due and payable at and after the 2d day of August 1791, and after the said deceased's death: that the said principal sum of £2000 was borrowed, and, together with the interest thereof, payable in Scotland to the said captain George Birrell, residing in Scotland, secured by a certain deed in the forms required by the law of Scotland, called an heritable bond and infeftment; and that by an express covenant in such heritable bond and infeftment, the security and lien created on such real estates in Scotland, were redeemable upon payment to the said captain George Birrell, or his heirs or assignees; and in the case of their absence or refusal, on consignment of the said sum of £2000, and interest on the same, not before paid, and expences which should have been incurred by the said captain George Birrell, his heirs or assigns, into the hands of the treasurer, to the governor and company of the bank of Scotland for the time being; and the place of redemption being in the parliament or new session house of Edinburgh, in that place where the commissaries usually sit in judgment." Further it was alleged and propounded "that there never was any English bond given by the said deceased to the said captain George Birrell, or any person in trust for him, for payment of the said sum of £2000 and interest, or for performance of the covenants contained in such heritable bond and infeftment; for that it never was the meaning or intention of either of them, the said captain George Birrell, or the said deceased, that the monies secured by the said heritable bond and infeftment should be recovered or paid in England, nor in any place than Scotland, and according to the laws of Scotland: and further, that the said James Drummond, the other party in this cause, entered, served, and retoured himself heir in the said two real estates of the said deceased, called Pittentian and Duchally, in the form required by the law of Scotland, and sold one of such real estates, to wit, the said real estate called Duchally, for the price or sum of £3800, or thereabout, and thereout, and not out of the said deceased's personal estates, or any part thereof, paid and satisfied the said principal sum of £2000, and all interest due thereon at the time the said principal sum was paid, and which had become due and payable at and after the 2d day of August 1791, and after the said deceased's death; and so paid the same to the said captain George Birrell or his agent, at the city of Edinburgh in Scotland; who, upon such payment, did, in the month of May 1792, renounce in the form required by the law of Scotland, the real security upon such estates, and dis-[607]-charge the said James Drummond and all others whomsoever, the heirs and representatives of the said deceased; and such renunciation was duly registered at Edinburgh in the month of June 1792: and further, that, according to the law of Scotland, where such security was granted, and debt payable, the said real or heritable debt of £2000 so due, existing, and secured, at the time of the death of the said deceased; and the said interest thereof, which became payable after his death, were an exclusive lien, and ultimately chargeable upon the said real estates of the said deceased, in Scotland, called Pittentian and Duchally only, and was not, nor is, a charge upon the personal estate of the said deceased, and although the said captain George Birrell, according to the law of Scotland, might, by the process of the said law, have attached all or any of the said estates of the said deceased in Scotland, whether real or personal, and have recovered from the same payment of the said debt of £2000 and interest; yet, in case he had recovered the same from the said deceased's personal estate, after his decease, the heir, by the law of Scotland, in the said deceased's real estate in Scotland, and the said estate in Perthshire in particular, would have been obliged to repay to the persons entitled to the said deceased's personal estate, the sum so recovered out of the same, in payment of such real or heritable debt and interest so charged on the real estates of the said deceased in Scotland; but that the said captain George Birrell never did use any process of the law for attaching the said deceased's personal estate, or receive payment of any part of the said £2000, or of such interest out of the same; but did actually receive payment of the aforesaid principal sum of £2000, and all such interest due thereon out of the price, for which one of the said deceased's real estates in Scotland, on which the same was so specially charged, sold as aforesaid; and did thereupon renounce and discharge, and completely extinguish the said debt as aforesaid, and the said deceased's personal estate from the payment of the same; and that the said James Drummond has no title or claim in law to be released of the said debt and interest out of the said deceased's personal estate. And further, that the said

James Drummond hath repeatedly, by the advice of his counsel, admitted and confessed that the said debt, so secured on the said deceased's real estates as aforesaid, to the said captain George Birrell, by the aforesaid heritable bond and infestment in the Scotch form, is not due from, or a charge upon, the said deceased's personal estate, but that the same was a lien upon, and is chargeable against the said deceased's real estates in Scotland only."

The administrator did not put in any answer in writing to this allegation; but counsel were heard thereon by sir William Wynne, judge of the prerogative court; on which occasion, it was argued for the nearest of kin, that James Drummond having succeeded as heir to his brother, and made up his titles by ser-[608]-vice, had sold the estate of Duchally: that he had, in the character of heir, and not as executor, paid off the debt to captain Birrell, and taken a discharge to himself in the character of heir: that, by the law of Scotland, the estate having been burdened with the debt, the heir was the principal debtor; and having paid the debt out of the heritage, was not entitled to relief from the personal funds; and therefore, if the judge permitted this article to remain in Mr. Drummond's account, it was in reality giving him relief out of the personal estate for a debt paid by him as heir, since the money had been truly paid out of the heritage, and not out of the personalty.

On the part of the administrator it was admitted, that the debt had been paid by him to captain Birrell, out of the price of the estate of Duchally, on which it was secured: but they contended that as David Drummond died domiciled in England, his personal estate was to be administered according to the English law; and, as that law rendered the personal estate primarily liable for debts of this nature, he was entitled to take credit for the payment thereof in the account of his administration.

Sir William Wynne, on delivering his opinion on this case, said, "That by the law of England, a mortgage is a clear charge on the personal estate. In this case it was pleaded, that there was no English bond, only a security on a foreign real estate; and that, by the foreign law, the debt so secured is a charge on the real estate, in exoneration of the personal estate. This court will sometimes interfere in foreign transactions; but this is completely an English transaction. The deceased was an Englishman, and the administrator an Englishman; also the transaction was in England. The money was received in England, and applied in England; and it seems so admitted by the other side, this being an application in an English court for the distribution of English property. The payment was made as administrator; he had a right to make it; his conduct as administrator was fair and honourable; and his account is a regular account, against which there does not appear any objection."

By the judgment, therefore, of the prerogative court, rejecting the above allegation, the abovementioned articles, contained in the administrator's account, were admitted; and when the judge was desired by the nearest of kin to throw into the sentence a reservation of action for their relief in Scotland, he rejected their request; being clearly of opinion that the question of relief had been tried and decided in the prerogative court, which was competent to the discussion thereof.

The judgment pronounced in the prerogative court was not brought under review in any court of appeal in England.

As, however, by the law of Scotland, the heir is liable for all debts secured by an heritable bond and infestment, and as the respondents apprehended that all questions relating to the heritable succession of a defunct fell to be regulated by the law of [609] the place where the land to which the heir succeeds is situated, (a point which they were advised could not be determined by the prerogative court of Canterbury, and of which that court would not take cognizance,) an action was raised August 27, 1796, before the court of session in Scotland in their name, declaratory of the law as it has just now been stated, and concluding, "that the said James Drummond should be ordained to make payment to them, equally among them, from his own proper money, as heir in the said heritable property, of six seventh shares of the said principal sum of £2000 sterling, and interest since the said 27th day of July 1791, the time of the death of the said David Drummond, and until payment, with £100 sterling as the expence of this process, besides the expence of extracting the decree to be pronounced therein, conform to the laws and daily practice of Scotland used and observed in the like cases."—[James Drummond as one of the seven nearest of kin of the deceased, was by the law of England entitled to one seventh share of his personal estate.]

This action came before the Lord Justice Clerk as ordinary; and upon the first hearing of the cause his Lordship pronounced the following interlocutor: "Having heard parties' procurators upon the grounds of the action and defences, in respect that David Drummond died domiciled in England, and that letters of administration were taken out from the prerogative court of Canterbury by the defender, James Drummond, finds that the personal estate of the said David Drummond is to be administered according to the law of England; and in respect that this question has been already tried, and received the decision of the judge of the prerogative court, finds the action not now competent in this court, and therefore sustains the defences, assoilzies the defender, and decerns."

After the date of this interlocutor, Mrs. Drummond the mother died; but having left a settlement, by which her interest in the matter at issue was transferred to those who now appear as respondents, the case was again submitted to the consideration of the lord ordinary by a representation, to which answers were appointed to be made; and upon advising these papers, the following judgment was pronounced in the cause: "Having considered this representation, with answers and whole process, finds that, by the law of Scotland, when a sum of money is secured upon lands by an heritable bond and infeftment, *the lands are held to be the principal debtor*; and in respect that the estate belonging to David Drummond, over which the heritable bond in question is granted was taken up by James Drummond as heir to his brother, and that the same is of much greater value than the sum in the heritable bond, finds that James Drummond is ultimately liable for payment of that heritable bond, without relief against the personal estate of David Drummond; finds that the decree of the prerogative court of Canterbury went no farther than to find, that the [610] sum in the heritable bond being chargeable as a debt against the personal estate, so James Drummond, who paid the heritable bond, was entitled to take credit for the contents thereof in accounting for the personal estate; *but did not determine, the question of relief competent to the executors against the heir*; therefore alters the former interlocutor, repels the plea of *res judicata*, finds that James Drummond, the heir is liable to the pursuers in payment of the contents of that heritable bond, and decerns and declares accordingly."

James Drummond, the administrator, also died after the first interlocutor was pronounced, leaving a widow and an infant son; and the widow being appointed guardian to her child, she granted a power of attorney to Mr. William Molle, writer to the signet; and these being made parties in the process, the merits of the question were again submitted to the consideration of the lord ordinary, by a representation for them; upon advising which, with answers, the interlocutor of the 8th of December 1797 was adhered to.

Against these two last judgments of the lord ordinary a reclaiming petition was presented to the whole lords; but without requiring any answer to be made on the part of the respondents, the following deliverance was given on the petition: "The lords having heard this petition, with what is above stated, in respect the pursuers do insist only upon a decree for six seventh parts of the sums contained in the heritable bond, they, with this explanation, adhere to the interlocutor of the lord ordinary reclaimed against, and refuse the desire of the petition." The reason of the restriction in this interlocutor was, that the lord ordinary had decerned, without any qualification, for the whole contents of the heritable bond, from not adverting to the terms of the summons, which concludes only for six sevenths of the £2000, one seventh, of the personal property being due to James Drummond himself; so that, though he got credit for the whole £2000, yet he in fact took no more than six sevenths of it out of the pockets of the respondents.

The interlocutor of the court was again brought under review by a petition, in which the whole merits of the question were again made the subject of discussion.

*On the part of THE APPELLANTS, who were the defenders in the court of session, the following were the arguments stated in their printed case; and as they are of importance to the general question of the distribution of an intestate's estate, in case of his having REAL PROPERTY in a country foreign to that in which he was domiciled, they are here preserved at length: It being conceived that this nice question cannot yet be considered as finally determined.*

"It is admitted by all the parties in the present action, that the late David Drum-

mond was domiciled in England at the time of his death; and consequently, that, as he died intestate, the succession to his personal estate must be regulated by the law of that country. Upon the faith of this, all the parties in the [611] present process have acted. Letters of administration were taken out in the prerogative court of Canterbury; his mother claimed a share of his personal estate, as one of the nearest of kin; a character which belonged to her by the law of England, but to which she has no title by the law of Scotland; and all the pursuers in this action concurred in calling the administrator to account for the personal estate of the defunct, and to distribute it according to the law of England for the distribution of intestates' estates, by an action in the proper court in England.

"But as it is the law of England alone which regulates the succession; as it decides who are and who are not called to share it without regarding the provisions of the law of any other country whatsoever; so it follows as a natural, and indeed as a necessary consequence, that the law of England must also determine what are the burdens to which the personal estate of the defunct is liable.

"As the personal estate of the deceased, wherever situated, must be regulated entirely by the law of England, where he was domiciled, it seems to be a natural consequence, that, in the distribution of that succession, no regard whatever can be paid to the claims which the parties may have against each other, according to the law of any other country; indeed, unless such claims are entirely disregarded, the succession to the personal estate would, in fact, not be regulated exclusively by the law of the domicile, but would, in some measure at least, be affected by the laws of other countries. Thus, by the law of Scotland, there is an absolute and universal separation between the succession in heritage and moveables; so that, in general, the heir has no claim to any part of the moveable succession, nor the executor any claim to any part of the heritage. From this rule, however, there is an exception with regard to certain heirs, who are entitled to those moveables which are known in the law of Scotland by the name of heirship moveables; but if James Drummond, in the character of heir of his brother, had claimed any part of the personal estate of David Drummond, as falling under the description of heirship moveables, it would be a good defence that the succession to David Drummond's personal estate was to be regulated solely by the law of England; and consequently could not recognize any claim that was competent to James Drummond, as heir to an estate situated in another kingdom.

"But if the claim of the heir against the nearest of kin, founded upon the law of Scotland, would not be listened to in a case such as has now been figured, it seems to follow, from the same principles, that any claim of the nearest of kin against the heir, must be regulated by the law of the domicile alone, without regard to the law of that country where the real estate of the deceased is situated. This may be illustrated by the law with respect to collation, in which the argument of the appel-[612]-lants is supported by a recent judgment of the house of peers, in a case of great importance.

"By the law of England all the nearest of kin are called to an equal share of the intestate succession of a defunct; and the heir of the real estates, if he happens to be also one of the nearest of kin, takes his share of the personal succession, without being obliged to collate the heritage. By the law of Scotland, the rule is different; for, according to it, the heir cannot claim any part of the personal estate without collation; but this provision of the law of Scotland, with respect to collation, does not operate as to the heir's claim of a share of a personal estate in England, as one of the nearest of kin by the law of that country; nor could the other nearest of kin exclude the heir from his share of the succession in the moveable estate in England, on account of his not having collated; nor are they even entitled by an action in this court to oblige the heir to collate.

"This was decided in a question between John Hay Balfour, esq. and others, against miss Henrietta Scott, now marchioness of Titchfield. Mr. Scott, of Scots-tarvet, was possessed of a valuable landed estate in Scotland, to which miss Scott succeeded, as heir of provision; he was also possessed of personal property in England and Scotland to a large amount: He died intestate, and he had his domicile in England at the time of his death. By the law of that country miss Scott and her sisters, and Mr. Hay Balfour, were his next of kin; and in appeal from the court of session to the house of lords (11th March [April, see p. 550], 1793) it was decided.



that miss Scott was entitled to her distributive share of both the English and Scotch personal property, without collating the heritable estate to which she succeeded as heir.

"Miss Scott and James Drummond were precisely in the same situation; both succeeded to a landed estate in Scotland, as heirs of provision; both had a right to a share of the personal estate, the succession to which was regulated by the law of England. (See the respondent's observations on this case, *post*.) In miss Scott's case it was found that she had a right, as nearest of kin, to part of that personal estate, without regard to any claims which the other nearest of kin might have had against her by the law of Scotland, with respect to her real estate; and that they could not make any such claim effectual, even by a process in the courts of Scotland, in which her real estates were situated. Upon the same principles James Drummond has a right, as nearest of kin, to a share of the personal estate of his brother, without regard to any claim of relief to which he might have been subject by the law of Scotland, as heir to his brother.

"In short, it seems to be clear, that as the succession to the personal estate of the late David Drummond, is regulated entirely by the law of England, so it is the province of that law to ascertain the debts and the burdens to which it is subject. And those who are called to the succession must take their share of the free produce, without regard to any claims which might have been [613] competent to them by the law of another country, but which are not recognized by the law of England; which must be the *regula regulans* in every question relative to the personal estate."

*The appellants having thus endeavoured to shew that every question regarding the personal estate of David Drummond must be regulated by the law of England, where he had his domicile, without regard to any claims which the heir or executors might have had against each other, according to the law of any other country, next proceeded to consider what the law of England is, and what has been decided in the courts of that country relative to the matter at issue between the parties; in the following manner:—*

"The heritable debt, due to Captain Birrell, was contracted by the deceased David Drummond himself; he received the money for which the security over his real estate in Scotland was granted; his personal estate, therefore, received the benefit of the burden which was laid upon his real estate, and consequently to be liable, in equity, to disencumber the real estate. These, it is conceived, are the principles of the law of England relative to this matter; and according to which, no doubt can be entertained that the personal estate of David Drummond is liable, in equity, to disencumber his real estate of that heritable debt which David Drummond himself had contracted.

"The respondents were at great pains in the proceedings before the lord ordinary, to shew that the law of England was not such as it has now been stated; but that in every case a mortgage debt was a burden upon the real estate, and that the personal estate was not liable to disencumber it. The appellants apprehend that it is unnecessary to enter upon any argument, in order to shew that this doctrine is altogether erroneous; indeed the plea which was thus maintained in the court of session, was altogether different from that which the respondents themselves maintained in the prerogative court; for, upon looking into the allegation, which has already been stated, it will appear that it is never once pretended that, according to the law of England, the personal estate was not liable to disencumber the real estate of a mortgage, contracted in the circumstances which have been mentioned. But the plea of the respondents in the prerogative court was this—First, That by the law of Scotland, the debt was a burden on the heir; and although the executor was also liable for it, yet if he had paid it, he was entitled to relief from the heir. And, Secondly, That this debt had not been paid by James Drummond as the administrator, or out of the personal estate of his brother, but in the character of heir served and retoured to him; and out of the proceeds of the estate at Duchally, which he had sold. In this state of the case the question was to be tried precisely on the same principles as if his mother had been the administratrix, and he had been asking his relief from her; because he explicitly admitted that he had paid the debt as heir, out of heritable funds, and was demanding reimbursement from the personality. After this allegation was put [614] in, counsel were heard thereon by Sir William Wynne, judge of the prerogative court; on which occasion they argued on the facts already mentioned

—That James Drummond having succeeded as heir to his brother, had made up his titles by service, and had sold the estate of Duchally: That he had, in the character of heir, and not as executor, paid off the debt to Captain Birrell, and taken a discharge to himself in the character of heir. That, by the law of Scotland, the estate having been burdened with the debt, the heir was the principal debtor; and having paid the debt out of the heritage, was not entitled to relief from the personal funds; and, therefore, if the judge permitted this article to remain in Mrs. Drummond's account, it was in reality giving him relief out of the personal estate for a debt paid by him as heir, since the money had been truly paid out of the heritage, and not out of the personality.

"Mr. Drummond admitted that the debt had been paid by him to Captain Birrell, out of the price of the real estate; but he contended, that as David Drummond died domiciled in England, his personal estate was to be administered according to the English law; and as that law rendered the personal estate primarily liable for debts of this nature, he was entitled to take credit for the payment thereof in the account of his administration.

"It was upon this statement of the pleas of the parties that Sir William Wynne rejected the allegation which has already been mentioned; which clearly shews, that the question before the prerogative court was not, Whether the personal estate was liable, by the law of England, to relieve the real estate of the mortgage? but, Whether James Drummond, the administrator, was entitled, in accounting for the personal estate, to state the heritable debt which he had paid, seeing that the heir was liable (according to the plea maintained by the respondents) to relieve the executors of that sum?

"The state of the proceedings in the prerogative court, clearly shews that the interlocutor of the lord ordinary, of date 8th of December 1797; and which was adhered to by the court, by the interlocutors appealed from, is altogether erroneous, as it finds, 'That the decree of the prerogative court of Canterbury went no farther than to find that the sum in the heritable bond being chargeable as a debt against the personal estate, so James Drummond, who paid the heritable bond, was entitled to take credit for the contents thereof, in accounting for the personal estate; but did not determine the question of relief competent to the executors against the heir.' It is plain that the very reverse of this was the case; and that the very point in which the parties were at issue in the prerogative court, regarded this right of relief.

"The interlocutors appealed from, seem to have proceeded on the idea that the judge in the prerogative court had decided the cause in the same manner as if the debt had been paid by the administrator, and creditors of the deceased had been pursuing [615] him for assets, in his hand in payment of their debts. In this situation it would have been sufficient for him to plead, that both the real and personal estates of the deceased were liable for the debt; and that by paying to the heritable creditor, who was distressing him, he had exhausted the fund. The judge must have allowed it as an article of his account, in the same manner as the court of session would allow an executor there to discharge himself with the payment of such a debt, which he had been compelled to pay.

"But the fact is completely otherwise: The parties in the prerogative court were not creditors, but the persons who had a right to call for the funds of the deceased to be administered and distributed in terms of law. The defender too, combined in his person both the character of heir and administrator; and as he admitted that the payment to captain Birrell had been made by him as heir, and not as administrator, it is, with submission, incredible that the judge could mean to decide any other point than the one at issue between the parties, viz. Whether, by the law of England, the real or personal estate was ultimately liable for the debt? It was in fact a decree regulating the distribution of the personal estate amongst the nearest of kin, and rejecting the claim of the respondents for the sum paid to captain Birrell, and allowing the administrator, James Drummond, to retain that money, and to that extent to diminish his brother's personal estate. If any doubt could remain upon this subject, it would be obviated by the admission made by the respondents themselves, that the judge in the prerogative court refused to put into his judgment any clause reserving relief to the respondents in another court.

"It was farther maintained for the respondents, that by the constitution of the prerogative court of Canterbury, its jurisdiction is limited to the personal estate of

a defunct, and has no concern with or power over the real succession ; as to which all questions must be determined before the temporal courts ; and thence, it is inferred, that the prerogative court had no jurisdiction to decide such a question ; the cognizance of which must belong to the temporal courts alone.

“ It shall afterwards be shewn, that the question before the prerogative court did not relate to the real estate in Scotland, but regarded merely a personal claim of relief against the heir ; but this personal claim of relief was an incidental question, arising in the course of the administrator's accounting for the personal estate of the intestate ; but as the prerogative court has undoubted jurisdiction to take the accounts betwixt the administration and the next of kin, and to compel distribution of the personal estate, all questions which are necessarily incidental to such an account, may be competently decided in that court in which the accounts must be rendered ; and this principle has been completely acknowledged by the respondents themselves, who, by their proceedings in the prerogative court, endeavour to make [616] effectual that very claim of relief which it is the object of their action before the court of session to establish.

“ The appellants contended, that from comparing the summons in the court of session with the allegation in the prerogative court, it was plain that the action in the court of session was nothing better than an attempt to make effectual, by a decision in the court of session, a claim which had been rejected by a court of competent jurisdiction in England. But as the pursuers had made their *electio fori* by resorting, in the first instance, to the prerogative court ; and as their plea in that court was founded on the same *media concludendi* with their action in the court of session, the appellants were entitled to the benefit of a *res judicata* ; and that the pursuers could not be permitted to vex and harass them, by constant litigation, with regard to a point which has already received the decision of a competent court.

“ In general, the judgment of a foreign court in a question where it possesses competent jurisdiction, must be considered as good and as decisive of the claims of the parties all the world over ; so that if an attempt is afterwards made to agitate the same question in the courts of another country, the definitive sentence, formerly pronounced between the parties, must be held *pro veritate*, and as affording an *exceptio rei judicatae* in favour of the party. The appellants are aware that the *exceptio rei judicatae* is not applicable to the decrees of all foreign courts without distinction, but any deviation from it takes place only in the case of persons who have obtained foreign decrees, and who seek execution of them in this country ; even in these instances the court pay such respect to the foreign decree as to hold it good evidence of the claim, unless the objector to it, or the defender, point out its injustice. The case however is most materially altered, where the pursuer in our courts has been pursuer in a foreign country, and has lost his cause. The respondents come to the court of session in Scotland as to a court of appeal from the prerogative court of Canterbury, which it surely is not ; and as they have already had their choice of a court, in which they did not prevail, it would be exceedingly hard to allow them to begin the matter anew, as if no proceedings had ever taken place in any court of competent jurisdiction.

“ This was decided in the following case : ‘ Captain Hamilton having arrested the effects of the Dutch East India Company, *jurisdictionis fundandae gratia*, brought an action against the company for damages alleged sustained by him, through their violent seizure and confiscation of a ship and cargo belonging to him in the East Indies. The defence was, that the ship and cargo in question were in due course of law condemned and confiscated in the council of justice of Malacca, which, upon Captain Hamilton's appeal was confirmed by the council of justice at Batavia ; and therefore they are safe *exceptione rei judi*-[617]-*catæ* ; which exception the lords sustained, 24th July 1731, *Hamilton contra Dutch East India Company* ; Dictionary, vol. 1. p. 323, *voce* Foreign.’ This is a case precisely in point, which the appellants apprehended to be perfectly consistent with law and good sense.

“ The pursuers were at great pains to shew, that, as every thing relative to real estate in Scotland must be regulated by the law of that country ; so also must the question of relief betwixt heir and executor. It was therefore argued by them, and it has been found by the lord ordinary, and by the interlocutors of the court of session appealed from, that by the law of Scotland, when a sum of money is secured upon lands by an heritable bond and infeftment, the lands are held to be the principal

debtor; and in respect that the estate belonging to David Drummond, over which the heritable bond in question is granted, was taken up by James Drummond, as heir to his brother, and that the same is of much greater value than the sum in the heritable bond, that James Drummond is ultimately liable for payment of that heritable bond, without relief against the personal estate of David Drummond.

"The appellants have no occasion to dispute the general abstract proposition, that by the law of Scotland, when a sum of money is secured upon lands by an heritable bond and infektment, the lands are the principal debtor; but they humbly beg leave to deny the application of that general principle to the present case. It is clear that the succession to every landed estate in Scotland must be regulated by the laws of that country alone; nor can any foreign court have a competent jurisdiction in any question regarding it; but a question of relief, betwixt heir and executor, stands upon a perfectly different footing.

"As long as the heritable bond and infektment subsisted in the person of the creditor, he had a real *lien* over the whole estate; and he was entitled to make that effectual by the diligence of the law of Scotland; nor could his right be limited or restrained, or in any shape affected, by the sentence of any foreign court whatever. But when the debt was paid to captain Birrell, he granted a discharge and renunciation, which was duly recorded. The heritable security, therefore, was completely at an end; the real *lien* over the land was dissolved; and, even by the law of Scotland, there remained nothing more than a claim of relief. That claim, however, is entirely of a personal nature; the cognizance of it, therefore, is not limited to the courts of this country, but might have been tried wherever the defender had a proper *forum*. It was an incidental question, arising in the course of the administrator's accounting, and might be competently decided in that court, in which he was bound to account. It is impossible, therefore, to say that this question stands precisely in the same situation as one regarding the succession of a landed estate, or with regard to a subsisting real security over a landed estate in this country, for in fact there [618] is no such thing; for it is a mere personal claim, and which might be competently decided in England as well as in this country.

"It was farther argued for the appellants, that even although every thing relative to the real estate in Scotland must be regulated by the law of that country, yet it did not by any means follow that a question of relief betwixt the heir and executor, must also be regulated by that law; for if it was true, on the one hand, that every thing relative to the real estate was to be regulated by the law of Scotland, it is equally true, on the other, that every thing regarding the personal estate must be regulated by the law of England, in which David Drummond had his domicile. If, therefore, the nearest of kin are entitled to come into the courts in Scotland, and there to make effectual, according to the law of that country, their claim of relief against the heir, it must, *ex paritate rationis*, be equally competent to the heir to go to the courts in England, and there to insist that the personal estate shall disencumber the real estate of the mortgage created by David Drummond. This, however, would lead to endless and inextricable confusion; and it is apprehended that those regulations of the municipal law of Scotland, which arise from the laws of succession in that country, cannot possibly have any effect in the succession of a personal estate, which is to be regulated entirely by the laws of another country; so that questions of relief between heir and executor, which admit of an easy solution while the succession to both the heritable and moveable estate is regulated by the law of the same country, cannot be entertained in such a case as the present, where the succession to the real estate is governed by the law of one country; and that to the personal estate, by the law of another.

"This may be illustrated by what has happened in this very case. The law of Scotland has said, that an executor paying a debt which is heritably secured, has relief against the heir. Under the authority of that law, the mother of the deceased David Drummond institutes an action in the court of session in Scotland, in the character of one of the co-executors *qua* nearest of kin of her deceased son, claiming relief of the heritable debt due to captain Birrell; but by the law of Scotland the mother is not one of the nearest of kin of her son; and therefore could not be a co-executor of her son, along with his brothers and sisters; she is therefore claiming, under the law of Scotland, in a character to which, by the law of that country, she has

no right; and the court of session in Scotland, by the interlocutors appealed from, has given a relief to her as executor, although the law of Scotland says that she neither is, nor can be, the executor of her son. If, therefore, the question of relief is to be judged of entirely by the law of Scotland, it is clear that the mother has no *persona standi* in the courts of that country, and cannot institute any action there in the character of executor *qua* nearest of kin to her son. But this is not all, for not only does the [619] mother insist in the courts in Scotland, in a character which the law of that country does not recognize, but the pursuers themselves fall into this farther absurdity, that in the very action in which they are seeking relief as executors against the heir, they admit that they are entitled to that relief only to the extent of six seventh parts of the sum paid to captain Birrell; and the interlocutors appealed against go no further; and the reason of all this is, that the heir of the real estate in Scotland was also one of the nearest of kin of the deceased, and consequently had an equal right, by the law of England, to a share of the personal estate along with the other nearest of kin.

"But it may be said that the mother is considered as one of the nearest of kin by the law of England, by which the succession is to be regulated: But if she maintains that the law of England regulates the succession, the appellants surely must be at liberty to maintain the same proposition; and by the law of that country a mortgage debt is chargeable upon the personal estate, without any claim of relief against the heir.

"Suppose that the late David Drummond had not left any sisters, and that his only nearest of kin were his mother and the late James Drummond his brother, and that all the other circumstances of the case had been precisely the same with those which have actually occurred, the principles of decision would have been the same with those which the appellants apprehend must regulate the present question; but the absurdity of the respondents' plea would be perhaps more striking."

*On the part of THE RESPONDENTS the foregoing defences of the appellants were resolved into the following short points, 1st, "That David Drummond having died a domiciled Englishman, the succession of his property fell to be regulated by the law of England, according to which it was alleged, a debt of the same nature with that of a Scotch heritable bond was ultimately a burden upon the personal estate." And 2dly, "There was here a res judicata, which rendered it incompetent for the court of session now to judge of the question, the matter having been already decided by the prerogative court, before which the parties had joined issue."*

*What would be the law of the case, if the question were to be judged of by the rules of the English law, the respondents contended, it was not material to enquire, as, in opposition to the first of these defences, they maintained, that the decision must depend on a more general principle; and that, in determining upon which of the parties this heritable debt must be ultimately a burden, the judgment of the Lords could only be directed by the law of the place in which the subject is situated: This they supported by the following arguments in their printed case.*

"What the law of Scotland is upon the subject, is so clearly and distinctly laid down in the interlocutor of the very able and respectable judge who acted as lord ordinary in the cause, that it will be unnecessary to say any thing with regard to the [620] declaratory conclusion of the libel. When a sum of money is secured by an heritable bond and infestment, the lands themselves which are disposed to the creditor are held to be the principal debtor; and the heir who takes up the estate must take it with the burden of the real right, which is, in virtue of the infestment, constituted in favour of the creditor. In fact, when the nature of an heritable bond and infestment is strictly attended to, the land only goes to the heir *minus* the heritable debt. As the land itself is disposed to the creditor, and also the whole rents and profits during the non-redemption, he, in truth, takes up no more in virtue of his service than the reversion or right to redeem the lands on making payment of the money. When James Drummond served himself heir of provision to these estates, he took them with the burden of this debt, as much as with any other burden that the law imposes. It was a *real debt*, which by the law of Scotland was effectual against the real estate, and which must have been ultimately paid by the person to whom that estate was vested, as a condition of his succession, and a burden indissolubly attached to it. The heir himself has in this case paid the debt out of a price of a part of the

lands over which the heritable right was created; but by doing so he has only discharged an incumbrance, under the burden of which they were transmitted to him by the succession, and which must have subsisted until the debt was paid. *If the debt had been paid out of the executory funds, the executor would have been entitled to relief against the heir; [and if the heritable estate had been insufficient for the discharge of the incumbrance, the heir would have had recourse against the executory for what he had paid above the value of the land (Query ?)].* In the present case, however, as your lordships have seen, besides the estate of Pittentian, which remained entire to James Drummond, and which is now enjoyed by his family, there was a very considerable reversion even of the price of Duchally, that part of the lands which was sold expressly for the discharge of this debt.

"To the declaratory conclusions of the summons, therefore, there cannot possibly be any objection. That the law of Scotland is as stated in the lord ordinary's interlocutor, has on all hands been admitted; and it only remains to enquire whether that law is to regulate the question now at issue, and whether, in decerning upon that principle against James Drummond for payment of the contents of the heritable bond in question, the judgment of the court of session rests upon a just and solid foundation?

"The plea maintained on the part of the appellants rests altogether upon the fact, that the deceased David Drummond had at the time of his death his domicile in England; and it is now understood that the law of the domicile regulates the moveable succession of the defunct; it was argued that, in accounting for his administration to the next of kin, James Drummond was entitled to all the eases which the law of England allows against [621] the executor, one of which, it was said, is, that the real debts of the deceased are a burden upon the personal funds, without recourse against the real estate.

"It is obvious, however, upon the bare statement of this plea, that if the appellants' conclusion is just, it can only be upon the principle that the law of the domicile is to be held as the rule, not only for the moveable succession, but, in fact, for the whole succession of a deceased, both heritable and moveable.

"In Scotland it seems for a long time not to have been settled, either by the opinions of lawyers or the decisions of the court, whether the moveable succession of a person dying intestate was to be regulated by the *lex domicilii*, or by the *lex rei sitae*; and the tendency of the law seems rather to have been to the last of these rules, than to the former. In the late case of *Lashly* against *Hog* (see *ante*, p. 577), in which the question was very fully considered, it was adjudged by the court of session that the succession of the whole moveables, wherever situated, fell to be regulated by the law of the country where the deceased died domiciled; and this decision having been upon appeal affirmed by your Lordships, it may perhaps now be considered as a settled point, that the succession of the personal estate is to be regulated by the law of the domicile. But it may be with equal truth affirmed, and may perhaps be stated as a matter even more firmly established, because it has in truth never been disputed, that as all rights respecting land must, from necessity and policy, be subject to the law of the country where the land is situated, so the heritable succession of a defunct must follow the same rule. Whatever differences of opinion there have been with regard to the moveable succession, whether it fell to be regulated by the *lex domicilii* or by the *lex rei sitae*, it appears to be universally admitted on all hands, that the dispute related solely to that species of succession; and it seems to have been reasoned upon as a fixed and settled principle, that with respect to the succession to land and other immoveable property, there could be no other rule than the law of the place where the subjects are situated.

"According to these ideas, when a man dies possessed of heritable and moveable property situated in different countries, the regulation of his succession is simple and obvious; his moveable succession will follow the law of his domicile; so that a title must be made up to it according to the law of the country where that is; and it will be taken up by the person to whom by that law it is destined, though by the *lex rei sitae* it might have gone to a different order of persons, and might have required a different form to vest it in the representatives. The heritable succession, however, will be regulated by the law of the place where the property is situated; and as the heir can make up a title to it in no other way than as the law of the [622] country directs, so he must take it subject to every burden which the law of the country imposes.

"In the present case David Drummond having died domiciled in England, his whole personal estate, whether situated there or in Scotland, must be governed by the English law. It must go to the persons pointed out by that law; and had he died leaving a family, it would not have been subject to the claim of legitim (see *ante*, p. 556-558). From the effect of this rule, James Drummond also derived this advantage, that he was entitled to his share of the moveables along with the other next of kin, without collating the heritage, which he must have done had the law of Scotland been the rule (see *Balfour v. Scott*, *ante*, p. 550. and alluded to *post*). But if to these advantages he were also to be allowed to add that which is now claimed, then the law of the domicile must be held as truly and in effect, the rule by which the heritable succession, as well as that to the personal estate, is to be regulated. When the law of England throws the payment of a mortgage debt upon the personalty, it determines not upon the *lex domicilii*, but upon the *lex rei sitae*; and for the very same reason the law of Scotland subjects the heir in the payment of such debts, because the land is held to be the principal debtor, and cannot be transferred by succession, or in any other way, without being liable to the real right created by the infertment in favour of the creditor. It is indeed, with submission, a mistake to say, that there is here any *conflictus legum*, any opposition between the law of England and that of Scotland, which would lead to a decision in the one country different from what would be pronounced in the other. If the respondents have viewed their cause aright, the point now at issue is properly a matter of general law, depending upon a general principle, which, it is apprehended, is as much recognized in England, as it is in Scotland, namely, that land and the succession to it, with all the questions that can relate thereto, are to be judged by the *lex rei sitae*, not by the *lex domicilii*.

"In the course of their pleadings in the cause, the appellants were pleased to consider the case as a question of will, and it was argued, that, 'if David Drummond had left a settlement burthening the executry with the payment of this debt, the heir would have been entitled to have been relieved of it, though by the nature of the heritable right, the land would still have been the debtor, and the heir still liable: But if the law of the domicile does that by imposing upon the personal estate all debts contracted by the predecessor, whether secured by mortgage or not, it does the same thing, and confers on the heir the same right which he would have had by the express will of the defunct. Where a man makes no will, or has none to make, the law presumes one for him, and proceeds accordingly.

"It will not escape observation, however, that a remark such as this, is a mere *petitio principii*, and that though it may [623] be an illustration, it is certainly no argument. The very same mode of reasoning, it is obvious, is no less applicable to the plea maintained on the part of the respondents; and it may with equal force be said, that if David Drummond had left a will, declaring that his real estate was to be burthened with payment of this debt, there can be no doubt that the heir would have been liable to discharge it, without any recourse upon the executry. But in fact, by imposing upon his land this real burthen, to which by the law of the country where it is situated, *the heir alone is liable*, he has shown his intention of burthening his heir, as completely as if he had left a will or declaration to that effect.

"In every country there is an order of succession pointed out, which is to take place unless the will of the defunct has determined otherwise; and when a person dies intestate, his intention must be presumed to have been, that his succession should be subject to the distribution of the law. This is the only presumption that can be made with regard to the will of a defunct (if, indeed, intestate succession can be at all considered as proceeding on presumed will,) and according to this principle, when he leaves both heritable and moveable property, his intention must be presumed to have been that the succession of his heritable property should be regulated by the *lex rei sitae*, and the succession to his moveable property by the *lex domicilii*, because such is the distribution which the law has pointed out in these two branches of succession."

In answer to the reference made by the appellants to the case of *Balfour v. Scott*, as a precedent in favour of the plea upon which the defence in this branch of the cause was founded, the respondents observed, that when the circumstances of that case were attended to, they would appear to be materially different from the present. "If indeed," they added, "it can at all be considered as a precedent in point of the matter

now at issue, it would seem to lead to a conclusion the reverse of that which the appellants have drawn from it.

"At the time that case was judged of in the court of session, the law was understood to be rather in favour of the *lex rei sitae*, than of the *lex domicilii*; and as Mr. Scott the predecessor died possessed of moveable funds, both in England and in Scotland, the court, agreeably to that idea of the law, found with regard to the English executry, that miss Scott was entitled to take her share along with the other next of kin, without collating the property to which she had succeeded as heir; but, upon the same principle, the opposite was found with regard to the Scotch executry. When the case came to be tried in the house of lords, your lordships were of opinion, that the whole of a man's moveable succession fell to be regulated by the law of his domicile, and for the same reason that the court of session had found miss Scott entitled to take her share of that part of the funds which were situated in England, your lordships found [624] her entitled to take a share of the whole without collating the Scotch heritage. But in all this there is no question with regard to the heritable succession, neither was there any interference of the one law with the other in what did not immediately fall under its own proper cognizance and jurisdiction, as it was ultimately found that the whole moveables, wherever situated, were to be distributed according to the *lex domicilii*, the law of England had full power over the personal succession, and behoved to give it to the persons to whom it went according to that law; but what burthens would have been imposed upon the heir, had the moveable succession been regulated by the law of Scotland, was a point which it had neither power nor occasion to determine. And, on the other hand, as the law of Scotland was found to have no force or power over the personal succession, there were, in fact, no moveables subject to the jurisdiction of the court of session, with which the heritage could be collated. The law of the domicile, which in Miss Scott's case was the law of England, could extend no further than to the moveables, and could not decide with regard to any burthens that were incident to the heritable succession by the law of a foreign country, and the *lex rei sitae*, which was the law of Scotland, could not compel the heir to collate the heritage, when there were no personal funds subject to its jurisdiction, which, in fact, would have been to interfere with the law of the domicile, and make the *lex rei sitae* the rule for the whole succession.

"In so far, therefore, as the decision can be considered as proceeding upon the principle, *that there is a complete and settled distinction between the rules by which the heritable and moveable succession of a defunct are to be regulated*, it certainly tends to enforce what it is the object of the respondents to impress upon your lordships as the ground and foundation of their action."

*The second defence proposed, on the part of the Appellants, was, "That the matter has already been judged by a court competent to decide the question, and before which the parties had joined issue upon the very point now in dispute." And to this the respondents offered the following answers.*

"With regard to this part of their plea, the court of session has found, 'That the decree of the prerogative court of Canterbury went no farther than to find that the sum in the heritable bond being chargeable as a debt against the personal estate, so James Drummond paying the heritable bond, was entitled to take credit for the contents thereof in accounting for the personal estate, but it did not determine the question of relief competent to the executors against the heir.' When the nature and jurisdiction of the prerogative court, and the circumstances in which the judgment was pronounced, are attended to, this branch of the judgments appealed from, it is humbly thought, will be found to have proceeded upon a principle no less clear and satisfactory than that which directed the former.

[625] "In the first place, the decree of the prerogative court must be taken in connexion with the record, and must be considered as having proceeded upon what is there in contained. So far, however, as appears from the record, the judgment can in truth be held, as having decided no more, than that James Drummond having, as administrator, paid the debt, he, in accounting for the personal estate to the other next of kin, was entitled to an allowance of what he had so paid. All that was before the judge was the personal estate of the defunct, and the administrator's accounts of his intromissions therewith. James Drummond's averment in these accounts is simply, that he paid this £2000 in discharge of a debt due by the deceased; and as it was a



debt undoubtedly chargeable against the personal estate, the court were bound to allow him credit for it as it had been stated: but of the ultimate recourse which the heir and executor might have on each other, the prerogative court had not the power to judge.

"What has just now been hinted at, presents a *second* reason for holding that the decree in Doctors Commons was not intended to be, and could not from the nature of the court be a *res judicata*, with regard to what debts were to be an ultimate burthen upon the real property, and what were not.

"By the constitution of the prerogative court of Canterbury, its jurisdiction is limited to the administration of a defunct's effects, and it has no power to determine any questions that arise with regard to rights affecting land. Nor is it at all inconsistent with this limited jurisdiction, that in judging of an administrator's accounts, exhibited by him upon oath, the court must admit every debt which he states as having been paid by him, though these debts may have been secured upon land; for, if the debt is chargeable against the personal estate, the administrator, particularly if he has actually paid it, is undoubtedly entitled to credit for it in the first place, whether it is ultimately a burden upon the real estate, or upon the personal funds.

"In a question between debtor and creditor, the whole funds and effects of the debtor, whether real or personal, must be liable to the creditor, and from that personal obligation which is expressed or implied in every debt, however constituted, or however secured, it may be made effectual against his person and against his means of every kind. A mortgage in England, though it gives a creditor a preferable right over the real estate, yet in general it lays open for the payment of the debt the personal funds of the debtor, as well as that particular subject upon which it is secured. In like manner, in the case of an heritable bond in Scotland, the executry is liable equally with the heritage for payment of the sums therein contained. In both these cases, the debt is chargeable against the personal estate, and whether it has been paid by the administrator or not, as it is a debt with which the personalty may be charged, the court in receiving it as part of the administrator's accounts, does not go beyond the [626] extent of its jurisdiction. But the decision can have no farther effect: for to determine the ultimate relief between the heir and executor is beyond the limits of its power. As the heir of his brother in his landed property, whether situated in England or in Scotland, James Drummond could not have claimed in the prerogative court relief of any debts which he had paid in that character, but must have gone, not to the ecclesiastical, but to the temporal courts. If, as ought regularly to have taken place, Mrs. Drummond the mother had herself administered, and her son had made up titles as heir to his brother, and sold the estate in order to pay off the heritable debt, he could not have gone for relief of what he had so paid into Doctors Commons, but must have carried the matter before some one or other of the temporal courts, even allowing that the estate had been situated in England. But that the two characters of heir and administrator were, by allowance of the proper administrator, united in him, cannot surely, in point of principle, make the smallest difference upon the nature and merits of the question. Whatever other character the administrator sustained, it was only as administrator that the prerogative court could judge of his accounts; and, in judging of these accounts, the administrator was entitled to demand, and the court entitled to grant, allowance of every claim which might have been made effectual out of the personal funds.

"In the third place, if the respondents are right in what they have been humbly endeavouring to establish, that the question here at issue, Whether James Drummond the heir is entitled to relief of this heritable debt against the other next of kin? must depend upon the application of the law of the place where the land is situated; the judgment of the prerogative court cannot be a *res judicata*, because the court of session in Scotland must be the proper *forum* for determining the matter. If it shall be thought that the law of the domicile ought to govern, then the action is, no doubt, incompetent in Scotland; not, however, because there is a *res judicata* arising from the decision of an English court, but because the courts of that country have the proper jurisdiction in the matter. But if it is a principle recognized by your lordships, that the law of the domicile regulates only the moveable succession of the defunct, and that the real succession, and all rights accruing to the heir, must be governed by the *lex rei sitae*, then the question must be still open and entire for the

determination of the court of session, as it relates most strictly to those rights and burthens which are by the law of Scotland transferred to the heir in virtue of his service.

"It has indeed been said, that the respondents in this case chose their own *forum*, and that having joined issue upon the point, they cannot now be allowed to begin the matter anew, as if no judicial procedure had taken place. It is, however, a mistake to say, that the respondents chose the prerogative court as the *forum* for determining this question, which makes no part [627] of the action that they there brought against their brother. As administrator of the personal funds, they called him to account in that court, which was the proper court for the purpose; and the objects of the suit were to cause him to exhibit an inventory of the personal effects recovered by him, to render an account of his administration thereof, and to obtain a distribution of the goods, chattels, and credits, so recovered among those having interest as the next of kin.

The petition presented on the 30th of May 1798, was, like the former, refused by the court of session, without answers, by an interlocutor in the following terms [7th June 1798]: "The lords having heard the petition of Mrs. Sarah Drummond, and considered the same with the foregoing minute, they adhere to their interlocutor reclaimed against, and refuse the desire of the petition; and further find David Drummond, and his tutrix, liable in payment to the pursuers of six-seventh parts of the £2000 contained in the bond libelled, and six-seventh parts of £116 Os. 4d. being the interest due thereon at the term of Whitsunday, immediately subsequent to David Drummond's death, and of the interest of the sums now found due from the term of Whitsunday 1792. Find the said David Drummond and his tutrix liable to the pursuers in the full expence of the extract, but in no other expences, and decern."

Against this interlocutor, and also against that pronounced by the court upon the 17th of May, and the two interlocutors pronounced by the lord ordinary upon the 8th of December 1797, and 27th of February 1798, the appellants appealed, praying that the same might be reversed or varied, or that the appellants might have other relief in the premises.

*In support of this appeal they assigned (W. Adam, J. Bell) the following reasons:*

First, That David Drummond, deceased, though a native of Scotland, was domiciled in England at the time of his death; and that having died intestate, the succession to his personal estate must be regulated by the law of England; and that those who are called to the succession by that law, must take it with every debt, and with every burden to which that law has rendered it liable.

Secondly, That by the law of England the mortgage debt due to Captain Birrell, having been contracted by the late David Drummond himself, is chargeable on his personal estate (which is more than sufficient for answering the same) in exoneration of the real estate.

Thirdly, That the heritable debt due to Captain Birrell having been completely extinguished by the discharge and renunciation of the creditor, the heritable security was at an end, and the real lien over the lands was dissolved, and the executors had nothing more than a personal claim of relief against the heir.

Fourthly, That under the circumstances of this case, that claim of relief was cognizable in the prerogative court of Canterbury; which, as it is undoubtedly competent to take cogni-[628]-zance of the accounts of the administrator acting under its own authority, and to compel from him the account and final distribution at the instance of the next of kin, according to their rights; so it had also an undoubted jurisdiction to take cognizance of every question necessarily incidental to such account and distribution; and that, *de facto*, the judgment of the prerogative court of Canterbury, admitting the articles in the account objected to in the allegation for the respondents, was decisive as to that very claim of relief which they endeavour to make effectual by their action in the court of session, and which was established by the interlocutor now appealed from.

Fifthly, That the point in dispute between the parties having been determined by the sentence of a court of competent jurisdiction, that sentence was to be considered as affording to the appellants the *exceptio rei judicatae*; and consequently it was not competent for the respondents to insist in the action before the court of session, in order to make effectual that claim which had already been dismissed by a sentence of the prerogative court.

SIMILAR. Even although such action had been competent in the court of session, and although the judgment of the prerogative court of Canterbury had not stood in the way, still as the real lien over the estate in Scotland was dissolved by the discharge and remission executed by the executor, the action in the court of session could have been nothing more than a personal claim of redress, in which the pursuers might have insisted as the trustees of any of their deceased brother, and as such having title to a share of his personal estate by the law of England; and consequently every personal claim competent to them, *non tenens* of a real estate, have been insisted by the law of England, which was the domicile of David Drummond, and as by the law of that country the personal estate was the primary fund for the payment of any debt contracted by David Drummond, so he carried it, and must take his succession according to that law, and cannot, by resorting to the courts of a foreign country, compel a distribution of the estate of the intestate different from that which the law of the domicile authorises.

*On the other side the Respondents stated, (W. Grant, F. Laurence) the following reasons for affirming the interlocutors complained of:*

I. Because by the law of Scotland, when a sum of money is secured by an heritable bond and infeftment, *the land is held to be the principal debtors*, and the land person to the heir burdened with the heritable debt as much as with the land tax, or any other imposition which the public law of the country lays upon it. When, therefore, James Drummond, who vested himself in the right of these lands, sold part of them, and out of the price discharged the debt due to captain Birrell, he was only relieving himself of an incumbrance, of which, had it been discharged at the expense of the executor, he himself would have been ultimately liable in the relief. But as the debt was not paid out of [629] the personal funds, nor is there any deficiency in the real estate, but, on the contrary, a very considerable reversion, there are no grounds for throwing this burden upon the executor in case of the heritable property.

II. Because, this being a question with regard to an heritable subject situated in Scotland, the law of that country must be the rule according to which it is to be judged of. Though, by David Drummond having died domiciled in England, the personal succession must be governed by the law of that country; yet that cannot affect or interfere with the succession to his real estate, situated in a different country and governed by a different law. Land, which cannot, like moveable property, be removed from one country to another at the pleasure of the proprietor, must necessarily be subject to the rules of the jurisdiction within which it is situated; and as it can only be acquired and transferred according to the forms, and under the qualifications which the law of the jurisdiction points out, so it must be subject to all those burdens and limitations which the law imposes.

III. Because James Drummond, when he took up these estates of Pittoutian and Duchally, by a service as heir of provision, took them with the burden of captain Birrell's infeftment; and as he became possessed of the fund out of which captain Birrell was entitled to operate payment of his debt, so he was primarily and ultimately liable for the discharge of it, without recourse against any person whatever. By serving himself heir in a subject situated in a country in which the law imposes the payment of heritable debts upon the heir, James Drummond became as effectually bound to discharge the sum in question, without relief against the executor, as if he had entered into a contract for that purpose, both with the creditor and the other next of kin; and under that condition only he takes up the succession.

IV. Because there is here *no res judicata* that can render it incompetent for the court of session to judge in a question which naturally and properly falls under their jurisdiction alone. The decision of the prerogative court of Canterbury respected only the accounts of the administrator in his management of the personal funds; and in allowing him to state the contents of this heritable debt as part of this account, it went no farther than to determine, that as a debt chargeable against the personal estate he was entitled to take credit for it in accounting for that estate. The action brought against the administrator in the prerogative court, related wholly to the personal funds; according to the terms of the record, the accounts exhibited were of his management as administrator only, and from the limited nature of its own jurisdiction, and the proper forum for

determining the question of ultimate relief being the law of the place where the landed property lay, not the law of the place where the deceased died domiciled, the court could not have intended to preclude the after discussion of the matter, neither could its judgment have that effect.

[630] It was accordingly ORDERED and ADJUDGED, that the appeal be dismissed, and that the interlocutors therein complained of be affirmed. (MS. Jour. *sub ann.* 1799.)

## STATUTE OF LIMITATIONS.

CASE 1.—EARL OF STRAFFORD,—*Appellant*; WILLIAM BLAKEWAY,—*Respondent* [7th February 1727].

[Mews' Dig. ix. 185. See *In re Stephens*, 1889, 43 Ch. D. 39.]

J. S. being indebted by simple contract, which was barred by length of time, made his will, and thereby devised lands in trust for the payment of his debts. Query, Whether this devise revives the debt; and whether to a bill filed by the creditor to have the benefit of this trust, a plea of the statute shall be allowed?

ORDER of Chancery partly REVERSED.

It seems, however, to be the inclination of courts of equity that such debts should be paid, for they are debts in equity, and the duty remains, which is not extinguished by the statute, though that takes away the remedy. See 3 P. Wms. 89. and the notes there.

2 Wms. 373. Viner, vol. 11. p. 320. ca. 25. 2 Eq. Ab. 579. ca. 6.

Sir Henry Johnson being possessed of several docks and yards at Blackwall, which, amongst other estates, were left to him by his father Sir Henry Johnson; he, after his father's death, continued to employ several workmen therein, whom he from time to time paid, and carried on a great dealing in these docks for near 40 years.

Sir Henry the son not having paid the appellant the greatest part of the portion he had covenanted to give him with his daughter, the appellant's wife; by his will dated the 19th of March 1718, directed that all his debts, legacies, and funeral charges should be paid; and in case his personal estate should not be sufficient to pay the same, he devised several parts of his real estate to trustees, in trust for the payment of so much thereof, as his personal estate should fall short to pay; and made William Guydott his sole executor, and gave all the residue of his estate to the appellant's two daughters.

The testator died on the 29th of September 1719, and Guydott having renounced the executorship, and the appellant's daughters being infants, the appellant thereupon obtained letters of [631] administration from the prerogative court, with the will annexed, during the minorities and for the use and benefit of his said daughters.

After such administration was granted, the appellant in looking into Sir Henry's accounts and papers, found he had been very remiss in preserving his receipts and vouchers, and in keeping his accounts; and that great sums had been paid by him, for which no receipts could be found.

In Hilary term 1724, the respondent and one Sarah Harding, widow, brought their bill in Chancery against the appellant as administrator of Sir Henry Johnson, stating, that Sir Henry was indebted to the respondent in £343 11s. 3d. for sail-maker's work done in and between the month of February 1696, and the month of July 1707, and that £50 was paid on account thereof in 1714; and that Sir Henry was indebted to the said Sarah Harding, as administratrix of her late husband, in £19 8s. 2d. for joiner's work done in 1717; and therefore the bill prayed a discovery of assets, and payment of the said debts.

The appellant had reason to believe nothing was due either to the respondent or the said Harding, and that they were encouraged in the suit by some other person; nevertheless the appellant, as to Harding's debt, it being so small, admitted assets, if she made it appear to be a just debt; but as to the respondent's debt, the appellant having just reason to suspect the reality of it, pleaded the statute of



the will of Sir Henry Johnson for the payment of his debts; and that the benefit of the plea should be saved to the appellant till the hearing of the cause\*. (Journ. vol. 23. p. 179.)

CASE 2.—CYPRIAN TAYLOR (dem. J. ATKYNS),—*Plaintiff* (in Error); THOMAS HORDE and others,—*Defendants* (in Error) [26th January 1758]

[Mews' Dig. vi. 346. (*Taylor d. Atkyns v. Horde*), 2 Sm. L. C. 10th ed. 559. See *Simpson v. Bathurst*, 1869, L. R. 5 Ch. 199: *Des Barres v. Shey*, 1873, 29 L. J. 595: *Weller v. Stone*, 1885, 54 L. J. Ch. 501: and now 3 and 4 Will. iv. c. 27.]

Under what circumstances a right of entry is barred by the statute of limitations; and in what case a defendant in ejectment may have the benefit of that statute, without specially pleading it.

JUDGMENT of the court of K. B. AFFIRMED.

After this determination the lessor of the plaintiff and all his brothers died without issue, and then, supposing the recovery in question to be void, Mr. Edw. Kinsey Atkyns, the then heir at law of Mr. Richard Atkyns, became entitled to the estate he claimed under a new title, and therefore was not bound by the statute of limitations. An ejectment was delivered by him in Hilary term 1777; this brought the question of the validity of the recovery once more before the court; who determined it to be fraudulent and void. See 1 Inst. 330 b. n. l. where the opinion of the court of K. B. on certain points of this case is very ably controverted. See 1 Burr. 60. Cowp. 689.

In Michaelmas term 1752, Mr. Atkyns brought an ejectment in the name of the said Cyprian Taylor as plaintiff, against the defendants, for the manor of Swell Inferior, otherwise Nether Swell, and divers messuages, lands, tenements, tithes, and hereditaments in the county of Gloucester, upon a demise made by Atkyns on the 16th of December 1752, for the term of 15 years.

The defendants appeared and pleaded not guilty, upon which issue was joined; and on the 23d of May 1753 the cause was tried at the bar of the court of King's Bench, when a special verdict was found to the effect following, viz.

That Sir Robert Atkyns the elder, being seised in fee of the said manor and premises, by indenture dated the 12th of June 1669, made between Sir Edward Atkyns, knt. one of the barons of the Exchequer, the said Sir Robert Atkyns, son and heir apparent of Sir Edward, and dame Mary the wife of Sir Robert, of the one part, and Sir Edward Carteret, knt. and John Lowe, gent. of the other part, in consideration of a marriage thentofore [634] had between Sir Robert and dame Mary, and of her releasing and acquitting a former jointure and bar of dower; Sir Robert Atkyns thereby covenanted with Sir Edward Carteret and Lowe, their heirs and assigns, that Sir Edward Atkyns, and Sir Robert and dame Mary his wife, should before the end of Michaelmas term then next, levy a fine or fines of the premises in question, which should enure to the use of Sir Robert the elder for life, without impeachment of waste; remainder to dame Mary for life, for her jointure and in bar of dower; remainder to Sir Robert Atkyns the younger, son and heir apparent of Sir Robert the elder, and the heirs male of his body, on the body of Lovis Carteret his intended wife, to be begotten; remainder to the right heirs of Sir Robert Atkyns the elder. And by this deed Sir Edward Atkyns and Sir Robert the elder covenanted with Sir Edward Carteret and Lowe and their heirs, as follows, viz. "That in case any defect shall happen in the said fine and this present assurance, or in case there shall not be some good conveyance in law made according to the intent of these presents, so that by reason of such defect or failure of such conveyance and assurance in law, the said manor and premises, or any part or parcel of them.

\* Mr. Brown says, that after the most diligent search at the Register-office, he had not been able to find any further proceedings in the cause; and therefore concludes that the respondent submitted to the present determination.

shall not, before the 30th day of November now next ensuing, be sufficiently conveyed according to the intent of these presents; that then they the said Sir Edward Carteret and John Lowe, and their heirs, and all and every other person and persons and their heirs, standing or being seised, or which shall stand or be seised of and in the said manor and premises, shall and will, from time to time, and at all times from thenceforth for ever, stand and be seised of and in the said manor and premises, or so much and such part and parts thereof, whereof or concerning which any such defect shall happen to be, to the uses, behoofs, intents, and purposes herein before declared, limited, and contained, according to the true intent and meaning of these presents, and to none other use, intent, or purpose whatsoever."

By indentures of lease and release, dated the 11th and 12th of June 1669, (and by way of distinction called the *Greater Deed*,) between Sir Edward Atkyns, Sir Robert the elder, and dame Mary his wife, Philip Sheppard, Sir Clement Farnham, and Edward Atkyns, esq. second son of Sir Edward, of the first part; Sir George Carteret, Sir Edward Carteret, John Lowe, Edward Montagu, esq. (called lord Hinchinbrok) Sir Philip Carteret, and Edward Swift, esq. of the second part; and Sir Robert Atkyns the younger, and Lovis Carteret, of the third part; in consideration of a marriage thentofore had between Sir Robert the elder and dame Mary, and of an intended marriage between Sir Robert the younger and the said Lovis Carteret, and of £6500 paid to Sir Robert the elder as her marriage portion, and for a provision for dame Mary, in nature of a jointure, and in bar of dower; and also for a like provision for the said Lovis Carteret, and for settling all the manors, lands, and hereditaments thereby con-[635]-veyed, to the several and respective uses, upon the trusts, to the intents and purposes, and with, under, and subject to the provisos, declarations, limitations, and agreements thereafter contained; the said Sir Edward Atkyns and Sir Robert the elder, granted, released, and confirmed to Sir Edward Carteret, and Lowe, and their heirs, the premises in question, and several other manors, lands, and hereditaments therein mentioned; and Sir Clement Farnham, Edward Atkyns, and Philip Sheppard, by the direction of Sir Robert the elder, granted, released, and confirmed to Sir Edward Carteret and Lowe, and their heirs, several other estates: as to the premises in question, to the use of Sir Robert Atkyns the elder for life, without impeachment of waste; remainder, as to the said premises, except timber-trees, to dame Mary for life, for her jointure and in bar of dower; remainder to Sir Robert the younger, and the heirs male of his body by the said Lovis Carteret; remainder to the right heirs of Sir Robert the elder. And several other parts of the estates were thereby limited to Sir Robert the younger for life; remainder to trustees to preserve contingent remainders; remainder to Lovis Carteret for life, for her jointure and in bar of dower; and then to the issue of the intended marriage in strict settlement. And in this indenture was contained a proviso in the following words:

"Provided always, that it shall and may be lawful to and for the said Sir Robert Atkyns the father, the said Sir Robert Atkyns the son, and the said Lovis Carteret respectively, when they are or shall be respectively seised in possession of the freehold of such of the premises, as, by virtue of and according to the limitations aforesaid, are respectively limited to them for their respective lives, by their respective deed or deeds in writing, sealed and delivered in the presence of two or more credible witnesses, to make any lease or demise, leases or demises, of all or any of the said premises, whereof they shall be so respectively seised in possession for life as aforesaid, (except of the capital messuage of Sapperton aforesaid, and the lodge in Pinbury Park aforesaid,) unto any person or persons, for one, two, or three lives, in possession, reversion, or remainder, or for any time or term of years in possession, reversion, or remainder, to end or determine upon the death of one, two, or three persons, or for the term of one and twenty years, absolute; so as there be not in the respective premises, or any part thereof, any estate exceeding the term or time of three lives, or one and twenty years in being at the same time, and so as such respective leases be not made without impeachment of waste; and so as the usual rents of such of the premises respectively as shall be so leased or demised upon fines, and the best rents that can be reasonably gotten for such of the premises respectively as shall be so leased or demised without fines, be respectively reserved upon every such respective lease or leases, demise or demises.

to be payable during the respective terms in the said respective leases or demises to be con-[636]-tained, any thing herein before contained to the contrary notwithstanding."

And by this deed a power was given to Sir Robert Atkyns the father, after the death of dame Mary, to limit the premises in question unto, or to the use of any woman or women he should marry, for life, for her or their jointure or jointures; and a like power to Sir Robert the son, after the death of Lovis Carteret.—And Sir Robert the father covenanted, that he and dame Mary would levy a fine of all the premises to the several uses aforesaid.—And after reciting that Sir Clement Farnham and Edward Atkyns were possessed of the premises in question, or several parts thereof, for several terms of years then in being, in trust for Sir Robert the father, that Sir Clement Farnham and Edward Atkyns should stand possessed of the premises comprised in the said terms, during the residue thereof, upon trust, and to the use and benefit of the person and persons to whom the premises, by virtue of the limitations therein before mentioned, should belong.

The jury further found, that the first of the said indentures was executed by Sir Edward Atkyns, Sir Robert Atkyns the father, and dame Mary his wife, and John Lowe. The second, (viz. the lease for a year,) by Sir Edward Atkyns, Sir Robert the father, Philip Sheppard, Sir Clement Farnham, and Edward Atkyns, esq. and the release by Sir Edward Atkyns, Sir Robert the father, dame Mary his wife, Sir Clement Farnham, Edward Atkyns, esq. Sir George Carteret, Sir Philip Carteret, Edward Swift, Sir Robert the son, and Lovis Carteret; and that the lease for a year was executed before the release.

That in Trinity term 1669 a fine was levied, wherein Sir Edward Carteret and Lowe were plaintiffs, and Sir Edward Atkyns, Sir Robert the father, and dame Mary his wife, defendants, of the premises in question and other lands. That on the 6th of July 1669, Sir Robert Atkyns the son married Lovis Carteret. And that dame Mary, the wife of Sir Robert the father, died on the 2d of March 1680.

That Sir Robert the father, being seised of the premises in question as of freehold for the term of his natural life without impeachment of waste, on the 26th of April 1681 duly executed an indenture under his hand and seal, attested by three witnesses, between himself of the one part, and Sir Robert Dacres, John Dacres, and Ann Dacres their sister, of the other part; whereby, reciting the indenture of release of the 12th of June 1669, and his power therein reserved of making a settlement of the premises in question on a future wife; in consideration of a then intended marriage between him and the said Ann, and of her marriage portion, Sir Robert the father, in pursuance of his said power, limited the said premises to the said Ann Dacres for her life, for her jointure and in bar of dower; and thereby covenanted with Sir Robert Dacres and John Dacres, that he had not released, extinguished, or made void the said power.

[637] That Sir Robert Atkyns the father, on the 28th of April 1681, married the said Ann Dacres.

That Sir Robert the father being seised of the premises in question as of freehold for life, without impeachment of waste, by indenture under his hand and seal, attested by three witnesses, dated the 31st of May 1698, between himself of the one part, Thomas Dacres, esq. eldest son and heir apparent of Sir Robert Dacres, and Robert Dacres and John Dacres, younger sons of the said Sir Robert, of the other part; reciting the indenture of release of the 12th of June 1669, and the power of leasing thereby reserved; Sir Robert Atkyns the father, in consideration of the rent reserved by this deed, and in pursuance of the said power, and by virtue thereof and of all and every power and authority whatsoever, demised, leased, granted, and to farm let, to the said Thomas, Robert, and John Dacres, and their assigns, the premises in question, for and during the natural lives of them the said Thomas Dacres, Robert Dacres, and John Dacres, and the life of the longer liver of them; yielding and paying therefor during the said term, to the said Sir Robert Atkyns (party thereto) and after his decease, to such person or persons respectively to whom the said manor and premises were limited, according to their respective estates and titles, the yearly rent of £360 at Michaelmas and Lady-day, by even and equal portions. And in this lease was contained the following clause, viz. "The true intent and meaning of this estate or term for lives so hereby



granted and made to the said Thomas Dacres, Robert Dacres, and John Dacres, and the survivor of them, being to preserve the said remainder so limited in the premises by the said recited indenture, to the right heirs of the said Sir Robert Atkyns, party to these presents, and to such person or persons to whom the said Sir Robert Atkyns, party to these presents, shall any way dispose of the same, from being barred by any recovery to be suffered, or by any other act to be attempted or done for the barring of the same."

That John Dacres alone executed a letter of attorney under his hand and seal, dated the 8th of June 1698, reciting the said lease, and empowering Thomas Barker to take livery of the premises from the said Sir Robert Atkyns the father, for himself, and for the said Thomas and Robert Dacres, and every of them, in their names, and for their use, according to the purport and true meaning of the said recited indenture, and to enter and take possession of the said premises, to the use of them and every of them; he the said John Dacres allowing of all and every the act and acts so done by the said attorney, to be as effectual and sufficient in law as if he had been personally present and had done the same. That Sir Robert Atkyns the father being so seised and in possession as aforesaid, did in his own person deliver seisin and possession of the said premises unto the said Thomas Barker, to the use of the said Thomas, Robert, and John Dacres, and of every of them, and of the survivor of them, as by an indorse-[638]-ment on the said letter of attorney set out in the verdict appeared. But the jury found that Thomas Dacres, Robert Dacres, and John Dacres, the lessees named in the said lease, or either of them, were never in possession of the premises in question otherwise than by the said livery and seisin so given by the said Sir Robert Atkyns the father as aforesaid; and that they or either of them did not receive or pay any rent for or in respect of the said premises, and that the said lease was not found in the custody of Thomas Dacres, the surviving lessee, at the time of his death.

That Sir Robert Atkyns the father, being so seised of the said premises, and of the remainder and reversion thereof as aforesaid, made his will, dated the 27th May 1708, attested by four witnesses, and thereby, amongst other things, gave and devised in the following words: "I give and confirm unto my said wife Dame Ann Atkyns, all those lands, tenements, and hereditaments in Lower Swell aforesaid, which were settled upon her for her jointure before our marriage; and I hereby further give and devise to her for term of her life, my manor of Lower Swell, and all the rest of my lands, tenements, and hereditaments whatsoever in Lower Swell aforesaid, for term of her life, as an addition to her jointure: And whereas I am seised of the remainder and reversion in fee of the said manor of Lower Swell, and of the rest of the said lands, tenements, and hereditaments in Lower Swell so settled, and by this my will given and confirmed to my said wife for her life; which remainder or reversion, after the death of my wife, is also further expectant upon an estate in the said manor and lands in special tail, settled upon my son Sir Robert Atkyns upon his marriage, by deed, dated 12th June 1669, and upon his sons by his now wife, and no otherwise: And whereas I have made a lease, dated the 8th day of June, in the year of our Lord 1698, executed by livery and seisin to Thomas Dacres, esq; and to Robert and John Dacres, gent. for the lives of the said Thomas, Robert, and John Dacres, and the life of the longer liver of them (according to a power I reserved to myself, upon the said settlement made upon the marriage of my said son Sir Robert Atkyns:) Now I give and devise the said remainder or reversion, and the benefit of the trust of the said lease for lives, to my grandson John Tracy, the now younger, and second son living of my son-in-law John Tracy of Stanway in the said county of Gloucester, esq; by my daughter Ann Tracy his wife, and to the heirs male of the body of my said grandson, by him to be begotten. And if my said grandson happen to die without issue male, then I give and devise the said remainder or reversion to the next younger son of the said John Tracy, my son-in-law, called Ferdinando Tracy, and to the heirs male of the body of the said Ferdinando: and for default of such issue, then I give and devise the said remainder or reversion to the next younger son my said son-in-law John Tracy may happen to have by my said daughter, and to the [639] heirs male of the body of such next younger son: On condition of their respectively taking and using the surname of Atkyns: And to the same persons, and in such order, one

after the other, with the like limitations of estate, and upon the same or like condition, I do further give and devise all my houses and all my lands, tenements and hereditaments, situate, lying and being in or near Cursitor's Alley in Holborn, within the city of London, or the suburbs thereof, or within the county of Middlesex, or in either of them." And then reciting, that the reversion or remainder of his manor and lands in Sapperton aforesaid, and of the advowson of the church of Sapperton, and of and in his manor of Pinbury, and of the lands thereto belonging, as also of Pinbury Park, was in him and his heirs; and also of the *Seven Hundreds of Cirencester*, and of the *Hundred of Bisney*, all in the said county of Gloucester, he devised the same in like manner, and then goes on, "I having also made a lease for lives of the said manors of Sapperton and Pinbury, and of the said advowson of Sapperton, and of the said Pinbury Park, and of all the said several hundreds, the better to preserve and support the remainders and reversions from being cut off or barred by any recovery; and if my said younger grandsons happen to die without issue male, then I give and devise the same reversions and remainders to my nephew Richard Atkyns, eldest son of my late brother Sir Edward Atkyns deceased, and to his heirs."

The jury found, that John Tracy the devisee in the will, and John Atkyns the lessor of the plaintiff was the same person.

That Sir Robert Atkyns the father, died on the 9th of February 1709, seised of the premises; upon whose death, Dame Ann his widow entered thereon, claiming the same for her life for her jointure, under the indenture of the 26th of April 1681, and was in possession.

That by indenture tripartite, dated the 18th of May 1710, and made between Richard Atkyns, esq; eldest son and executor of Sir Edward Atkyns, of the first part, Joseph Walker of the second part, and Sir Robert Atkyns of the third part, reciting the indenture of release of the 12th of June 1669, and that it was therein mentioned, that Sir Clement Farnham and Edward Atkyns were possessed of several terms of years in the premises in question, and that they were to stand possessed thereof, in trust for such person and persons to whom the same were limited by the said indenture; and reciting, that Sir Robert Atkyns claimed the premises by and under the said indenture, that Sir Clement Farnham was dead, and Sir Edward Atkyns survived him and was also dead, having made his will, and thereof appointed the said Richard Atkyns executor, which he had proved; the said Richard Atkyns, at the instance and request of Sir Robert, testified by his executing the said indenture, and in consideration of 5s. assigned the premises in question to Walker, his executors, administrators, and assigns, for the residue of the [640] said terms, in trust for Sir Robert Atkyns and the heirs male of his body, by Lovis his wife.

That dame Ann being so in possession, in Trinity term 1710, an ejectment was brought in the Common Pleas, by John Phillips, on the several demises of Sir Robert Atkyns and Joseph Walker against her, and the tenants in possession, for the recovery of the premises in question, and the same was tried at the bar of the court of Common Pleas in Michaelmas term following, and both the indentures of the 12th of June 1669, were given in evidence on that trial, but the assignment of the 18th of May 1710, was not given in evidence; when a verdict was found for the plaintiff, and judgment entered up accordingly.

That soon after the said judgment so obtained, and during the life of dame Ann, Sir Robert Atkyns the son entered into, and was in possession of the premises in question; and that John Phillips, the plaintiff in the said ejectment, by deed poll, dated the 1st of January 1710, surrendered the terms for years of the premises to Sir Robert Atkyns the son, then in possession thereof.

That Sir Robert the son, being so in possession during the life-time of dame Ann, by indenture tripartite, dated the 17th of January 1710, between himself of the first part, James Earl of the second part, and John Holmden of Lincoln's Inn, gent. of the third part, for docking, barring, and destroying all estates tail, use and uses, reversions and remainders, created or limited of the premises in question, and for vesting and settling an estate in fee simple therein to Sir Robert Atkyns; Sir Robert granted, bargained, sold, enfeoffed, and confirmed, unto the said James Earl, his heirs and assigns, the premises in question, to hold to, and to the use of the said James Earl, his heirs and assigns, to the intent and purpose that the said

James Earl might become perfect tenant of the freehold of the same premises, in order to the suffering a common recovery in Hilary term then next, wherein the said John Holmden was to be demandant, the said Earl tenant, and Sir Robert Atkyns vouchee, which it was thereby declared should enure to the use of Sir Robert Atkyns, his heirs and assigns; and Sir Robert Atkyns did thereby constitute Edward Carter and John Longford his attornies or attorney, either jointly or severally, to enter on the premises, and take possession and seisin thereof, and to deliver possession and seisin thereof to the said James Earl, his heirs and assigns, according to the purport and true meaning of the said indenture. That on the 20th of January 1710, livery and seisin of the premises was given to the said James Earl by the said Edward Carter, by virtue of the warrant of attorney contained in the said indenture. That a recovery was suffered in Hilary term 9th Ann, of the premises in question, wherein the said John Holmden was demandant, the said James Earl tenant, and Sir Robert Atkyns and Lovis his wife vouchees. And that the said recovery was prosecuted, had and executed, to the several uses in the said indenture of feoffment mentioned.

[641] That Sir Robert Atkyns continued in possession of the premises in question, until the 9th of November 1711, when he died, without issue male of his body by the said Lovis his wife, who survived him.

That Dame Ann Atkyns, in Hilary term 1711, brought an ejectment in the King's Bench, in the name of John Miles as plaintiff, on the several demises of herself and the said Thomas Dacres, the surviving lessee, in the indenture of the 31st of May 1698, against Robert Atkyns, esq.; and his tenants; and the several demises laid in the declaration, were mentioned to be made upon the 14th day of February, in the 8th year of Queen Ann; and upon a trial at bar in the court of King's Bench, a verdict was given for the plaintiff, and judgment entered thereon.

That Dame Ann, immediately after this judgment, entered and took possession of the premises in question, and continued in possession thereof till the 9th of October 1712, when she died. And that soon after the death of dame Ann, Robert Atkyns, esq.; who was the nephew and heir at law of Sir Robert Atkyns, the son, entered into the premises in question, and continued in possession till his death, which happened on the 16th of March 1753. That John Dacres, one of the lessees in the indenture of the 31st May 1698, died in the year 1705; Robert Dacres, another of the said lessees, died in the year 1706; and that Thomas Dacres survived both John and Robert, and died the 23d of July 1752.

That John Atkyns, the lessor of the plaintiff, never was in possession of the premises in question, or any part thereof, or in receipt of the rents and profits thereof, or any part thereof, or entered thereon, 'til the 15th of December 1752, when he entered upon the same, claiming as devisee under and by virtue of the will of Sir Robert Atkyns the father, and demised to the present plaintiff for a term of 15 years, from the 16th of the said December; and upon this case the jury submitted to the judgment of the Court, whether the verdict ought to be for the plaintiff or defendants.

This verdict was argued four several times in the court of King's Bench, and upon the arguments the plaintiff insisted, that the leasing and jointuring powers did exist at the time when they were executed by Sir Robert Atkyns the father; that those powers were well executed by him, and that the lease and jointure which he made pursuant to those powers, were an impediment to Sir Robert Atkyns the son's suffering the common recovery, and consequently that the remainder or reversion in fee devised by the will of Sir Robert the father, to the lessor of the plaintiff, was not barred by the recovery suffered by Sir Robert the son. For the defendants it was insisted, that the leasing and jointuring powers did not exist at the time when they were executed by Sir Robert Atkyns the father; for that the deed of covenants of the 12th of June 1669, was executed subsequent to the release of that date, and thereby, and by the fine levied [642] thereupon, those powers were extinguished. But if the jointuring power did then exist, and was well executed, yet that the jointure made to dame Ann, the second wife of Sir Robert Atkyns the father, was no impediment to Sir Robert his son's suffering the recovery; because when he entered after his father's death, he became seised of an estate tail executed in possession, or he became possessed of the premises; and in either case, the feoffment made by him to James Earl was a valid feoffment, and passed the freehold; and that if the leasing power did then

exist, yet it was not well executed, because the lease extended to things out of which no rent could be reserved, as tithes, rents reserved upon leases, and to lands then in the possession and occupation of several persons: Whereas the terms of the power were, that there should be but one lease in being at one time; and for that it was uncertain whether the rent reserved was the best rent, and the rent was not payable during the term, and there was no remedy for it; and for that the lease was made for no other purpose than to restrain the tenant in tail from suffering a common recovery.

Upon these arguments the Court were of opinion, that all the deeds and the fine must be taken as one transaction, and the same to all intents and purposes, as if expressed in one instrument: That the jointuring and leasing powers were well created and subsisting powers, and that the jointuring power was well executed: That there was no good tenant to the *precipe* in the recovery, and therefore that the recovery was void: But the Court were unanimously of opinion, that the lease to Thomas, Robert, and John Dacres, was not a good execution of the leasing power, but that the lease was absolutely void; and that the lessor of the plaintiff's right of entry, accruing on the death of dame Ann in 1712, his remedy by ejectment was barred by the statute of limitations, and thereupon gave judgment for the defendants.

To reverse this judgment, the lessor of the plaintiff brought a writ of error in parliament; and on his behalf it was said, that the principal questions upon this special verdict concerned the *right* and the *remedy*. As to the *right*, whether the common recovery suffered by Sir Robert Atkyns the younger, was substantially good? And to the *remedy*, whether the proceeding in ejectment was barred by the statute of limitations?

I. As to the *right*, it would depend upon the validity of the common recovery, whether John Earl was a good tenant of the freehold, in the recovery suffered by Sir Robert Atkyns the younger. If he was, then the use in fee limited to Sir Robert the father, subject to the estate tail of Sir Robert the son, was barred, and consequently the reversion, out of which the devise to the lessor of the plaintiff, by the will of the father, was intended to take effect, was gone. If he was not a good tenant of the freehold, then the recovery being void, the right of the lessor of the plaintiff must stand uncontroverted. Now to shew that John Earl took no estate by the feoffment which could make him [643] a sufficient tenant of the freehold to answer the writ in a common recovery, it would be material to consider, 1st, Whether Sir Robert Atkyns was tenant in tail in possession? And 2dly, Supposing him to be only tenant in tail in remainder, whether his feoffment conveyed the freehold to John Earl by disseisin?

As to the first of these questions, if Sir Robert Atkyns the younger, had been tenant in tail in possession, his bargain and sale, his lease and release, his fine or his feoffment, would have conveyed a base fee, and operating by way of discontinuance, voidable either by the entry or action of the issue in tail, or remainder man, as the case might require, would have made the discontinuee a sufficient tenant of the freehold: But dame Ann Atkyns the jointress, was seised of the freehold for life at the time of making the feoffment, and never joined in conveying an estate to the feoffee: The feoffment therefore, being only the act of tenant in tail in remainder, must either pass an estate by disseisin, or was absolutely void.—To this however it is objected, that Sir Robert Atkyns the younger was tenant in tail in possession, because dame Ann had no precedent estate for life, by way of valid and effectual jointure. The *greater* deed contained the powers for making jointures and leases: The *lesser* deed was executed subsequent to the greater deed, and took no notice of them: By consequence, the fine levied after both, in Trinity term 1669, being levied between the same parties, and of the same premises, extinguished the powers; and if the power of making jointures was extinguished, the execution of that power by the jointure made to dame Ann, the second wife of Sir Robert Atkyns the elder, was null and void.—But there is a very easy answer to this objection: For the verdict has not found which of the two deeds was first executed. The internal evidence arising from the deeds themselves, speaks the whole to be one transaction, flowing from one agreement previous to the marriage of Sir Robert Atkyns the younger with Lovis Carteret, both bear the same date, and are equally consistent. The *lesser* deed contains covenants with the trustees, relative to nothing but those lands which dame Mary.

[illegible]

years, and the wrongful feoffee was put into possession, the true owner might either accept his rent and treat him as an under-tenant and assignee of the term, or he might maintain an assize and recover the freehold. If the wrongful feoffor continued in possession by collusion with his feoffee, as in the present case, the true owner was under no necessity to take notice of the feoffment; he was not bound to consider his own tenant as a disseisor, and himself as out of possession; but still had it in his election either to accept his rent, distrain, and bring an action for it, or to proceed in a real action for recovery of the freehold, as in case of a forfeiture. Thus the feoffment of tenant for years, or tenant by sufferance, would make a disseisin for the benefit of his lessor, in respect of that remedy which the lessor might elect to take; but estates in remainder could not be displaced without a tortious entry, and as to such remainders, the feoffment was absolutely void in law.—But 2. As a conveyance executed with the particular intent of making a tenant to the *precipe* in a common recovery, it has never yet been determined that the feoffment of a tenant for years, being also tenant in tail in remainder, perfected by livery upon the land under colour of a lawful possession, *eo animo* to make a tenant of the freehold in a common recovery, will be sufficient to support the judgment in that recovery, and enable him to bar his own and the subsequent estates. If it will, then a tenant in tail in remainder may suffer a recovery in every instance as freely as a tenant in tail in possession, not only without the concurrence of the immediate owner of the freehold, by his joining in it as an essential party, or surrendering his estate, but even without asking his consent or giving him any notice. By collusion with a tenant for years, by secret practices to take advantage of a vacant possession, when the tenant of the freehold is absent from his house or land, he may execute a feoffment, and then suffer a common recovery to anticipate that right, which the law has wisely and justly postponed till he shall chance to succeed in the order of the entail. If this method of suffering recoveries be [646] once established as legal, the eldest sons of the first families in England, who are tenants in tail in remainder, expectant on the estate for life of the father, may dispose of the inheritance of their estates at the age of 21, against the consent, and in spite of the authority or the freehold of their parents: but it is plainly contrary to the grounds of law. Conveyances to make a tenant to the *precipe* in a common recovery are considered as mere instruments to make parties in a fictitious action, to serve the purpose of him who means to suffer that recovery. Such a feoffee, as in the present case, is often called a mere *actor fabulae*. If he was tenant for years of the lands conveyed by the feoffment before the making of it, his term will not merge in the fee simple; no dower can arise out of it; his judgments or statutes will not bind it. This being the uniform tenor of determinations in courts of law, in which the intent of the conveyance has been considered, and not the mere legal operation of it, it is consequential that the validity of his estate in order to support it as an instrument, must depend on the right and power of him who made it to suffer a recovery. If the feoffor has no such right or power, his feoffment is void; and the estate conveyed being founded in fraud, is as no estate in judgment of law. The common law avows these principles, and the legislature has adopted them; for the statute 14 Geo. II. c. 20. which was made to support common recoveries against nice exceptions, and to raise presumptions in favour of them after a limited time, most anxiously provides, that the persons joining in such recoveries shall have sufficient estate and power to suffer the same; as if the legislature had foreseen the present case, and were aware and afraid that tenants in tail in remainder might, by colour of that law in future times, suffer common recoveries without the concurrence of the true immediate owner of the freehold.

II. As to the *remedy*, it would depend on this, whether the lessor of the plaintiff was not barred of his entry by the statute of limitations, not having entered after the death of Sir Robert Atkyns, which was on the 9th of November 1711, till the 15th of December 1752; and to this there were two general answers.

The first general answer was, that so long as the jointure of dame Ann Atkyns subsisted, which determined on her death 9th October 1712, the lessor of the plaintiff could not enter: And this was admitted, in case the power by which the jointure was created was not previously extinguished. And so long as the lease for lives to the three Dacres's was in being, which did not expire till the death of Thomas Dacres, the surviving lessee, on the 23d of July 1752, the lessor of the plaintiff could not enter. But this however was disputed upon several grounds of objection.



ment was to be made, it was rather to be presumed, that it was in the possession of some of the lessees, or their representatives. The intent of the lease recited in it, to prevent barring the reversion in fee, would be considered in equity, only as a request to the lessees, not to join with the tenant in tail in suffering a common recovery, and could not be enforced as a trust. But supposing the lease to be a trust to attend the inheritance, still a court of law could take no notice of that trust. It was no argument to say, that the lessor of the plaintiff might long since have had the aid of a court of equity to remove it out of the way, in order to a trial of the title at law between him and the defendants; both as it was an equitable relief, which various circumstances might have rendered very doubtful, and as courts of law do not found their judgments of legal questions upon the possible relief to be given in courts of equity. And if the lessor of the plaintiff might have been nonsuited, by the production of this lease in any ejectment brought during the life of the surviving lessee, it follows, that the statute of limitations could not begin to run against him, in bar of his entry, till the expiration of the lease.

The second general answer to the objection arising from the statute of limitations (which did not occur when the cause was argued in the court of King's Bench) was this: That supposing the lease to be absolutely void from the instant of making it, [649] yet upon this record, the finding of the jury was not sufficient in law to warrant the inference made by the court, that the lessor of the plaintiff was barred of his remedy. There are several determinations of weight, in which it has been held, that a bar from the statute of limitations shall not be raised by construction and collection from facts found in a special verdict. The presumption of law is in favour of the plaintiff's remedy for his right; and the defendant must insist upon the bar to that remedy by the statute of limitations, if he would take advantage of it. In all cases where the limitation of time expressly bars the action, he can only take advantage of the statute by pleading it, to which the plaintiff may reply that he is within the savings and exceptions. If the defendant pleads the general issue, it is a waiver of the statute which binds him. In cases of ejectment, the limitation of time bars the entry, which is the ground of the action, but not the action itself; therefore it has been held, that the defendant is not under the necessity of pleading the statute, but may take advantage of it in evidence. The plaintiff has then an opportunity of shewing, by way of reply in evidence, that he was within the savings of infancy, etc. or that he has made continual claim, etc. From hence it necessarily follows, in reason, law, and justice, that in order to infer a bar of the plaintiff's action, from a special verdict, the jury must not only find that he was out of possession, or did not enter till a particular day, but *negatively*, that he has not made continual claim, nor is within any of the exceptions of the statute; otherwise it cannot be presumed, by any rules of intendment upon special verdicts, that he is not entitled to the benefit of one or other of those exceptions, or has not saved his right or entry. And upon this record it is observable, that the jury have expressly found the plaintiff to be seised *prout lex postulat*, after his actual entry in December 1752, which seisin could not have been found, unless it appeared to them in proof, that he had made continual claim: And therefore it was hoped, that the judgment would be reversed.

But in support of the judgment it was argued (G. Pratt, J. Knowles), that the deed of covenants of the 12th of June 1669, which comprised the premises in question only, without any jointuring or leasing powers, must necessarily have been executed subsequent to the release or settlement of that date, wherein those powers were contained, and could not be made for any other purpose, than to extinguish and destroy those powers; for Sir Edward Carteret and Lowe could not stand seised to the uses in this deed, unless the inheritance had been before conveyed to them, and which it appeared to have been by the deeds of lease and release. That by the entry of Sir Robert Atkyns the son, and the feoffment made by him after such entry, to James Earl, Earl became tenant of the freehold; consequently, the recovery was good, and barred the remainder and reversion in fee devised by Sir Robert the father to the lessor of the plaintiff. That a common [650] recovery is an assurance much favoured by the law, and the present action was brought to deprive the defendants, who were heirs at law of both Sir Robert the father and son, of an estate which had been enjoyed under one for upwards of forty years, in favour of the devisee of a remainder



or reversion in fee expectant on an estate tail, an interest of no value or consideration in law. That the lease made by Sir Robert the father to the Dacres's was void; not only for the reasons before mentioned, but because the lessees never had the lease in their custody; never entered or took possession of the demised premises, never paid any rent, nor ever executed any counterpart. But besides all this, the lease itself was fraudulent as against Sir Robert the son, the remainder-man in tail; and if not, it determined on his death without male issue, the intent of making it being only to prevent him from suffering a common recovery: And therefore, and for that the plaintiff's remedy by ejectment was barred by the statute of limitations; it was hoped, that the unanimous judgment given by the court of King's Bench, would be affirmed with costs.

After hearing counsel on this writ of error, the judges were directed to deliver their opinions upon the following question; viz. "Whether sufficient appears by the special verdict in this cause, to prevent the lessor of the plaintiff by the force of the statute of limitations of the 21st of king James I. (c. 16.) from recovering in this ejectment?" Whereupon the Lord Chief Justice of the Common Pleas, having conferred with the rest of the judges, (who all attended the hearing except Mr. Justice Bathurst) delivered the following opinion; viz. "That sufficient does appear by the special verdict in this cause, to prevent the lessor of the plaintiff by force of the statute of limitations, from recovering in this ejectment."

Accordingly, it was ORDERED and ADJUDGED, that the judgment given in the court of King's Bench should be affirmed, and the record remitted: And it was further ORDERED, that the plaintiff in error should pay to the defendants in error, the sum of £5 for their costs in the house. (Jour. vol. 29. p. 222.)



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